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THE
ENGLISH AND EMPIRE DIGEST
WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS.

VOLUME XVII.

THE ENGLISH AND EMPIRE DIGEST

WITH
COMPLETE AND EXHAUSTIVE
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XVII.

*CUSTOM AND USAGES.
DAMAGES.*

*DEEDS AND OTHER INSTRU-
MENTS.*

*DEPENDENCIES INCLUDING
DOMINIONS, DEPENDENCIES,
COLONIES, AND BRITISH
POSSESSIONS.*

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DEBTS, ATTACHMENT OF.

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REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

.. (preceded by date)	Law Reports, Appeal Cases House of Lords, since 1890 (<i>e.g.</i> , [1891] A. C.)	Eng.
ur. Rep	Australian Jurist Reports	Aus.
. T	Australian Law Times	Aus.
...	Ontario Appeals	Can.
...	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
& El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
n	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
...	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
...	Agra High Court	Ind.
F. B.	Agra High Court, Full Bench	Ind.
& N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
n	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
...	New Brunswick Reports (Allen)	Can.
L. R.	Alberta Law Reports	Can.
...	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
...	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
...	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
...	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
Ot. Rep.	Appeal Court Reports	N.Z.
D.	South African Law Reports, Appellate Division	S. Af.
itects' L. R.	Architects' Law Reports, 4 vols., 1904—1909	Eng.
L. R.	Argus Law Reports	Aus.
y	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
...	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
& H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
...	Ashburner's Principles of Equity, 1902	Eng.
M. L. O.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
...	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
an	Ayliffe's New Pandect of Roman Civil Law	Eng.
Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
Ad.	Barber's Gold Law	S. Af.
...	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
J.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
J. R. (preceded by)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (<i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
J.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
R.	British Columbia Reports	Can.
...	Bose's Digest	Ind.
...	Bengal Law Reports	Ind.
...	Bengal Law Reports, Appeal Cases	Ind.
A. C.	Bengal Law Reports, Privy Council	Ind.
P. O.	Bengal Law Reports, Supp. Vol.	Ind.
Sup. Vol.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
C. O.	Bacon's Abridgment	Eng.
br.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.
Cas		

Bald. ...	Baldon's Select Cases in Chancery (Selden Society, Vol. X.) ...	Eng.
Ball & B. ...	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814 ...	Ir.
Bankr. & Ins. R. ...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 ...	Eng.
Bar. & Arn. ...	Barron and Arnold's Election Cases, 1 vol., 1843—1846 ...	Eng.
Bar. & Aust. ...	Barron and Austin's Election Cases, 1 vol., 1842 ...	Eng.
Barn. Ch. ...	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741 ...	Eng.
Barn. K. B. ...	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734 ...	Eng.
Barnes ...	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760 ...	Eng.
Batt. ...	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826 ...	Ir.
Beat. ...	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830 ...	Ir.
Beav. ...	Beavan's Reports, Rolls Court, 36 vols., 1838—1866 ...	Eng.
Beav. & Wal. ...	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846 ...	Eng.
Beaw. ...	Beawes's Lex Mercatoria ...	Eng.
Bell, C. O. ...	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860 ...	Eng.
Bell, Ct. of Sess. ...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792 ...	Scot.
Bell, Ct. of Sess. fol. ...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795 ...	Scot.
Bell, Dict. Dec. ...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833 ...	Scot.
Bell, Sc. App. ...	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850 ...	Scot.
Bellewe ...	Bellewe's Cases temp. Richard II., King's Bench, 1 vol. ...	Eng.
Belt's Sup. ...	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1766 ...	Eng.
Ben. & D. ...	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579 ...	Eng.
Benl. ...	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627 ...	Eng.
Ber. ...	New Brunswick Reports (Berton) ...	Can.
Bing. ...	Bingham's Reports, Common Pleas, 10 vols., 1822—1834 ...	Eng.
Bing. N. O. ...	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840 ...	Eng.
Biss. & Sm. ...	Bisset and Smith's Digest ...	S. Af.
Bitt. Prac. Cas. ...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876 ...	Eng.
Bitt. Rep. in Ch. ...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884 ...	Eng.
Bl. Com. ...	Blackstone's Commentaries ...	Eng.
Bl. D. & Osb. ...	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848 ...	Ir.
Bli. ...	Bligh's Reports, House of Lords, 4 vols., 1819—1821 ...	Eng.
Bli. N. S. ...	Bligh's Reports, House of Lords, New Series 11 vols., 1827—1837 ...	Eng.
Bluett ...	Bluett's Isle of Man Cases ...	I. of M.
Bom. ...	Bombay High Court Reports ...	Ind.
Bom. A. O. ...	Bombay Reports, Appellate Jurisdiction ...	Ind.
Bom. O. O. ...	Bombay Reports, Original Civil Jurisdiction ...	Ind.
Bos. & P. ...	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804 ...	Eng.
Bos. & P. N. R. ...	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807 ...	Eng.
Bott ...	Bott's Laws Relating to the Poor, 2 vols. ...	Eng.
Bourke ...	Bourke's Reports ...	Ind.
Br. & Col. Pr. Cas. ...	British and Colonial Prize Cases, 3 vols., 1914—1919 ...	Eng.
Bract. ...	Bracton De Legibus et Consuetudinibus Angliæ ...	Eng.
Bro. Abr. ...	Sir J. Brooke's Abridgement ...	Eng.
Bro. C. C. ...	W. Brown's Chancery Reports, 4 vols., 1778—1794 ...	Eng.
Bro. Ecc. Rep. ...	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872 ...	Eng.
Bro. N. O. ...	Sir R. Brooke's New Cases, 1 vol., 1515—1558 ...	Eng.
Bro. Parl. Cas. ...	J. Brown's Cases in Parliament, 8 vols., 1702—1800 ...	Eng.
Bro. Supp. to Mor. ...	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols. ...	Scot.
Bro. Synop. ...	M. P. Brown's Synopses of Decisions, Court of Session (Scotland), 4 vols., 1532—1827 ...	Scot.
Brod. & Bing. ...	Broderip and Bingham's Reports, Common Pleas, 8 vols., 1819—1822 ...	En
Brod. & F. ...	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864 ...	En
Broun ...	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845 ...	Scot.
Brown. & Lush. ...	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866 ...	En
Brownl. ...	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624 ...	En
	— " — Decisions, Court of Session (Scotland), 1714—1715 ...	Scot.

Buch. ...	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S. Af.
Buch. A. O. ...	Buchanan's Reports of Appeal Court (Cape)	S. Af.
Buchan. ...	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Buck ...	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bull. N. P. ...	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst. ...	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	Eng.
Bunb. ...	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	Eng.
Burr. ...	Burrow's Reports, King's Bench, 5 vols., 1756—1772	Eng.
Burr. S. O. ...	Burrow's Settlement Cases, King's Bench, 1 vol., 1783—1776	Eng.
Burrell ...	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. A. ...	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P. ...	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B. ...	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S. ...	Common Bench Reports, New Series, 20 vols., 1856—1865	Eng.
C. C. Ct. Cas. ...	Central Criminal Court Cases (Sessions Papers), 1834—(current)	Eng.
C. L. Ch. ...	Common Law Chambers	Can.
C. L. J. ...	Cape Law Journal	S. Af.
C. L. J. N. S. ...	Canada Law Journal, New Series, 1865—(current)	Can.
C. L. J. O. S. ...	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
C. L. R. ...	Common Law Reports, 3 vols., 1853—1855	Eng.
C. L. R. ...	Commonwealth Law Reports	Aus.
C. L. R. ...	Calcutta Law Reporter	Ind.
C. L. R. ...	Cape Law Reports	S. Af.
C. L. T. ...	Canadian Law Times	Can.
C. L. T. Occ. N. ...	Canadian Law Times, Occasional Notes	Can.
C. P. ...	Upper Canada Common Pleas	Can.
C. P. D. ...	Law Reports, Common Pleas Division, 5 vols., 1875—1880	Eng.
C. P. D. ...	Cape Provincial Division Reports	S. Af.
C. R. [date] A. O. ...	Canadian Reports, Appeal Cases	Can.
C. T. R. ...	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N. ...	Calcutta Weekly Notes	Ind.
Cab. & Ell. ...	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	Eng.
Cald. Mag. Cas. ...	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	Eng.
Calth. ...	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	Eng.
Cam. Cas. ...	Cameron's Supreme Court Cases	Can.
Cam. Prac. ...	Cameron's Supreme Court Practice	Can.
Camp. ...	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas. ...	Commercial Law Reports of Canada	Can.
Can. Crim. Cas. ...	Canadian Criminal Cases, Annotated	Can.
Can. Gaz. ...	Canadian Gazette	Can.
Can. Ry. Cas. ...	Canadian Railway Cases	Can.
Car. & Kir. ...	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M. ...	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	Eng.
Car. O. L. ...	Carrington's Treatise on Criminal Law	Eng.
Carl. ...	New Brunswick Reports (Carleton)	Can.
Carp. Pat. Cas. ...	Carpmael's Patent Cases, 2 vols., 1802—1842	Eng.
Cart. ...	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	Eng.
Cart. ...	Cases on British North America Act (Cartwright)	Can.
Carth. ...	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	Eng.
Cary ...	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Oh. ...	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B. ...	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett. ...	Cases of Settlements and Removals, 1 vol., 1685—1727	Eng.
Cas. temp. Finch ...	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680	Eng.
Cas. temp. King ...	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733	Eng.
Cas. temp. Talb. ...	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737	Eng.
Cass. Dig. ...	Cassell's Digest	Can.
Ch. (preceded by date) ...	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)	Eng.
Ch. App. ...	Law Reports, Chancery Appeals, 10 vols., 1865—1875	Eng.
Ch. Cas. in Oh. ...	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. Ch. ...	Upper Canada Chancery Chambers Reports	Can.
Ch. D. ...	Law Reports, Chancery Division, 45 vols., 1875—1890	Eng.
Ch. Rob. ...	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Char. Cham. Cas. ...	Charley's Chamber Cases, 1 vol., 1875—1876	Eng.
Char. Pr. Cas. ...	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
Chip. ...	New Brunswick Reports (Chipman)	Can.
Chit. ...	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822	Eng.
Cl. & Fin. ...	Clark and Finnally's Reports, House of Lords, 12 vols., 1831—1846	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

So. Dr. Cas.	...	Clark and Scully's Drainage Cases	...	...	...	Can.
...	...	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	...	...	...	Eng.
Rich.	...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	...	...	...	Eng.
Steph.	...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	...	...	...	Eng.
...	...	Cook's Lower Canada Admiralty Court Cases	...	...	...	Can.
nt.	...	Coke's Entries	...	...	...	Eng.
ist.	...	Coke's Institutes	...	...	...	Eng.
J.	...	Colonial Law Journal	...	...	...	N.Z.
Att...	...	Coke on Littleton (1 Inst.)	...	...	...	Eng.
ep.	...	Coke's Reports, 13 parts, 1572—1616	...	...	...	Eng.
...	...	Nova Scotia Reports (Cochran)	...	...	...	Can.
. & Rowe	...	Cockburn and Rowe's Election Cases, 1 vol., 1833	...	...	...	Eng.
...	...	Collyer's Reports, Chancery, 2 vols., 1844—1846	...	...	...	Eng.
Jurid.	...	Collectanea Juridica, 2 vols.	...	...	...	Eng.
...	...	Colles' Cases in Parliament, 1 vol., 1697—1713	...	...	...	Eng.
...	...	Coltman's Registration Cases, 1 vol., 1879—1885	...	...	...	Eng.
...	...	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	...	...	...	Eng.
Cas.	...	Commercial Cases, 1895—(current)	...	...	...	Eng.
Dig.	...	Comyns' Digest	...	...	...	Eng.
...	...	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	...	...	...	Eng.
& Law.	...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	...	...	...	Ir.
Dig.	...	Congdon's Digest	...	...	...	Can.
& Al.	...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	...	...	...	Ir.
Pr. Cas.	...	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	...	...	...	Eng.
Pr. Reg.	...	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	...	...	...	Eng.
G.	...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	...	...	...	Eng.
Pr. Cas.	...	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	...	...	...	Eng.
temp. Brough.	...	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834	...	...	...	Eng.
temp. Cott.	...	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases)	...	...	...	Eng.
...	...	Coryton's Reports	...	...	...	Ind.
& D.	...	Corbett and Daniell's Election Cases, 1 vol., 1819	...	...	...	Eng.
Correspondances Jud.	...	Correspondances Judiciaires	...	...	...	Can.
er	...	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885	...	...	...	Scot.
...	...	Coutlees' Unreported Cases	...	...	...	Can.
Dig.	...	Coutlees' Digest	...	...	...	Can.
...	...	Cowper's Reports, King's Bench, 2 vols., 1774—1778	...	...	...	Eng.
Atk.	...	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846	...	...	...	Eng.
C. C.	...	E. W. Cox's Criminal Law Cases, 1843—(current)	...	...	...	Eng.
Eq. Cas.	...	S. C. Cox's Equity Cases, 2 vols., 1745—1797	...	...	...	Eng.
M. & H.	...	Cox, Macrae, and Hertalet's County Courts Cases and Appeals, 1 vol., 1846—1852	...	...	...	Eng.
J.	...	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832	...	...	...	Eng.
M.	...	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834	...	...	...	Eng.
Ph.	...	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841	...	...	...	Eng.
pp. Rep.	...	Cohen's Criminal Appeal Reports, 1908—(current)	...	...	...	Eng.
& R.	...	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835	...	...	...	Eng.
& D.	...	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846	...	...	...	Ir.
& D. Abr. C.	...	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838	...	...	...	Ir.
Insolv. Cas.	...	Cresswell's Insolvency Cases, 1 vol., 1827—1829	...	...	...	Eng.
Church Cas.	...	Cripps' Church and Clergy Cases, 2 parts, 1847—1850	...	...	...	Eng.
Car.	...	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641	...	...	...	Eng.
Eliz.	...	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603	...	...	...	Eng.
Jac.	...	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625	...	...	...	Eng.
Dig.	...	Cruise's Digest of the Law of Real Property, 7 vols.	...	...	...	Eng.
...	...	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735	...	...	...	Eng.
...	...	Curtis' Ecclesiastical Reports, 3 vols., 1834—1844	...	...	...	Eng.
...	...	Duxbury's Reports of the High Court of the South African Republic	...	...	...	S. Af.
A.	...	Dorion's Queen's Bench Reports	...	...	...	Can.
R.	...	Dominion Law Reports	...	...	...	Can.
...	...	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	...	...	...	Scot.
...	...	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823	...	...	...	Eng.
& Ll.	...	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829	...	...	...	Eng.

av. & Mer.	...	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844...	Eng.
av. Ir.	...	Davy's (or Davis' or Davy's) Reports (Ireland), 1 vol., 1804—1811...	Ir.
av. Pat. Cas.	...	Davies' Patent Cases, 1 vol., 1785—1816...	Eng.
ay	...	Day's Election Cases, 1 vol., 1892—1893...	Eng.
ea. & Sw.	...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857...	Eng.
zac.	...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840...	Eng.
zac. & Ch.	...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835...	Eng.
ears. & B.	...	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858...	Eng.
ears. O. C.	...	Dearsly's Crown Cases Reserved, 1 vol., 1852—1856...	Eng.
ears & And.	...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832...	Scot.
e G.	...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848...	Eng.
e G. & J.	...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859...	Eng.
e G. & Sm.	...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852...	Eng.
e G. F. & J.	...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862...	Eng.
e G. J. & Sm.	...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865...	Eng.
e G. M. & G.	...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857...	Eng.
elane	...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835...	Eng.
en.	...	Denison's Crown Cases Reserved, 2 vols., 1844—1852...	Eng.
ick.	...	Dickens' Reports, Chancery, 2 vols., 1559—1798...	Eng.
ig.	...	Justinian's Digest or Pandects...	Eng.
irl.	...	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677...	Scot.
ods.	...	Dodson's Reports, Admiralty, 2 vols., 1811—1822...	Eng.
onnelly	...	Donnelly's Reports, Chancery, 1 vol., 1836—1837...	Eng.
oug. El. Cas.	...	Douglas' Election Cases, 4 vols., 1774—1776...	Eng.
oug. K. B.	...	Douglas' Reports, King's Bench, 4 vols., 1778—1785...	Eng.
ow	...	Dow's Reports, House of Lords, 6 vols., 1812—1818...	Eng.
ow & Cl.	...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832...	Eng.
ow. & L.	...	Dowling and Lowndes' Practice Reports, 7 vols., 1848—1849...	Eng.
ow. & Ry. K. B.	...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827...	Eng.
ow. & Ry. M. O.	...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827...	Eng.
ow. & Ry. N. P.	...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823...	Eng.
owl.	...	Dowling's Practice Reports, 9 vols., 1830—1841...	Eng.
owl. N. S.	...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843...	Eng.
r. & Wal.	...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841...	Ir.
r. & War.	...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843...	Ir.
ra.	...	Draper's King's Bench Reports...	Can.
rew.	...	Drewry's Reports, Chancery, 4 vols., 1852—1859...	Eng.
rew. & Sm.	...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865...	Eng.
rinkwater	...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841...	Eng.
rury temp. Nap.	...	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859...	Ir.
rury temp. Sug.	...	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844...	Ir.
ugd. Orig.	...	Dugdale's Origines Juridicales...	Eng.
unl. (Ct. of Sess.)	...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1835—1862...	Scot.
unning	...	Dunning's Reports, King's Bench, 1 vol., 1753—1754...	Eng.
urle	...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642...	Scot.
yer	...	Dyer's Reports, King's Bench, 3 vols., 1513—1581...	Eng.
. & A.	...	Upper Canada Error and Appeal...	Can.
. & B.	...	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858...	Eng.
. & E.	...	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861...	Eng.
B. & E.	...	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860...	Eng.
D. C.	...	Reports of the Eastern Districts Court (Cape) from 1880...	S. Af.
D. L.	...	South African Law Reports, Eastern Districts Local Division...	S. Af.
L. R.	...	Eastern Law Reporter...	Can.
R. (or Eng. Rep.)	...	English Reports...	Eng.
R.	...	Ontario Election Reports...	Can.
. & Y.	...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825...	Eng.
	...	Edwards' Reports, King's Bench, 16 vols., 1800—1819...	Eng.

xx **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

East, P. C. ...	East's Pleas of the Crown ...	Eng.
Ecc. & Ad. ...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	Eng.
Eden ...	Eden's Reports, Chancery, 2 vols., 1757—1766 ...	Eng.
Edgar ...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	Scot.
Edw. ...	Edwards' Reports, Admiralty, 1 vol., 1808—1812 ...	Eng.
Elchies ...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754 ...	Scot.
Emden's B. C. ...	Emden's Building Contracts, Building Leases and Building Statutes ...	Eng.
Eng. Pr. Cas. ...	Roscoe's English Prize Cases, 2 vols., 1745—1858 ...	Eng.
Eq. Cas. Abr. ...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744 ...	Eng.
Eq. Rep. ...	Equity Reports, 8 vols., 1853—1855 ...	Eng.
Esp. ...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810 ...	Eng.
Ex. D. ...	Law Reports, Exchequer Division, 5 vols., 1875—1880 ...	Eng.
Exch. ...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856 ...	Eng.
Exch. C. R. ...	Exchequer Court Reports ...	Can.
F. (Ot. of Sess.) ...	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	Scot.
F. ...	Forod's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880 ...	S. Af.
F. & F. ...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867 ...	Eng.
F. N. D. ...	Finnemore's Notes and Digest of Natal Cases, 1863—1867 ...	S. Af.
Fao. Coll. ...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841 ...	Scot.
Falc. ...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751 ...	Scot.
Falc. & Fitz. ...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838 ...	Eng.
Fenton ...	Fenton, Important Judgments ...	N.Z.
Ferg. ...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	Scot.
Fitz. Nat. Brev. ...	Fitzherbert's Natura Brevium ...	Eng.
Fitz-G. ...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	Eng.
Fl. & K. ...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842 ...	Ir.
Fonbl. ...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852 ...	Eng.
For. ...	Forrest's Reports, Exchequer, 1 vol., 1800—1801 ...	Eng.
Forb. ...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713 ...	Scot.
Fort. De Laud. ...	Fortesque, De Laudibus Legum Angliæ ...	Eng.
Fortes. Rep. ...	Fortescue's Reports, fol., 1 vol., 1692—1736 ...	Eng.
Fost. ...	Foster's Crown Cases, 1 vol., 1708—1760 ...	Eng.
Fount. ...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712 ...	Scot.
Fox & S. Ir. ...	M. C. Fox and T. B. O. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825 ...	Ir.
Fox & S. Reg. ...	J. S. Fox and O. L. Smith's Registration Cases, 1 vol., 1886—1895 ...	Eng.
Fras. ...	Fraser (Simon), Election Cases, 2 vols., 1793 ...	Eng.
Freem. Ch. ...	Freeman's Reports, Chancery, 1 vol., 1660—1706 ...	Eng.
Freem. K. B. ...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704 ...	Eng.
G. ...	Gregorowski's Reports of the High Court of the Orange Free State from 1883 ...	S. Af.
G. & R. ...	Nova Scotia Reports (Geldert & Russell) ...	Can.
G. I. Dig. ...	General Index Digest ...	Can.
Gal. & Dav. ...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843 ...	Eng.
Gale ...	Gale's Reports, Exchequer, 2 vols., 1835—1836 ...	Eng.
Gaz. L. R. ...	New Zealand Gazette Law Reports ...	N.Z.
Geld. Dig. ...	Geldert's Digest ...	Can.
Gib. Cod. ...	Gibson's Codex Juris Ecclesiastici Anglicani ...	Eng.
Giff. ...	Giffard's Reports, Chancery, 5 vols., 1857—1865 ...	Eng.
Gilb. ...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714 ...	Eng.
Gilb. C. P. ...	Gilbert's History and Practice of the Court of Common Pleas ...	Eng.
Gilb. Ch. ...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726 ...	Eng.
Gilm. & F. ...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686 ...	Scot.
Gl. & J. ...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	Eng.
Glanv. ...	Glanville, De Legibus et Consuetudinibus Regni Angliæ ...	Eng.
Glanv. El. Cas. ...	Glanville's Election Cases, 1 vol., 1623—1624 ...	Eng.
Glascock ...	Glascock's Reports (Ireland), 1 vol., 1831—1832 ...	Ir.
Godb. ...	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637 ...	Eng.

ldsb.	...	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
...	...	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
...	...	Upper Canada Chancery (Grant)	Can.
in's Patent Cases	...	Griffin's Patent Cases, 1884—1887	Eng.
ll.	...	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
...	...	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
O.	...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
& N.	...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
& Tw.	...	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	Eng.
& W.	...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
B. R. (preceded by ate)	...	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 8 vols., 1915—1917 (e.g., [1915] H. B. R.)	Eng.
C.	...	Reports of the High Court of Griqualand West	S. Af.
E. O.	...	Hodgin's Election Reports	Can.
L. Cas.	...	Clark's Reports, House of Lords, 11 vols., 1847—1866	Eng.
Adm.	...	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Con.	...	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Ecc.	...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	Eng.
les	...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
e, C. L.	...	Hale's Common Law	Eng.
e, P. C.	...	Hale's Pleas of the Crown, 2 vols.	Eng.
1.	...	New Brunswick Reports (Hannay)	Can.
& Ruth.	...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	Eng.
& W.	...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
c.	...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
d.	...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
e	...	Hare's Reports, Chancery, 11 vols., 1841—1853	Eng.
wk. P. O.	...	Hawkins's Pleas of the Crown, 2 vols.	Eng.
y	...	Hay's Reports	Ind.
y & Marr.	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
yes	...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
yes & Jo.	...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
n. & M.	...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
...	...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
...	...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	Eng.
lg.	...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	Eng.
t.	...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	Ir.
t, Adm.	...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
t, Eq.	...	W. Holt's Equity Reports, 2 vols., 1845	Eng.
t, K. B.	...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
t, N. P.	...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
ne, Ct. of Sess.	...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
ng Kong L. R.	...	Hong Kong Reports	Hong Kong.
o. & Colt.	...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
o. & Ph.	...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
n & H.	...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
v. Supp.	...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
v. O.	...	Howard's Chancery Practice	Ir.
v. C. S.	...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	Ir.
v. E. E.	...	Howard's Equity Exchequer	Ir.
v. P. L.	...	Howard on the Popery Laws	Ir.
l. & B.	...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
ison's B. C.	...	Hudson on Building Contracts, 2 vols.	Eng.
ne	...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
...	...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng.
B.	...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
le	...	Hyde's Reports	Ind.

I. C. L. R.	...	Irish Common Law Reports, 17 vols., 1849—1866	...	Ir.
I. Ch. R.	...	Irish Chancery Reports, 17 vols., 1850—1867	...	Ir.
I. Eq. R.	...	Irish Equity Reports, 13 vols., 1838—1851	...	Ir.
I. L. R.	...	Irish Law Reports, 13 vols., 1838—1851	...	Ir.
I. L. R. (Vol.) All.	...	Indian Law Reports, Allahabad	...	Ind.
I. L. R. (Vol.) Bom.	...	Indian Law Reports, Bombay	...	Ind.
I. L. R. (Vol.) Calc.	...	Indian Law Reports, Calcutta	...	Ind.
I. L. R. (Vol.) Lah.	...	Indian Law Reports, Lahore	...	Ind.
I. L. R. (Vol.) Mad.	...	Indian Law Reports, Madras	...	Ind.
I. L. T.	...	Irish Law Times, 1867—(current)	...	Ir.
I. L. T. Jo.	...	Irish Law Times Journal, 1867—(current)	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 (<i>e.g.</i> [1894] 1 I. R.)	...	Ir.
I. R. (Vol.) C. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	Ir.
I. R. Eq.	...	Irish Reports, Equity, 11 vols., 1866—1877	...	Ir.
Ind. Awards	...	Industrial Awards Recommendations	...	N.Z.
Ind. Jur. N. S.	...	Indian Jurist, New Series	...	Ind.
Ind. Jur. O. S.	...	Indian Jurist, Old Series	...	Ind.
Ir. Cir. Rep.	...	Reports of Irish Circuit Cases, 1 vol., 1841—1843	...	Ir.
Ir. Jur.	...	Irish Jurist, 18 vols., 1849—1866	...	Ir.
Ir. L. Rec. 1st ser.	...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	...	Ir.
Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	Ir.
Irv.	...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	Scot.
J. Bridg.	...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	...	Eng.
J. D. R.	...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	...	S. Af.
J. P.	...	Justice of the Peace, 1837—(current)	...	Eng.
J. P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	Eng.
J. R.	...	Jurist Reports	...	N.Z.
J. R. N. S.	...	Jurist Reports, New Series	...	N.Z.
J. Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	Scot.
Jac.	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	Eng.
Jac. & W.	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	Eng.
James	...	Nova Scotia Reports (James)	...	Can.
Jebb & B.	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	...	Ir.
Jebb, C. O.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	Ir.
Jenk.	...	Jenkins' Reports, 1 vol., 1220—1623	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	Ir.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	...	Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	Eng.
John. & H.	...	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	Eng.
Just. Inst.	...	Justinian's Institutes	...	Eng.
K.	...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	S. Af.
K. & G.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	Eng.
K. & J.	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	Eng.
K. B. (preceded by date)	...	Law Reports, King's Bench Division, since 1900 (<i>e.g.</i> , [1901] 2 K. B.)	...	Eng.
Kames Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	Scot.
Kay	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	Eng.
Kebl.	...	Keble's Reports, fol., 3 vols., 1661—1677	...	Eng.
Keen	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	Eng.
Kell.	...	Kellway's Reports, King's Bench, fol., 1 vol., 1327—1578	...	Eng.
Kel.	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	Eng.
Kel. W.	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	...	Eng.
Keny.	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	...	Eng.
Keny. Oh.	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	Eng.
Kerr	...	New Brunswick Reports (Kerr)	...	Can.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Arran	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	...	Scot.
& Omb.	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	...	Eng.
pp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	...	Eng.
	...	Knox's Reports	...	Aus.
t. & W. Rat. App.	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	...	Eng.
t. Rat. App.	...	Konstam's Reports of Rating Appeals, 2 vols., 1894—1904	...	Eng.
G. temp. Plunk.	...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	...	Ir.
G. temp. Sugd.	...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	...	Ir.
Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	...	Eng.
& M. Gaz.	...	Local Courts and Municipal Gazette	...	Can.
J.	...	Lower Canada Jurist	...	Can.
L. J.	...	Lower Canada Law Journal	...	Can.
R.	...	Lower Canada Reports	...	Can.
R.	...	Local Government Reports, 1902—(current)	...	Eng.
Adm.	...	Law Journal, Admiralty, 1865—1875	...	Eng.
Boy.	...	Law Journal, Bankruptcy, 1832—1880	...	Eng.
C. O.	...	Law Journal (County Courts Reporter), 1912—(current)	...	Eng.
C. P.	...	Law Journal, Common Pleas, 1831—1875	...	Eng.
Ch.	...	Law Journal, Chancery, 1831—(current)	...	Eng.
Eocl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	...	Eng.
Ex.	...	Law Journal, Exchequer, 1831—1875	...	Eng.
Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	...	Eng.
K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	...	Eng.
M. O.	...	Law Journal, Magistrates' Cases, 1831—1896	...	Eng.
N. O.	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	...	Eng.
O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831	...	Eng.
P.	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	...	Eng.
P. & M.	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	...	Eng.
P. O.	...	Law Journal, Privy Council, 1865—(current)	...	Eng.
P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	...	Eng.
R.	...	Law Journal Newspaper, 1866—(current)	...	Eng.
& P.	...	Leader Law Reports	...	S. Af.
	...	Lowndes, Maxwell, and Pollock's Reports, Ball Court and Practice, 2 vols., 1850—1851	...	Eng.
A. & E.	...	Legal News	...	Can.
	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	...	Eng.
O. O. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	...	Eng.
O. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875	...	Eng.
Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875	...	Eng.
Exch.	...	Law Reports, Exchequer, 10 vols., 1865—1875	...	Eng.
H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	...	Eng.
Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	...	Eng.
Ind. App. Supp.	...	Law Reports, India Appeals, Privy Council, Supplementary Volume, 1872—1873	...	Eng.
Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	...	Ir.
P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	...	Eng.
P. O.	...	Law Reports, Privy Council, 6 vols., 1865—1875	...	Eng.
Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	...	Eng.
Q. B.	...	Quebec Reports, Queen's Bench	...	Can.
Sc. & Div.	...	Law Reports, Scotch and Divorce Appeals, House of Lords, 2 vols., 1866—1875	...	Eng.
	...	Law Times Reports, 1859—(current)	...	Eng.
Jo.	...	Law Times Newspaper, 1843—(current)	...	Eng.
O. S.	...	Law Times Reports, Old Series, 34 vols., 1843—1860	...	Eng.
	...	La Themis	...	Can.
	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	...	Eng.
	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	...	Eng.
Reg. Cas.	...	Lawson's Registration Cases, 1895—(current)	...	Eng.
aym.	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	...	Eng.
Ca.	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	...	Eng.
	...	Leach's Crown Cases, 2 vols., 1730—1814	...	Eng.
	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	...	Eng.
mp. Hard.	...	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	...	Eng.
ep.	...	Legal Reporter	...	Ir.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

...	...	Legge's Reports	Aus.
...	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	Eng.
...	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	Eng.
C. O.	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	Eng.
...	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	Eng.
Ass.	...	Liber Assisarum, Year Books, 1—51 Edw. III.	Eng.
...	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	Eng.
...	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
L. R.	...	Lloyd's List Law Reports, 1919—(current)	Eng.
L. Pr. Cas.	...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	Eng.
...	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	Eng.
L. & T.	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	Ir.
L. Journals	...	Journals of the House of Lords	Eng.
E. O.	...	Luder's Election Cases, 3 vols., 1784—1787	Eng.
L. P. L. O.	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	Eng.
L.	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	Eng.
...	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	Eng.
Reg. Cas.	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	Eng.
L.	...	Lyndwood, Provinciale, fol., 1 vol.	Eng.
...	...	Menzies's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.
L. S.	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	Eng.
L. W.	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	Eng.
L. R.	...	Montreal Condensed Reports	Can.
L. C. R.	...	Madras High Court Reports	Ind.
L. R. (Vol.) K. B. or	...	Montreal Law Reports, King's Bench or Queen's Bench	Can.
L. R. (Vol.) S. O.	...	Montreal Law Reports, Superior Court	Can.
M. Cas.	...	Martin's Reports of Mining Cases	Can.
...	...	Macassey's New Zealand Reports	N.Z.
L. & G.	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	Eng.
L. & H.	...	Macrae and Hertalet's Insolvency Cases, 1 vol., 1847—1852	Eng.
le	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	Eng.
le. & Yo.	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	Eng.
Macfarlane	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	Scot.
Maclean & Rob.	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	Scot.
Macph. (Ct. of Sess.)	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	Scot.
Macq.	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	Scot.
Macr.	...	Macquay's Patent Cases, 2 parts, 1847—1856	Eng.
Mad.	...	Madras High Court Reports	Ind.
Madd.	...	Maddock's Reports, Chancery, 6 vols., 1815—1821	Eng.
Madd. & G.	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	Eng.
Madox	...	Madox's Formulæ Anglicanum	Eng.
Madox, Exch.	...	Madox's History and Antiquities of the Exchequer, 2 vols.	Eng.
Mag.	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	Eng.
Manning & G.	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	Eng.
Manning & Ry. K. B.	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	Eng.
Manning & Ry. M. O.	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	Eng.
M. L. J.	...	Manitoba Law Journal	Can.
M. L. R.	...	Manitoba Law Reports	Can.
M. R. temp. Wood	...	Manitoba Reports temp. Wood	Can.
Mans.	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	Eng.
M. L. O.	...	Maritime Law Reports (Oxford), 3 vols., 1860—1871	Eng.
March	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	Eng.
Mar.	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Marsh.	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	Eng.
Marsh.	...	Marshall's Reports	Ind.
Mayn.	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1278—1326	Eng.
McG.	...	McGee's Companies Acts Cases, 2 vols., 1889—1891	Eng.
McM.	...	McMenzies's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af.

...	...	Marivale's Reports, Chancery, 8 vols., 1815—1817	...	Eng.
...	...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	...	Ir.
Rep.	...	Modern Reports, 12 vols., 1689—1755	...	Eng.
...	...	Molloy's Reports, Chancery (Ireland), 8 vols., 1808—1831	...	Ir.
...	...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	...	Eng.
& A.	...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	...	Eng.
& B.	...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	...	Eng.
& Ch.	...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	...	Eng.
& M.	...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	...	Eng.
D. & De G.	...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	...	Eng.
& P.	...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	...	Eng.
& S.	...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	...	Eng.
Ind. App.	...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	...	Eng.
P. O. C.	...	Moore's Privy Council Cases, 15 vols., 1836—1863	...	Eng.
P. O. C. N. S.	...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	...	Eng.
I. & M.	...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	...	Eng.
I. & R.	...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	...	Eng.
I. O. C.	...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	...	Eng.
e, C. P.	...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	...	Eng.
e, K. B.	...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	...	Eng.
Dict.	...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	...	Scot.
...	...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	...	Eng.
...	...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	...	Eng.
Rep.	...	Municipal Reports	...	Can.
I. Epit.	...	Murdoch's Epitome	...	Can.
p. & H.	...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	...	Eng.
...	...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	...	Scot.
& Cr.	...	Myline and Craig's Reports, Chancery, 5 vols., 1835—1841	...	Eng.
& K.	...	Myline and Keen's Reports, Chancery, 3 vols., 1832—1835	...	Eng.
I. O.	...	Native Appeal Cases	...	S. Af.
S.	...	Nichols and Stop's Reports (Tasmania)	...	Tasmania.
Dig.	...	New Brunswick Digest (Stevens)	...	Can.
Eq. Rep.	...	New Brunswick Equity Reports	...	Can.
I. R.	...	New Brunswick Reports	...	Can.
I. R. (All.)	...	New Brunswick Reports (Allen)	...	Can.
I. R. (Ber.)	...	New Brunswick Reports (Berton)	...	Can.
I. R. (Carl.)	...	New Brunswick Reports (Carleton)	...	Can.
I. R. (Chip.)	...	New Brunswick Reports (Chipman)	...	Can.
I. R. (Han.)	...	New Brunswick Reports (Hannay)	...	Can.
I. R. (Kerr)	...	New Brunswick Reports (Kerr)	...	Can.
I. R. (P. & B.)	...	New Brunswick Reports (Pugsley and Burbidge)	...	Can.
I. R. (P. & T.)	...	New Brunswick Reports (Pugsley and Trueman)	...	Can.
I. R. (Pug.)	...	New Brunswick Reports (Pugsley)	...	Can.
I. R. (Tru.)	...	New Brunswick Reports (Trueman)	...	Can.
I. R.	...	Natal Law Reports	...	S. Af.
I. R.	...	Nova Scotia Reports	...	Can.
I. R. (Coch.)	...	Nova Scotia Reports (Cochran)	...	Can.
I. R. (G. & R.)	...	Nova Scotia Reports (Geldert & Russell)	...	Can.
I. R. (James)	...	Nova Scotia Reports (James)	...	Can.
I. R. (Old.)	...	Nova Scotia Reports (Oldrights)	...	Can.
I. R. (R. & O.)	...	Nova Scotia Reports (Russell and Chesley)	...	Can.
I. R. (R. & G.)	...	Nova Scotia Reports (Russell and Geldert)	...	Can.
I. R. (Thom.)	...	Nova Scotia Reports (Thomson)	...	Can.
S. W. Adm. or Ad.	...	New South Wales Reports, Admiralty	...	Aus.
S. W. B.	...	New South Wales Reports, Bankruptcy	...	Aus.
S. W. Bkpty. Cas.	...	New South Wales Bankruptcy Cases	...	Aus.
S. W. Eq.	...	New South Wales Reports, Equity	...	Aus.
S. W. Ind. Arbtrn. Cas.	...	New South Wales Industrial Arbitration Cases	...	Aus.
S. W. L. R.	...	New South Wales Law Reports	...	Aus.
S. W. Land App. Ots.	...	New South Wales Land Appeal Courts	...	Aus.
S. W. S. O. R.	...	New South Wales Supreme Court Reports	...	Aus.
S. W. S. O. R. N. S.	...	New South Wales Supreme Court Reports, New Series	...	Aus.
S. W. W. N.	...	New South Wales Weekly Notes	...	Aus.
W.	...	North-Western Provinces High Court Reports	...	Ind.
W. T. R.	...	North-West Territories Reports	...	Can.
Z. Jur.	...	New Zealand Jurist	...	N.Z.
Z. Jur. Mining Law	...	New Zealand Jurist Mining Law	...	N.Z.
Z. Jur. N. S.	...	New Zealand Jurist, New Series	...	N.Z.
Z. L. R.	...	New Zealand Law Reports, 1883—(current)	...	N.Z.
Z. L. R. O. A.	...	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	...	N.Z.
a.	...	Nelson's Reports, Chancery, 1 vol., 1626—1698	...	Eng.

vi REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

r. & M. K. B.	...	Neville and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
r. & M. M. C.	...	Neville and Manning's Magistrates' Cases, 8 vols., 1832—1836	Eng.
r. & P. K. B.	...	Neville and Perry's Reports, King's Bench, 8 vols., 1836—1838	Eng.
r. & P. M. C.	...	Neville and Perry's Magistrates' Cases, 1 vol., 1836—1837	Eng.
w Mag. Cas.	...	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850	Eng.
w Pract. Cas.	...	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
w Rep.	...	New Reports, 6 vols., 1862—1865	Eng.
w Sess. Cas.	...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	Eng.
ld. L. R.	...	Newfoundland Reports	Nfld.
lan	...	Nolan's Magistrates' Cases, 1 vol., 1791—1793	Eng.
tes of Cases	...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	Eng.
y	...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649	Eng.
B. & F.	...	Ollivier Bell and Fitzgerald's Reports	N.Z.
B. S. P.	...	Old Lailey Session Papers	Eng.
Bridg.	...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666	Eng.
F. S.	...	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
L. R.	...	Ontario Law Reports	Can.
M. & H.	...	O'Malley and Hardcastle's Election Cases, 1869—(current)	Eng.
P. D.	...	South African Law Reports, Orange Free State Provincial Division	S. Af.
R.	...	Ontario Reports	Can.
R.	...	Official Reports of the South African Republic, 1894—1899	S. Af.
R. C.	...	Reports of the High Court of the Orange River Colony	S. Af.
S.	...	Upper Canada Queen's Bench, Old Series	Can.
W. N.	...	Ontario Weekly Notes	Can.
W. R.	...	Ontario Weekly Reporter	Can.
ld.	...	Nova Scotia Reports (Oldrights)	Can.
nt. Dig.	...	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
wen	...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	Eng.
(preceded by date)	...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (e.g., [1891] P.)	Eng.
& B.	...	New Brunswick Reports (Pugsley and Burbidge)	Can.
& T.	...	New Brunswick Law Reports (Pugsley and Trueman)	Can.
Cas.	...	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	Eng. & Col.
D.	...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	Eng.
E. I.	...	Prince Edward Island Reports	Can.
R.	...	Ontario Practice	Can.
Wms.	...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735	Eng.
alm.	...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	Eng.
ark.	...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	Eng.
at. App.	...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
ater. App.	...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
ea	...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794	Eng.
ea, Add. Cas.	...	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812	Eng.
eck.	...	Peckwell's Election Cases, 2 vols., 1803—1806	Eng.
elham	...	Pelham (S. A.) Reports	Aus.
er. & Dav.	...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
er. & Kn.	...	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
er. C. S.	...	Perrault's Conseil Supérieur	Can.
er. P.	...	Perrault's Prévosté de Quebec, 1726—1756	Can.
Ph.	...	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas.	...	Phillips' Election Cases, 1 vol., 1780	Eng.
Phillim.	...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821	Eng.
Phillim. Eccl. Jud.	...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip.	...	Phipson's Digest of Natal Reports, 1858—1859	S. Af.
Pig. & R.	...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845	Eng.
Pitc.	...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624	Scot.
Plowd.	...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I.	Eng.
Poll.	...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682	Eng.
Poph.	...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627	Eng.
Pow. R. & D.	...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.
Pre. Ch.	...	Precedents in Chancery, fol., 1 vol., 1689—1722	Eng.
Price	...	Price's Reports, Exchequer, 13 vols., 1814—1824	Eng.
Price	...	Price's Mining Commissioners' Cases	Can.
Pug.	...	New Brunswick Reports (Pugsley)	Can.
Py. R.	...	Pykes' Lower Canada Reports	Can.

... ..	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	Eng.
(preceded by date)	Law Reports, Queen's Bench Division, 1891—1901 (<i>e.g.</i> , [1891] 1 Q. B.)	Eng.
D.	Law Reports, Queen's Bench Division, 25 vols., 1875—1890	Eng.
Q.	Queensland Justice of Peace Reports	Aus.
Y.	Queensland Law Journal	Aus.
R.	Quebec Law Reports	Can.
R. (Beor) ...	Queensland Law Reports by Beor	Aus.
R.	Quebec Practice Reports	Can.
Vol.) K. B. or Q. B.	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current)	Can.
(Vol.) S. O.	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	Can.
J. R.	Queensland Supreme Court Reports	Aus.
R.	Queensland State Reports	Aus.
N.	Weekly Notes, Queensland	Aus.
... ..	The Reports, 15 vols., 1893—1895	Eng.
... ..	Roscoe's Reports of the Supreme Court of the Cape of Good Hope 1861—1867, 1871—1872, 1877—1878	S. Af.
of Sess.)	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	Scot.
O.	Ramsay, Appeal Cases	Can.
J.	Nova Scotia Reports (Russell & Chesley)	Can.
G.	Nova Scotia Reports (Russell and Geldert)	Can.
... ..	La Revue Critique de Législation et de Jurisprudence de Canada	Can.
J.	Revue de Jurisprudence	Can.
L.	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	Can.
D.	New South Wales, Reserved and Equity Decisions	Aus.
D.	Ritchie's Equity Decisions (Russell)	Can.
R. Q.	Quebec Revised Reports	Can.
N. S.	Revue Légale, New Series, 1895—(current)	Can.
O. S.	Revue Légale, Old Series, 21 vols., 1869—1892	Can.
O.	Reports of Patent Cases, 1884—(current)	Eng.
... ..	Revised Reports	Eng.
... ..	Rastell's Entries	Eng.
... ..	Rayner's Tithe Cases, 3 vols., 1575—1782	Eng.
Prop. Cas.	Real Property Cases, 2 vols., 1843—1847	Eng.
Ch.	Reports in Chancery, fol., 8 vols., 1615—1710	Eng.
in O. of A.	Reports in Courts of Appeal	N.Z.
& Eq. Jud.	New South Wales Reserved and Equity Judgments	Aus.
v. Cas.	Reserved Cases	Ir.
& M.	Rickards and Michael's Locus Standi Reports, 1 vol., 1885—1889	Eng.
& S.	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	Eng.
L. & S.	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	Ir.
Parl. Rep.	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796	Ir.
temp. H.	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	Eng.
Eq. Rep.	Ritchie's Equity Reports	Can.
Ecll.	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853	Eng.
L. & W.	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	Eng.
t. App.	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	Scot.
App.	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	Scot.
Abr.	Rolle's Abridgment of the Common Law, fol., 2 vols.	Eng.
Rep.	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625	Eng.
... ..	Romilly's Notes of Cases in Equity, 1 part, 1772—1787	Eng.
oe's B.O.	Roscoe, Digest of Building Cases	Eng.
... ..	Rose's Reports, Bankruptcy, 2 vols., 1810—1816	Eng.
L. O.	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	Eng.
... ..	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	Eng.
Cas.	Campbell's Ruling Cases, 25 vols.	Eng.
... ..	Russell's Reports, Chancery, 5 vols., 1824—1829	Eng.
& M.	Russell and Mylne's Reports, Chancery, 2 vols., 1829—1833	Eng.
& Ry.	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
E. R.	Russell's Election Reports	Can.
Can. Cas.	Railway and Canal Cases, 7 vols., 1835—1854	Eng.
Can. Tr. Cas.	Railway and Canal Traffic Cases, 1855—(current)	Eng.
M.	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826	Eng.
& K. Rat. App.	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904	Eng.
, Rat. App.	Ryde's Rating Appeals, 3 vols., 1871—1893	Eng.

xxviii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

S.	...	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	...	South African Law Journal	S. Af.
S. A. L. R.	...	South Australian Law Reports	Aus.
S. A. L. R.	...	South African Law Reports	S. Af.
S. A. R.	...	Reports of the High Court of the South African Republic, 1881—1892	S. Af.
S. A. S. R.	...	South Australian State Reports, since 1921 (e.g., [1921] S. A. S. R.)	Aus.
S. O.	...	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
S. O. (preceded by date)	...	Court of Session Cases (Scotland), since 1906 (e.g., [1906] S. O.)	Scot.
S. O. (H. L.) (preceded by date).	...	Court of Session Cases (Scotland) (House of Lords), since 1906 (e.g., [1906] S. O. (H. L.))	Scot.
S. O. (J.) (preceded by date).	...	Court of Justiciary Cases (Scotland), since 1906 (e.g., [1906] S. O. (J.))	Scot.
S. O. R.	...	Canada, Supreme Court Reports	Can.
S. L. T.	...	Scots Law Times, 1893 (current)	Scot.
S. Q. R.	...	Queensland State Reports	Aus.
S. R.	...	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C.	...	Stuart's Lower Canada Reports	Can.
S. R. N. S. W.	...	New South Wales, State Reports	Aus.
S. R. Q.	...	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	...	Stuart's Vice-Admiralty Reports	Can.
Saint	...	Saint's Digest of Registration Cases, 1848—1906, 1 vol.	Eng.
Salk.	...	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	...	Saskatchewan Law Reports	Can.
Sau. & Sc.	...	Sause and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund.	...	Saunders's Reports, King's Bench, 2 vols., 1666—1672	Eng.
Saund. & A.	...	Saunders and Austin's Locust Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	...	Saunders and Bidder's Locust Standi Reports, 1905—(current)	Eng.
Saund. & C.	...	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848	Eng.
Saund. & M.	...	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	Eng.
Sav.	...	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591	Eng.
Say.	...	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756	Eng.
Sc. Jur.	...	Scottish Jurist, 46 vols., 1829—1873	Scot.
Sc. L. R.	...	Scottish Law Reporter, 1865—(current)	Scot.
Sc. R. R.	...	Scots Revised Reports	Scot.
Sch. & Lef.	...	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	Ir.
Scott	...	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R.	...	Scott's New Reports, Common Pleas, 8 vols., 1840—1845	Eng.
Sea. & Sm.	...	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860	Eng.
Sel. Cas. Ch.	...	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Selwyn's N.P.	...	Selwyn's Abridgement of the Law of Nisi Prius	Eng.
Sess. Cas. K. B.	...	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem.	...	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742	Eng.
Sh. (Ct. of Sess.)	...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	Scot.
Sh. & Maccl.	...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	Scot.
Sh. Dig.	...	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	Scot.
Sh. Just.	...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App.	...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct.	...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch.	...	Sheppard's Touchstone of Common Assurances	Eng.
Show.	...	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas.	...	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	Eng.
Sid.	...	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1870	Eng.
Sim.	...	Simons' Reports, Chancery, 17 vols., 1826—1852	Eng.
Sim. & St.	...	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826	Eng.
Sim. N. S.	...	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852	Eng.
Skin.	...	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697	Eng.
Sm. & Bat.	...	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	Ir.
Sm. & G.	...	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	Eng.
Smith, K. B.	...	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806	Eng.
Smith L. O.	...	Smith's Leading Cases, 2 vols.	Eng.
Smith, Reg. Cas.	...	O. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe	...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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A. Jo.	Soliditors' Journal, 1856—(current) ...	Eng.
Spence	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks ...	...	Spinks' Prize Court Cases, 2 parts, 1854—1856 ...	Eng.
St. R. Qd. (preceded by date) ...	...	Queensland State Reports, since 1902 (<i>e.g.</i> , [1902] St. R. Qd.) ...	Aus.
Stair Rep. ...	...	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681 ...	Scot.
Stark. ...	...	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823 ...	Eng.
State Tr. ...	...	State Trials, 34 vols., 1163—1820 ...	Eng.
State Tr. N. S. ...	...	State Trials, New Series, 8 vols., 1820—1858 ...	Eng.
Stewart ...	...	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton ...	...	Stockton's Vice-Admiralty Report and Digest ...	Can.
Story ...	...	Story's Commentaries on Equity Jurisprudence ...	Eng.
Stra. ...	...	Strange's Reports, 2 vols., 1716—1747 ...	Eng.
Stu. M. & P. ...	...	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ...	Scot.
Stuart ...	...	Sessions Cases (Stuart) ...	Scot.
Stuart, Adm. ...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S. ...	...	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874 ...	Can.
Stuart, K. B. ...	...	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ...	Can.
Sty. ...	...	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw. ...	...	Swabey's Reports, Admiralty, 1 vol., 1855—1859 ...	Eng.
Sw. & Tr. ...	...	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ...	Eng.
Swan. ...	...	Swanston's Reports, Chancery, 3 vols., 1818—1821 ...	Eng.
Swin. ...	...	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme ...	...	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M. ...	...	Temple and Mew's Criminal Appeal Cases, 1 vol., 1818—1851 ...	Eng.
T. H. ...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ...	S. Af.
T. Jo. ...	...	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ...	Eng.
T. L. ...	...	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ...	S. Af.
T. L. R. ...	...	The Times Law Reports, 1884—(current) ...	Eng.
T. P. ...	...	Reports of the Supreme Court of the Transvaal, 1910—(current) ...	S. Af.
T. P. D. ...	...	South African Law reports, Transvaal Provincial Division ...	S. Af.
T. Raym. ...	...	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683 ...	Eng.
T. S. ...	...	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml. ...	...	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ...	Eng.
Tas. L. R. ...	...	Tasmanian Law Reports ...	Aus.
Taunt. ...	...	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas. ...	...	Tax Cases, 1875—(current) ...	Eng.
Tay. ...	...	Taylor's King's Bench Reports ...	Can.
Temp. Wood ...	...	Manitoba Reports <i>temp.</i> Wood ...	Can.
Term Rep. ...	...	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R. ...	...	Territories Law Reports ...	Can.
nom. ...	...	Nova Scotia Reports (Thomson) ...	Can.
oth. ...	...	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ...	Eng.
own. St. Tr. ...	...	Townsend, Modern State Trials ...	Eng.
rem. P. O. ...	...	Tremaine Pleas of the Crown, 1 vol., 1667 ...	Eng.
ist. ...	...	Tristram's Consistory Judgments, 1 vol., 1872—1890 ...	Eng.
ador, L. O. Merc. Law. ...	...	New Brunswick Reports (Trueman) ...	Can.
ador, L. O. Real. Prop. ...	...	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
... & R. ...	...	Tudor's Leading Cases on Real Property ...	Eng.
... & Gr. ...	...	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
... & Gr. ...	...	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ...	Eng.
... & Gr. ...	...	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836 ...	Eng.
J. Jur. ...	...	Upper Canada Jurist ...	Can.
L. J. N. S. ...	...	Canada Law Journal, New Series, 1865—(current) ...	Can.
L. J. O. S. ...	...	Canada Law Journal, Old Series, 10 vols., 1855—1864 ...	Can.
R. ...	...	Upper Canada Reports, Queen's Bench ...	Can.
R. ...	...	Fiji Law Reports (Udal) ...	Fiji.
R. ...	...	Victorian Law Reports ...	Aus.
... (Adm.) ...	...	Victorian Reports (Admiralty) ...	Aus.
... (Eq.) ...	...	Victorian Reports (Equity) ...	Aus.
... (Law) ...	...	Victorian Reports (Law) ...	Aus.
ugh. ...	...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673 ...	Eng.

xxx REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Vent.	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	Eng.
Vern.	Vernon's Reports, Chancery, 2 vols., 1680—1719	Eng.
Vern. & Scr.	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	Ir.
Ves.	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	Eng.
Ves. & B.	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	Eng.
Ves. Sen.	Vesey Sen.'s Reports, 2 vols., 1747—1756	Eng.
Vin. Abr.	Viner's Abridgment of Law and Equity, fol., 22 vols.	Eng.
Vin. Supp.	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	Eng.
W.	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	S. Af.
W. A. L. R.	West Australian Law Reports	Aus.
W. A' B. & W.	Webb, A'Beckett and Williams' Victorian Reports	Aus.
W. & W.	Wyatt and Webb	Aus.
W. C. C.	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	Eng.
W. H. C.	South African Law Reports, Witwatersrand High Court	S. Af.
W. Jo.	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	Eng.
W. L. D.	South African Law Reports, Witwatersrand Local Division	S. Af.
W. L. R.	Western Law Reporter	Can.
W. L. T.	Western Law Times	Can.
W. N. (preceded by date)	Law Reports, Weekly notes, 1866—(current) (e.g., [1866] W. N.)	Eng.
W. N.	Calcutta Weekly Notes	Ind.
W. R.	Weekly Reporter, 54 vols., 1852—1906	Eng.
W. R.	Sutherland's Weekly Reporter	Ind.
W. R.	Weekly Reporter, reporting cases in the Cape Provincial Division	S. Af.
W. W. & A' B.	Wyatt, Webb and A'Beckett	Aus.
W. W. R.	Western Weekly Reports	Can.
Wallis	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	Ir.
Web. Pat. Cas.	Webster's Patent Cases, 2 vols., 1802—1855	Eng.
Welsh, Reg. Cas.	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	Ir.
Went. Off. Ex.	Wentworth's Office and Duty of Executors	Eng.
West	West's Reports, House of Lords, 1 vol., 1839—1841	Eng.
West temp. Hard.	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740	Eng.
West. Tithe Cas.	Western's London Tithe Cases, 1 vol., 1592—1822	Eng.
White	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	Scot.
White & Tud. L. C.	White and Tudor's Leading Cases in Equity, 2 vols.	Eng.
Wight.	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	Eng.
Will. Woll. & Dav.	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Ball Court, 1 vol., 1837	Eng.
Will. Woll. & H.	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Ball Court, 2 vols., 1838—1839	Eng.
Willes	Willes' Reports, Common Pleas, 1 vol., 173 ... 1758	Eng.
Wilm.	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	Eng.
Wils.	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	Eng.
Wils & S.	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	Scot.
Wils. Ch.	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	Eng.
Wils. Ex.	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	Eng.
Win.	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	Eng.
Wm. Bl.	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	Eng.
Wm. Rob.	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	Eng.
Wms. Saund.	Williams' Notes to Saunders' Reports, 2 vols.	Eng.
Wolf. & B.	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	Eng.
Wolf. & D.	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	Eng.
Woll.	Wollaston's Reports, Ball Court and Practice, 1 vol., 1840—1841	Eng.
Wood	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	Eng.
Y. A. D.	Young's Vice-Admiralty Reports	Can.
Y. & O. Ch. Cas.	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	Eng.
Y. & O. Ex.	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	Eng.
Y. & J.	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830	Eng.
Y. B.	Year Books	Eng.
Yelv.	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	Eng.
You.	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	Eng.

ABBREVIATIONS

USED IN THIS WORK,

(For Abbreviations used in citing Reports, *see* pp. xv.—xxx., *ante*.)

A.-G.	.	.	.	.	for Attorney-General.
Act.	.	.	.	.	" Actiengesellschaft.
Admlty.	.	.	.	.	" Admiralty.
Affd.	.	.	.	.	" Affirmed.
Affg.	.	.	.	.	" Affirming.
Akt.	.	.	.	.	" Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.	.	.	.	.	" Anonymous.
Apld.	.	.	.	.	" Applied.
Appet.	.	.	.	.	" Applicant.
Appln.	.	.	.	.	" Application.
Appin.	.	.	.	.	" Application to Register a Trade Mark.
App't.	.	.	.	.	" Appellant.
Apprvd.	.	.	.	.	" Approved.
Arbn.	.	.	.	.	" Arbitration.
Archbp.	.	.	.	.	" Archbishop.
Art.	.	.	.	.	" Article.
Assce.	.	.	.	.	" Assurance.
Assocn.	.	.	.	.	" Association.
B. C.	.	.	.	.	" Borough Council.
Bkpcy.	.	.	.	.	" Bankruptcy.
Bkpt.	.	.	.	.	" Bankrupt.
Bldg. Soc.	.	.	.	.	" Building Society.
Bp.	.	.	.	.	" Bishop.
C. A.	.	.	.	.	" Court of Appeal.
C. & S. L. Ry. Co.	.	.	.	.	" City & South London Railway Co.
C. O. A.	.	.	.	.	" Court of Criminal Appeal.
C. O. R.	.	.	.	.	" County Court Rules.
C. C. R.	.	.	.	.	" Court of Crown Cases Reserved.
C. L. P. Act.	.	.	.	.	" Common Law Procedure Act.
C. L. Ry. Co.	.	.	.	.	" Central London Railway Co.
C. O. R.	.	.	.	.	" Crown Office Rules.
C. S. U. O.	.	.	.	.	" Consolidated Statutes of Upper Canada.
Ca. sa.	.	.	.	.	" <i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	.	.	.	.	" Cal-donian Railway Co.
Ch.	.	.	.	.	" Chancery.
Ch. Div.	.	.	.	.	" Chancery Division.
Co.	.	.	.	.	" Company.
Co-op. Assocn.	.	.	.	.	" Co-operative Supply Association.
Cours.	.	.	.	.	" Commissioners.
Consd.	.	.	.	.	" Considered.
Corpn.	.	.	.	.	" Corporation
Ct.	.	.	.	.	" Court.
Ct. of Ch.	.	.	.	.	" Court of Chancery.
Ct. of Eq.	.	.	.	.	" Court of Equity.
Ct. of R.	.	.	.	.	" Court of Review.
D. C.	.	.	.	.	" Divisional Court.
Dtd.	.	.	.	.	" Doubted.

Deft.	for Defendant.
Distd.	„ Distinguished.
Div. Ct.	„ Divisional Court.
Eccl. Comrs.	„ Ecclesiastical Commissioners.
Eccl. Ct.	„ Ecclesiastical Court.
Ex Oh	„ Exchequer Chamber.
Ex p.	„ <i>Ex parte</i> .
Exch.	„ Exchequer.
Exor.	„ Executor.
Exorship.	„ Executorship.
Expld.	„ Explained.
Extd.	„ Extended.
Extrix.	„ Executrix.
Fi. fa.	„ <i>Fieri facias</i> .
Folld.	„ Followed.
G. & S. W. Ry. Co.	„ Glasgow & South Western Railway Co.
G. C. Ry. Co.	„ Great Central Railway Co.
G. E. Ry. Co.	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	„ Great Western Railway Co.
Govt.	„ Government.
Grdns.	„ Guardians or Guardians of the Poor.
H. C. of A.	„ High Court of Australia.
H. L.	„ House of Lords.
I. R. Comrs.	„ Inland Revenue Commissioners.
Insce.	„ Insurance.
JJ.	„ Justices.
Jud. Act	„ Judicature Act.
K. B. Div.	„ King's Bench Division.
L. & B. Ry. Co.	„ London & Brighton Railway Co.
L. & N. W. Ry. Co.	„ London & North Western Railway Co.
L. & S. W. Ry. Co.	„ London & South Western Railway Co.
L. & Y. Ry. Co.	„ Lancashire & Yorkshire Railway Co.
L. B.	„ Local Board.
L. B. & S. C. Ry. Co.	„ London, Brighton & South Coast Railway Co.
L.O.	„ Lord Chancellor.
L. C. & D. Ry. Co.	„ London, Chatham & Dover Railway Co.
L. O. C.	„ London County Council.
L. Elec. Ry. Co.	„ London Electric Railway Co.
L. G. Board	„ Local Government Board.
L.J.	„ Lord Justice.
L.JJ.	„ Lords Justices.
L. T. & S. Ry. Co.	„ London, Tilbury & Southend Railway Co.
M. S. Act	„ Merchant Shipping Act.
M. S. & L. Ry. Co.	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	„ Magistrates.
Mentd.	„ Mentioned.
Met. Dist. Ry. Co.	„ Metropolitan District Railway Co.
Met. Ry. Co.	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co.	„ Midland Great Western Railway Co.
Mid. Ry. Co.	„ Midland Railway Co.
Mtge.	„ Mortgage.
Mtgee.	„ Mortgagee.
mtgor.	„ Mortgagor.
N. B. Ry. Co.	„ North British Railway Co.
N. E. Ry. Co.	„ North Eastern Railway Co.
N. F.	„ Not Followed.
N. P.	„ Nisi Prius.
Ord.	„ Order.
Overd.	„ Overruled.

ABBREVIATIONS.

xxxiii

P. O.	.	.	.	.	for Privy Council.
Petn.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	„ <i>Quære</i> .
R. C.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	„ Rural Sanitary Authority.
R. S. C.	.	.	.	.	„ Revised Statutes of Canada.
R. S. O.	.	.	.	.	„ Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	„ Registration of Trade Mark.
Regr. of Trade Mks.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	„ Reversed.
Revsd.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	„ Rail. Co. or Railway Co.
S. C.	.	.	.	.	„ Same Case.
S. O. (name of colony following)	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	„ Settled Estates.
S. E. & O. Ry. Co.	.	.	.	.	„ South Eastern & Oatham Railway Co.
S. E. Ry. Co.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	„ Same Point.
S.S.	.	.	.	.	„ Steamship.
Sched.	.	.	.	.	„ Schedule.
<i>Sci. fa.</i>	.	.	.	.	„ <i>Scire facias</i> .
Sect.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	„ Workmen's Compensation Act.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

TABLE OF CASES.

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Custom of the Country *See* AGRICULTURE.

Customs of Manors, COPYHOLDS.

Easements, EASEMENTS AND PROFITS
A PRENDRE.

Particular Customs *See* AGRICULTURE; BANKERS AND BANKING; AND TITLES *passim*.
Trade Regulations, FACTORIES AND WORKSHOPS; TRADE AND TRADE UNIONS.

Part I.—Custom.

SECT. 1.—IN GENERAL.

1. As foundation of law.]—Ancient custom is generally recognised as a just foundation of all law (LORD STOWELL).—SLAVE (GRACE), THE, R. v. ALLAN (1827), 2 Hag. Adm. 94; 2 State Tr. N. S. 273.

2. Effective as local common law.]—This ct. will upon a writ of error take judicial notice of all private customs in private places; for they below are as much bound to proceed upon their customs as the judges here are upon the common law (*per* CUR.).—ANON. (1706), 11 Mod. Rep. 68; 88 E. R. 892.

3. —.]—If there is a peculiar local custom in the place, the general law will accept that as the rule in the particular case.—FILEWOOD v. MARSH (1797), 1 Hag. Con. 178; 161 E. R. 623.

4. —.]—(1) A custom which is proved to have existed immemorially will be good, if it be of such a nature that it is possible it can have had a good beginning. Although it be such as to confer what the King cannot grant, yet, if it be not contrary to reason, it may be supported, for it might have had its commencement from an act of the Legislature. (2) Custom is a local law which supersedes the general law (BEST, C.J.).—

PART I. SECT. 1.

2 i. Effective as local common law.]—Custom is a local law which supersedes the general law, &c. if properly established, it is no objection to its validity that it is in opposition to the law generally governing the rights of parties.—PITT v. JONES (1884), 5

N. S. W. L. R. 1.—AUS.

2 ii. —.]—A custom is a rule which in a particular district has from long usage obtained the force of law.—HURPURSHAD v. SHEO DYAL (1876), L. R. 3 Ind. App. 259.—IND.

2 iii. —.]—Where a custom is

proved to exist, it supersedes the general law.—SARTAJ KUARI (RANI) v. DEORAJ KUARI (RANI) (1887), I. L. R. 10 All. 272; L. R. 15 Ind. App. 51.—IND.

2 iv. —.]—Custom in its legal sense means a rule exceptional to the general rule of law.—SHAIK v.

Sect. 1.—In general. Sect. 2.]

FALMOUTH (LORD) v. GEORGE (1828), 5 Bing. 286; 2 Moo. & P. 457; 7 L. J. O. S. C. P. 40; 130 E. R. 1071.

Annotations.—Generally, *Mentd.* Lancum v. Lovell (1833), 9 Bing. 465; Jenkins v. Harvey (1835), 2 Cr. M. & R. 393; Walker v. Needham (1841), 3 Man. & G. 557; Owen v. Routh (1854), 14 C. B. 327; Shepherd v. Payne (1862), 9 Jur. N. S. 364; Brecon Markets Co. v. Neath & Brecon Ry. (1872), L. R. 7 C. P. 555.

5. —.]—In trespass for breaking & entering pltf.'s close, & erecting stalls, booths, etc., there, deft. justified under a custom that, at fairs holden at certain times of the year, on some part of the commons & waste of a manor, to be named by the lord of the manor, the *locus in quo* being parcel of such commons & waste, & named by the lord, every liege subject exercising the trade of a victualler might enter at the time of the fairs, & for the more conveniently carrying on his said trade, erect a booth, etc., & continue the same for a reasonable time after the fairs, paying 2d. to the lord:—*Held*: the custom was reasonable, & the plea a good justification in trespass brought by the owner of the soil.

It is an acknowledged principle that, to give validity to a custom, which has been well described to be an usage, which obtains the force of law, & is, in truth, the binding law, within a particular district or at a particular place, of the persons & things which it concerns, it must be certain, reasonable in itself, commencing from time immemorial, & continued without interruption. A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law. Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth. But, on the other hand, a custom that is contrary to the public good, or injurious or prejudicial to the many, & beneficial only to some particular person, is repugnant to the law of reason; for it could not have had a reasonable commencement; as a custom set up in a manor, on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad; for it is injurious to the multitude, & beneficial only to the lord. In all these, the customs themselves are held to be void, on the ground of their having had no reasonable commencement, but as being founded in wrong & usurpation, & not on the voluntary consent of the people to whom they relate (TINDAL, C.J.).—TYSON v. SMITH (1838), 9 Ad. & El. 406; 3 J. P. 65; 112 E. R. 1205; *sub nom.* SMITH v. TYSON, 1 Per. & Dav. 307; 1 Will. Woll. & H. 749, Ex. Ch.

Annotations.—*Refd.* Race v. Ward (1855), 4 E. & B. 702; London Corp'n. v. Cox (1867), L. R. 2 H. L. 239; Mills v. Colchester Corp'n. (1867), L. R. 2 C. P. 476; Sowerby v. Coleman (1867), L. R. 2 Exch. 96; Bradburn v. Foley (1878), 3 C. P. D. 129; Mercer v. Denne, [1905] 2 Ch. 538. *Mentd.* Elwood v. Bullock (1844), 6 Q. B. 383; Lloyd v. Jones (1848), 6 C. B. 81; Peter v. Daniel (1848), 12 Jur. 604; Dunraven v. Llewellyn (1850), 14 Jur. 1089.

6. —.]—A custom which has existed from time immemorial without interruption within a certain place, & which is certain & reasonable in itself, obtains the force of law, & is, in effect, the common law within that place to which it extends, though contrary to the general law of the realm. In the case of a custom, therefore, it is unnecessary

to look out for its origin; but in the case of prescription, which founds itself upon the prescription of a grant that has been lost by process of time, no prescription had a legal origin where no grant could have been made to support it. Thus a custom for all fishermen within a certain district to dry their nets upon the land of another might well be a good custom; & yet a grant of such an easement to fishermen within the district *eo nomine* might well be held void (TINDAL, C.J.).—LOCKWOOD v. WOOD (1844), 6 Q. B. 50; 13 L. J. Q. B. 365; 3 L. T. O. S. 139; 8 Jur. 543; 115 E. R. 19, Ex. Ch.

Annotations.—*Refd.* Mercer v. Denne, [1904] 2 Ch. 534; Anglo-Hellenic S.S. Co. v. Dreyfus (1913), 108 L. T. 36. *Mentd.* Constable v. Nicholson (1863), 14 C. B. N. S. 230; Hoare v. Metropolitan Board of Works (1874), L. R. 9 Q. B. 296; A.-G. v. Horner (1884), 14 Q. B. D. 245.

7. —.]—A custom is the *lex loci*, an ancient local law in some known district, as a hamlet, town or manor, & does not arise from the grant, act or agreement of the party (PARKE, B.).—JONES v. ROBIN (1847), 10 Q. B. 620; 17 L. J. Q. B. 121; 12 Jur. 308; 116 E. R. 235, Ex. Ch.

Annotations.—*Refd.* Prichard v. Powell (1845), 10 Q. B. 589; Kaye v. Sutherland (1887), 20 Q. B. D. 147. *Mentd.* Clarke v. Tinker (1845), 10 Q. B. 604; Cape v. Scott (1874), L. R. 9 Q. B. 269.

8. —.]—(1) A custom for the inhabitants of a parish to enter upon certain land in the parish, & erect a maypole thereon, & dance round & about it, & otherwise enjoy on the land any lawful & innocent recreation at any times in the year is good.

(2) A custom may be defined to be a local law arising from the assent of all the inhabitants of a particular district, before the time of legal memory (CLEASBY, B.).—HALL v. NOTTINGHAM (1875), 1 Ex. D. 1; 45 L. J. Q. B. 50; 33 L. T. 697; 24 W. R. 58.

Annotations.—As to (1) *Distd.* Allgood v. Gibson (1876), 34 L. T. 883. *Refd.* Mercer v. Denne, [1904] 2 Ch. 534; A.-G. v. Sewell (1918), 88 L. J. K. B. 425.

9. —.]—(1) A custom as I understand it is local common law. It is common law because it is not statute law, & it is local law because it is the law of a particular place as distinguished from the general common law. Local common law, like general common law, is the law of the country as it existed before the time of legal memory, which is generally considered the time of Richard I. Therefore, when people allege a custom they allege that which they call a custom as having been the law of the place before the time of legal memory (JESSEL, M.R.).

(2) Again, for how long must you prove your usage? It is impossible to prove actual usage in all time by living testimony. The usual course taken is this, persons of middle or old age are called, who state that in their time, usually at least half a century, the usage has always prevailed. That is considered, in the absence of countervailing evidence, to show that the usage has prevailed from all time. Now you may have two sorts of countervailing evidence. You may call other old persons who show that there was an interruption during the period spoken to by the first set of witnesses, or you may show from the nature of the case that it was quite impossible that such a right should have existed from time immemorial, that there is some legal difficulty or obstacle in the way, which makes the alleged

MUHAMMAD (1915), L. L. R. 39 Mad. 664.—IND.

2 v. —.]—By the Civil & Roman-Dutch Law a general custom might abrogate a written law.—ZEILER v. WERNER (1818), K. 17.—S. AF.

a. Whether a question of law or of fact.]—A question of custom is a ques-

tion of fact.—HUREEHUR MOOKERJEE v. JUDOOONATH GHOSH (1868), 10 W. R. 153.—IND.

b. —.]—SYUD ALI v. GOPAL DASS (1870), 13 W. R. 420.—IND.

c. —.]—The question of the existence of a particular custom is one of law.—RAM BILAS v. LAL BAHADUR

(1908), L. L. R. 30 All. 311.—IND.

d. Not in itself a cause of action.]—Custom alone cannot found a cause of action, but must be attached to & form an incident of some legal contract.—MICHAU & DE VILLIERS v. ROUSSEAU & ROUSSEAU, [1913] C. P. D. 146.—S. AF.

assertion of right incompatible with the law of the country. In that way again you destroy the evidence of the custom, that is, of the law (JESSEL, M.R.).

(3) It is said that a custom must be continuous. What is that? It means there must be long, continuous habitual usage without interruption (JESSEL, M.R.).

(4) Again, what must be the usage proved? It must not only be consistent with the custom alleged, but, if I may use the expression, not too wide. For instance, if you allege a custom for certain persons to dance on a green, & you prove in support of that allegation, not only that some people danced, but that everybody else in the world who chose danced & played cricket, you have got beyond your custom. It is not confined to what you say it is, & if your evidence is good for anything you prove a great deal more than you have alleged. You cannot select a bit of the practices proved, which might possibly have a legal origin, & say that the evidence must be rejected which would show that bit to be only a small part, say one-twentieth, of the whole usage of which the remaining nineteen-twentieths may be utterly incapable of legal origin, & therefore that the one-twentieth must be assumed to have had a legal origin (JESSEL, M.R.).

(5) The nature of custom being, as it is, local law, you can only get rid of it in the same way as other local laws are got rid of, namely, by Act of Parliament (JESSEL, M.R.).—HAMMERTON v. HONEY (1876), 24 W. R. 603.

Annotations:—*As to* (4) *Reid*. De la Warr v. Miles (1881), 17 Ch. D. 535; Edwards v. Jenkins, [1896] 1 Ch. 308. *As to* (5) *Reid*. Harrison v. Powell (1894), 10 T. L. R. 271.

10. —.]—A custom is a reasonable & universal rule of action in a locality, followed, not because it is believed to be the general law of the land or because the parties following it have made particular agreements to observe it, but because it is in effect the common law within that place to which it extends.—ANGLO-HELLENIC S.S. Co. v. DREYFUS (LOUIS) & Co. (1913), 108 L. T. 36; 29 T. L. R. 197; 57 Sol. Jo. 246; 12 Asp. M. L. C. 291.

Essential characteristics of custom.—See Sect. 5, *post*.

11. **Custom of the realm—As common law.**—ANON. (1401), Y. B. 2 Hen. 4, fo. 18, pl. 6.

Annotations:—*Mentd.* Southern v. How (1617), Poph. 143; Canterbury v. R. (1842), 3 State Tr. N. S. 767; Reddie v. North Western Ry. (1849), 13 Jur. 659.

12. —.]—**Judicial notice.**—A custom regulating the rights of the owners of all lands bordering on the sea is so general that it need not be pleaded.

General customs were, in ancient times, stated in the pleadings of those who claimed under them; as the custom of merchants, the customs of the realm, with reference to innkeepers & carriers, & others of the same description. But it has not been usual for a long time to allude to such customs in the pleadings, because no proof is required of their existence; they are considered as adopted into the common law, & as such are recognised by the judges without any evidence (BEST, C.J.).—R. v. YARBOROUGH (LORD) (1828), 2 Bli. N. S. 147; 1 Dow. & Cl. 178; 4 E. R. 1087; *sub nom.* GIFFORD v. YARBOROUGH (LORD), 5 Bing. 163, H. L.

Annotations:—*Mentd.* Scrutton v. Brown (1825), 4 B. & C. 485; Re Hull & Selby Ry. (1839), 5 M. & W. 327; Egerton v. Brownlow (1853), 4 H. L. Cas. 1; A.-G. v. Hammer (1858), 27 L. J. Ch. 837; A.-G. v. Chambers (1859), 4 De G. & J. 55; Waterloo Bridge Co. v. Cull (1859), 5 Jur. N. S. 1288; Ford v. Lacey (1861), 30 L. J. Ex. 351; Lopez v. Muddun Mohun Thakoor (1870), 13 Moo. Ind. App. 467; Foster v. Wright (1878), 4 C. P. D. 430; A.-G.

v. Reeve (1885), 1 T. L. R. 675; Hindson v. Ashby, [1896] 2 Ch. 1; Mercer v. Denna, [1905] 2 Ch. 538; A.-G. of Southern Nigeria v. Holt (Liverpool), [1915] 1 A. C. 599; Nesbitt v. Mablethorpe U. D. C., [1917] 2 K. B. 568; Brighton & Hove General Gas Co. v. Hove Bungalows, Ltd. (1923), 68 Sol. Jo. 165.

13. —.]—The custom of the realm is the law, & the ct. will take notice of it (PATTERSON, J.).—POZZI v. SHIPTON (1838), 8 Ad. & El. 963; 1 Per. & Dav. 4; 1 Will. Woll. & H. 624; 8 L. J. Q. B. 1; 112 E. R. 1106.

Annotations:—*Mentd.* Wyld v. Pickford (1841), 8 M. & W. 443; Marshall v. York, Newcastle & Berwick Ry. (1851), 11 C. B. 655; Tatton v. G. W. Ry. (1860), 2 E. & E. 844; Foulkes v. Met. Dist. Ry. (1879), 4 C. P. D. 267.

— **As to liability of innkeepers.**—See INNS & INNKEEPERS.

— **As to rights of owners of lands adjacent to sea.**—See WATERS & WATER COURSES.

14. **Implication of possibility—& past user.**—All customs imply two things, a thing possible to be done, & that the thing has sometimes been done (GLYN, C.J.).—PROTECTOR v. KINGSTON-UPON-THAMES TOWN, YATES'S CASE (1655), Sty. 477; 82 E. R. 870.

Annotations:—*Mentd.* R. v. Lane (1708), Fortes. Rep. 275; R. v. Doncaster Corp. (1729), 2 Ld. Raym. 1564.

15. **Triable at common law.**—Custom or prescriptions are only triable at common law.—HODGSON v. ATKINSON (1738), 2 Com. 603; 92 E. R. 1229.

SECT. 2.—DISTINGUISHED FROM PRESCRIPTION.

16. **Custom attaches to locality—Prescription appertains to persons.**—FOISTON v. CRACHROODE (1587), 4 Co. Rep. 31 b; 76 E. R. 902.

Annotations:—*Consd.* Gateward's Case (1607), 6 Co. Rep. 59 b. *Refd.* R. v. Ecclesfield (1818), 1 B. & Ald. 348; Derry v. Sanders, [1919] 1 K. B. 223. *Mentd.* R. v. Churchill (1825), 6 Dow. & Lry. K. B. 635.

17. —.]—A custom that every inhabitant of a town shall have a way over land, either to the church or market, etc., is good (COKE, C.J.).

A difference was taken, & agreed, between a prescription which always is alleged in the person, & a custom, which always ought to be alleged in the land; for every prescription ought to have by common intentment a lawful beginning, but otherwise it is of a custom; for that ought to be reasonable, & *ex certa causa rationabili usitata*, but need not be intended to have a lawful beginning, as custom to have land devisable, or of the nature of gavelkind, or borough English, etc. These & the like customs are reasonable, but by common intentment they cannot have a lawful beginning, by no grant, or act, or agreement, but only by Parliament (COKE, C.J.).—GATEWARD'S CASE (1607), 6 Co. Rep. 59 b; 77 E. R. 344; *sub nom.* SMITH v. GATEWOOD, Cro. Jac. 152.

Annotations:—*Consd.* Day v. Savadge (1614), Hob. 85; R. v. Ecclesfield (1818), 1 B. & Ald. 348; Lockwood v. Wood (1844), 6 Q. B. 50; Rogers v. Brenton (1847), 10 Q. B. 26; Constable v. Nicholson (1863), 14 C. B. N. S. 230; Brocklebank v. Thompson, [1903] 2 Ch. 344. *Refd.* Baker v. Brereman (1835), Cro. Car. 418; Payne v. Partridge (1690), 1 Show. 255; Weekly v. Wildman (1697), 1 Ld. Raym. 405; Drake v. Wigglesworth (1752), Willes, 654; English v. Burnell (1765), 2 Wils. 258; Grimstead v. Marlowe (1792), 4 Term Rep. 717; Jones v. Robin (1847), 10 Q. B. 620; Mounsey v. Ismay (1863), 11 W. R. 270; Austin v. Amhurst (1877), 7 Ch. D. 689; Rivers v. Adams (1878), 3 Ex. D. 361; Goodman v. Saltash Corp. (1882), 7 App. Cas. 633. *Mentd.* Ordway v. Orme (1612), 1 Bulst. 183; Bond's Case (1639), March. 16; North v. Coe (1668), Vaugh. 251; Miller v. Spateman (1669), 2 Keb. 527; St. Albans Corp. v. Dobbins (1672), Freeman. K. B. 36; Osbuston v. James (1688), 2 Lut. 1377; Lloyd v. Jones (1848), 6 C. B. 81; A.-G. v. Mathias (1858), 4 K. & J. 679; Murphy v. Ryan (1868), 16 W. R. 678; London City Sewers Commr. v. Glasco (1872), 7 Ch. App. 466; R. v. Rollett (1875), L. R. 10 Q. B. 469; Chilton v.

Sect. 2.—Distinguished from prescription. Sect. 3.]

London Corp'n. (1878), 7 Ch. D. 735; *Re Christchurch Inclosure Act* (1887), 35 Ch. D. 355; *Re St. Stephen, Coleman Street, Re St. Mary the Virgin, Aldermanbury* (1888), 39 Ch. D. 492; *Tilbury v. Silva* (1890), 45 Ch. D. 98; *Chesterfield v. Harris*, [1908] 2 Ch. 397; *Mitcham Common Conservators v. Banks* (1912), 76 J. P. 413.

18. ———.]—Nothing may be good by prescription, but that which may have beginning by grant, & also prescription is incident to the person, & custom to some place, & holds place in many cases which cannot be by grant. Prescription is for one man & custom is for many, if all but one be not dead (COKE, C.J.).—*ROWLES v. MASON* (1612), 2 Brownl. 192; 123 E. R. 892.

19. ———.]—A custom is *lex loci*, & inherent in the soil whereto it is fixed for the service of every one that is qualified to use it, whereas prescription is fixed in the person, & therefore ought always to be laid in persons (*per* CUR.).—*LINN-REGIS CORPN. v. TAYLOR* (1684), 3 Lev. 160; 83 E. R. 629.

Annotations:—Reid. Wilkes v. Broadbent (1744), 1 Wils. 63. *Mentd. Ilchester v. Raishley* (1889), 38 W. R. 104.

20. ———.]—Where an individual has enjoyed a right time out of mind, without being able to trace the origin or foundation of his right, a grant is presumed; & therefore, if the occupier of a certain messuage has enjoyed it he must claim it by prescription, but when the claim depends on a general rule of property within certain limits, it is alleged as a custom or *lex loci*. All local or real property must be governed by such law, it has no relation to persons out of the limits (LORD MANSFIELD, C.J.).—*CLARKSON v. WOODHOUSE* (1782), 5 Term Rep. 412, n.; 3 Doug. K. B. 189; 101 E. R. 231; *affd.* (1780), 3 Doug. K. B. 194, Ex. Ch.

Annotations:—Reid. Tyson v. Smith (1838), 9 Ad. & El. 406. *Mentd. Arlett v. Ellis* (1827), 7 B. & C. 346; *Doe v. Egremont v. Fulman* (1842), 3 Q. B. 622; *Hilton v. Granville* (1845), 5 Q. B. 701; *Wakefield v. Buclench* (1867), L. R. 4 Eq. 613; *Bristow v. Corniean* (1878), 3 App. Cas. 641.

21. ———.]—A prescription always is alleged in the person, a custom ought always to be alleged in the land or place. Every prescription ought to have by common intentment a lawful beginning. All customs are purely local & confined to particular places. There cannot be a custom in one place to do something in another. The land in a particular place & the inhabitants in respect thereof may be changed by custom for matters within the place, but custom will not apply to matters out of it (LORD ELLENBOROUGH, C.J.).—*R. v. ECCLESFIELD (INHABITANTS)* (1818), 1 B. & Ald. 348; 106 E. R. 128.

Annotations:—Reid. Brooklebank v. Thompson, [1903] 2 Ch. 344. *Mentd. R. v. West Riding of Yorkshire* (1821), 4 B. & Ald. 623; *R. v. New Sarum* (1845), 7 Q. B. 941; *G. W. Ry. v. Denchworth Surveyors of Highways* (1861), 25 J. P. 342; *Freeman v. Read* (1863), 4 B. & S. 174; *R. v. Ashby Folville* (1866), 7 B. & S. 277; *R. v. Rollett* (1875), L. R. 10 Q. B. 469; *R. v. Central Wingland* (1877), 36 L. T. 798.

22. ———.]—(1) When the sea has gradually receded, land added by accretion takes the character of, & becomes subject to the same customs as, the land to which it is added.

(2) A custom must be certain, reasonable in itself, commencing from time immemorial, & continued without interruption. The period for ascertaining whether a custom is reasonable or not is its inception. A deft. may no doubt defeat a custom by showing that it could not have existed in the time of Richard I., but he must demonstrate its impossibility, & the onus is on him to do so if the existence of the custom has been proved for a long period. Not only ought

the cts. to be slow to draw an inference of fact which would defeat a right that has been exercised during so long a period as the present, unless such inference is irresistible, but it ought to presume everything possible to presume in favour of such right. The mere non-user during the period the sea flowed over the spot is immaterial, for it was no interruption of the right, but only of the possession, & an interruption of the possession only for ten or twenty years will not destroy the custom. (3) The difference between custom & prescription is only that the right to the former must be claimed by or in respect of a locality & to the latter by a person or corp'n., but the rules affecting the subject-matter are in each case the same (FARWELL, J.).—*MERCER v. DENNE*, [1904] 2 Ch. 534; 74 L. J. Ch. 71; 91 L. T. 513; 68 J. P. 479; 53 W. R. 55; 20 T. L. R. 609; 3 L. G. R. 385; *affd.*, [1905] 2 Ch. 538, C. A.

Annotations:—Generally. Mentd. Assheton-Smith v. Owen (1905), 94 L. T. 42; *Ramsgate Corp'n. v. Debling* (1906), 70 J. P. 132; *Fitzhardinge v. Purcell* (1908), 77 L. J. Ch. 529; *Johnson v. Clark*, [1908] 1 Ch. 303; *Re Fountaine, Fountaine v. Amherst* (1909), 78 L. J. Ch. 648; *North Staffordshire Ry. v. Hanley Corp'n.* (1909), 73 J. P. 477; *Heyue v. Fischel* (1913), 110 L. T. 264; *Re Petition of Right*, [1915] 3 K. B. 649; *Collis v. Amplett* (1918), 118 L. T. 466.

23. ———.]—Prescription to specific portion of locality.]—The principal difference between liability to pay tithes in respect of a house by prescription & custom is that the custom would apply to all the houses in the parish, the prescription only to a particular house (KINDERSLEY, V.-C.).

It is essential to the validity of any alleged custom that it should be certain. By this I understand not merely that the custom as alleged should point out clearly & certainly the principle or rule of the custom but that the principle or rule so pointed out must be one which is definite & certain so that by the application of it to each particular case, it may be known with certainty what are the rights which the custom gives in that case (KINDERSLEY, V.-C.).

The rules of pleading require that the bill should allege with reasonable certainty & distinctness, not only the existence of the custom from time immemorial, but the nature & particulars of such custom, including the principle or rule of the custom. The extreme strictness with which this rule is enforced in an action of law is well known, & although in this ct. we are not so rigid with respect to pleading as in the cts. of law, still the same general principle in this respect must be substantially adhered to (KINDERSLEY, V.-C.).—*CHAMPNEYS v. BUCHAN* (1857), 4 Drew. 104; 29 L. T. O. S. 47; 21 J. P. 340; 5 W. R. 461; 62 E. R. 41.

24. Custom extends to several persons—Prescription confined to one.]—*ROWLES v. MASON*, No. 18, *ante*.

25. As to origin—Prescription founded upon presumption of grant—Legal origin of custom presumed.]—*GATEWARD'S CASE*, No. 17, *ante*.

26. ———.]—As to prescription & custom this difference is to be observed, a prescription ought to stand on reason, but a custom cannot have commencement but by Parliament & not by grant as borough English & gavelkind, no reason being to maintain these but only by Act of Parliament. If this custom hath a reasonable commencement this is not then to be defeated. They which do repair bridges, & causeys may have toll by prescription. As to the present case, here is a custom alleged & with it a consideration, the bellman to look unto the sweeping & the paving

of the streets & for this his so doing, he claims to have of every bag of corn, if it contain a bushel then to have a pint & if more then a quart, & this he claims to have by custom there used. As to the body of this custom it is a very plain case, that this custom here is a good custom (COKE, C.J.).—HILL v. HANKS (1614), 2 Bulst. 201; 1 Roll. Rep. 44; 80 E. R. 1066.

Annotations.—*Mentd.* Lee v. Elkins (1701), 12 Mod. Rep. 585; R. v. Bembridge (1783), 22 State Tr. 1.

27. ————]—Every custom supposes an Act of Parliament, or a law made in former times by an equivalent power; though it were not called a Parliament; therefore, that may be good by custom, which cannot be created nor pass by grant; as the King cannot grant that land shall be of the nature of gavelkind or borough English. But every prescription supposes a grant in the beginning; & therefore that which cannot be granted cannot be prescribed for (VAUGHAN, C.J.).—HARLAND v. COOKE (1673), Freem. K. B. 319; 89 E. R. 236.

28. ————]—Unnecessary to look for origin of custom.]—LOCKWOOD v. WOOD, No. 6, *ante*.

29. Custom may control prescription.]—A particular prescription may be controlled by a general custom.—HICKMAN v. THORNY (1670), Freem. K. B. 210; 2 Mod. Rep. 104; 89 E. R. 149.

Annotation.—*Mentd.* Cheesman v. Hardham (1818), 1 B. & Ald. 706.

—.]—*See, further*, COMMONS & RIGHTS OF COMMON, Vol. XI., p. 25, Nos. 309–311.

Manorial custom.]—*See* COPYHOLDS, Vol. XIII., p. 81, No. 1026.

As to creation & origin of custom.]—*See* Sect. 4, *post*.

Profit à prendre may be claimed by prescription—Not by custom.]—*See* EASEMENTS & PROFITS À PRENDRE.

As to prescription generally, *see* EASEMENTS & PROFITS À PRENDRE; REAL PROPERTY & CHATTELS REAL.

SECT. 3.—DISTINGUISHED FROM PARTICULAR TRADE OR LOCAL USAGE.

30. Antiquity, uniformity & notoriety of custom—Not essential characteristics of usage—Sufficient if usage well known & acquiesced in.]—To support mercantile usage there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known & acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract (*per* CUR.).—JUGGOMOHUN GHOSE v. MANICKCHUND (1859), 7 Moo. Ind. App. 263; 7 W. R. 715; 19 E. R. 308.

Annotations.—*Refd.* Juggomohun Ghose v. Kaisreechund (1862), 9 Moo. Ind. App. 260. *Mentd.* Geake v. Ross (1875), 44 L. J. C. P. 315.

31. Usage must accord with law.]—(1) The argument that the character of negotiability does not attach by the law merchant is founded on the view that the law merchant thus referred to is fixed & stereotyped & incapable of being expanded & enlarged so as to meet the wants & requirements of trade in the varying circumstances of commerce.

It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, & as it were coeval with it. But as a matter of legal history, the view is altogether incorrect. The law merchant is neither more or less than the usages of merchants & traders in the different departments of trade, ratified by the decisions of cts. of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade & the public convenience, the ct. proceeding herein on the well-known principle of law that with reference to the different departments of trade, cts. of law, in giving effect to the contracts & dealings of the parties will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into the common law, & may thus be said to form part of it (COCKBURN, C.J.).

(2) We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail if contrary to positive law, including in the latter such usages as, having been made the subject of legal decision, & having been sanctioned & adopted by the cts., have become, by such adoption, part of the common law. To give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle, & we quite agree that this would apply quite as strongly to an attempt to set up a new usage against one which has become settled & adopted by the common law as to one in conflict with the more ancient rules of the common law itself (COCKBURN, C.J.).—GOODWIN v. ROBERTS (1875), L. R. 10 Exch. 337; 44 L. J. Ex. 157; 33 L. T. 272; 23 W. R. 915, Ex. Ch.; *affd.* (1876), 3 App. Cas. 476, H. L.

Annotations.—*As to* (1) *Consd.* Franco v. Clark (1884), 26 Ch. D. 257; Bechuanaland Exploration Co. v. London Trading Bank, [1898] 2 Q. B. 658; Edelstein v. Schuler, [1902] 2 K. B. 144; Webb, Hale v. Alexandria Water Co. (1905), 93 L. T. 339. *Refd.* Clayton v. Le Roy (1911), 104 L. T. 419. *As to* (2) *Refd.* Dashwood v. Magniac, [1891] 3 Ch. 306. *Generally, Refd.* Rumball v. Metropolitan Bank (1877), 2 Q. B. D. 194; Williams v. Ayres (1877), 3 App. Cas. 133; Easton v. London Joint Stock Bank (1886), 34 Ch. D. 95; Pickers v. London & County Banking Co. (1887), 18 Q. B. D. 515; Colonial Bank v. Cady & Williams, London Chartered Bank of Australia v. Cady & Williams (1890), 15 App. Cas. 267; Clayton v. Le Roy, [1911] 2 K. B. 1031. *Mentd.* Johnson v. Credit Lyonnais Co. (1877), 3 C. P. D. 32; Bickerton v. Walker (1885), 31 Ch. D. 151; Fine Art Soc. v. Union Bank of London (1886), 17 Q. B. D. 705; Colonial Bank v. Hepworth (1887), 36 Ch. D. 36; London & County Banking Co. v. London & River Plate Bank (1887), 20 Q. B. D. 232; Sheffield v. London Joint Stock Bank (1888), 13 App. Cas. 333; Williams v. Colonial Bank, Williams v. London Chartered Bank of Australia (1888), 38 Ch. D. 388; Simmons v. London Joint Stock Bank, Little v. London Joint Stock Bank, [1891] 1 Ch. 270; London Joint Stock Bank v. Simmons, [1892] A. C. 201; Bentinck v. London Joint Stock Bank, [1893] 2 Ch. 120.

32. —.]—Littleton in Sect. 169 states that “a custom used upon a certain reasonable cause, depriveth the common law,” & in Sect. 170, “& note that no custom is to be allowed, but such custom as hath been used by title of prescription, that is to say, from time out of mind.” But this must not be confounded with such customs or rather usages as are imported into commercial contracts, or into contracts between landlord & tenant. Evidence of immemorial usage in such cases is not required; but such usage, however extensive, would not prevail against positive law,

PART I. SECT. 3.

30 1. Antiquity, uniformity & notoriety of custom—Not essential cha-

acteristics of usage—Sufficient if usage well known & acquiesced in.]—A trade usage differs from custom & is reasonably certain & generally acknowledged

will be held established though of no great age or not strictly uniform.—WATT v. WISEMAN (1915), 11 Tas. L. R. 151.—AUS.

Sect. 3.—Distinguished from particular trade or local usage. *Sects. 4 & 5: sub-sect. 1, A.]*

whether by statute or decision (KAY, L.J.).—**DASHWOOD v. MAGNIAC**, [1891] 3 Ch. 306; 60 L. J. Ch. 809; 65 L. T. 811; 7 T. L. R. 629; 36 Sol. Jo. 362, C. A.

Annotations :—**Mentd.** *Re Chaytor*, [1900] 2 Ch. 804; *Pardoe v. Pardoe* (1900), 82 L. T. 547; *Chaytor v. Trotter* (1902), 87 L. T. 33; *Re Trevor-Batye's Settlement*, *Bull v. Trevor-Batye*, [1912] 2 Ch. 339; *Re Hall, Hall v. Hall*, [1916] 2 Ch. 488; *Lloyd-Jones v. Clark-Lloyd*, [1919] 1 Ch. 424.

33. Usage need not have immemorial existence.]

—**DASHWOOD v. MAGNIAC**, No. 32, *ante*.

Essential characteristics of custom.]—See Sect. 5, post.

Characteristics of usages.]—See Part II., Sect. 3, post.

SECT. 4.—CREATION AND ORIGIN.

34. General rule.—Unnecessary to look for origin—Where immemorial, certain, reasonable & uninterrupted.]—LOCKWOOD v. WOOD, No. 6, *ante*.

35. — Must be reasonable.]—GATEWARD'S CASE, No. 17, *ante*.

36. — —.]—HILL v. HANKS, No. 26, *ante*.

37. — —.]—All customs must have reasonable beginnings (per CUR.).—PAIN v. PATRICK (1690), 3 Mod. Rep. 289; 87 E. R. 191; *sub nom.* **PAYNE v. PARTRIDGE**, 1 Show. 255; Comb. 180; Holt, K. B. 6; Carth. 191.

Annotations :—**Mentd.** *Iverson v. Moore* (1698) 1 Ld. Raym. 486; *Greasley v. Codling* (1824), 2 Bing. 263; *Lyme Regis Corp'n. v. Henley* (1834), 1 Bing. N. C. 222; *R. v. Ward* (1836), 4 Ad. & El. 384; *Lockwood v. Wood* (1844), 13 L. J. Q. B. 365; *Chamberlain & West End of London & Crystal Palace Ry.* (1862), 2 B. & S. 617; *Newton v. Cubitt* (1862), 12 C. B. N. S. 32; *Cameron v. Charing Cross Ry.* (1864), 16 C. B. N. S. 430; *Ricket v. Met. Ry.* (1865), 5 B. & S. 156; *Hopkins & G. N. Ry.* (1877), 2 Q. B. D. 224; *Mercer v. Donue*, [1904] 2 Ch. 534; *Dibden v. Skirrow*, [1907] 1 Ch. 437; *Clarke v. West Ham Corp'n.*, [1909] 2 K. B. 558; *Hammerton v. Dysart*, [1916] 1 A. C. 67.

38. Whether by statute.]—HILL v. HANKS, No. 26, *ante*.

39. — —.]—HARLAND v. COOKE, No. 27, *ante*.

40. — —.]—It is never to be presumed that a custom owes its origin to an Act of Parliament.

One ought not to presume any Act of Parliament in the case, for such presumption would make all unreasonable customs good; but these customs ought to appear of themselves to be reasonable, otherwise they will not be good (TREBY, C.J.).—**WEEKLY v. WILDMAN** (1698). 1 Ld. Raym. 405; 91 E. R. 1169.

Annotations :—**Mentd.** *Ackroyd v. Smith* (1850), 10 C. B. 164; *Race v. Ward* (1855), 4 E. & B. 702; *Hill v. Tupper* (1863), 2 New Rep. 201.

41. By grant or agreement.]—Customs are supposed to take their rise by grant or agreement (LORD HARDWICKE, C.).—FAWCET v. LUTHER (1751), 2 Ves. Sen. 300; 28 E. R. 193, L. C.

Annotations :—**Mentd.** *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177; *Re Hudson, Cassels v. Hudson*, [1908] 1 Ch. 655.

42. Legal origin presumed.]—The rule of law is that wherever there is an immemorial usage the ct. must presume everything possible which would give it a legal origin (LORD MANSFIELD).—COCKSEGE v. FANSHAW (1779), 1 Doug. K. B. 119; 99 E. R. 80; *affd. sub nom.* **FANSHAW v. COCKSEGE** (1783), 3 Bro. Parl. Cas. 690.

Annotations :—**Refd.** *Mounsey v. Ismay* (1863), 1 H. & C. 729; *R. v. Rollett* (1875), L. R. 10 Q. B. 469; *Goodman*

v. Saltash Corp'n. (1882), 7 App. Cas. 633. **Mentd.** *Sewel v. Burdick* (1884), 10 App. Cas. 74.

43. — —.]—Where it is proved that it has been the practice for a long series of years for the vicars choral of a cathedral during their year of probation to be excluded from a share in some of the emoluments of their offices & it can be gathered from the documents in existence that some person had the power of regulating the manner in which the vicars choral were to be maintained, it will be presumed that some regulation was made, out of which the practice originated.—SHOUBRIDGE v. CLARK (1852), 12 C. B. 335; 19 L. T. O. S. 203; 138 E. R. 934.

44. — —.]—From the year 1808 to 1854 the fee paid on the celebration of a marriage in a parish church was proved to have been almost uniformly 13s. There was no evidence extending beyond 1808. The ct. having power to draw inferences of fact :—Held : considering the difference in the value of money in 1189 & the present time, of which the ct. will take judicial notice, it was impossible that a payment of 13s. on every marriage could have been made at that period, & the objection of rankness applied, & rebutted the presumption, arising from uninterrupted modern usage that the fee was taken as of right in the time of Richard I.—BRYANT v. FOOT (1868), L. R. 3 Q. B. 497; 9 B. & S. 444; 37 L. J. Q. B. 217; 18 L. T. 578; 32 J. P. 516; 16 W. R. 808, Ex. Ch.; *affg.* S. C. (1867), L. R. 2 Q. B. 161.

Annotations :—**Consd.** *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140. **Refd.** *Mills v. Colchester Corp'n.* (1867), L. R. 2 C. P. 476; *Maule v. White, Maule v. Herbert, Maule v. Green* (1895-6), 60 J. P. 567. **Mentd.** *Kirtton v. Dear* (1869), L. R. 5 C. P. 217; *Veley v. Pertwee* (1870), 18 W. R. 1024; *Neville v. Bridger* (1874), 22 W. R. 740; *Re Haigh with Aspall New Parish*, [1919] P. 143.

45. — —.]—The parish of C. contained four townships, each of which had been accustomed from time immemorial to maintain its own highways. There was, from time immemorial, in one of the townships a hamlet, the owners & occupiers in which had never in the memory of man paid highway rates, nor done team work, nor paid any composition in lieu thereof. There were now no public roads in the hamlet which could be repaired by it :—Held : (LUSH, J. diss.) the above circumstances were insufficient by themselves to establish a custom exempting the occupiers in the hamlet from contribution to the repair of highways without its limits.

The question is whether the custom found by the justices can be upheld in the absence of affirmative proof that it had a legal origin. I am of opinion that it can, & that a legal origin ought to be presumed. I take it to be an established rule of law that every intendment is to be made in favour of ancient usage, provided it be such as can have had a lawful beginning (LUSH, J.).

It is not necessary in pleading a custom to state how it originated. It is sufficient to allege the fact that it existed from time immemorial (LUSH, J.).—**R. v. ROLLETT** (1875), L. R. 10 Q. B. 469; 44 L. J. M. C. 190; 24 W. R. 26; *sub nom.* **ROLLETT v. CORRINGTON OVERSEERS**, 32 L. T. 769; 39 J. P. 820.

46. — — Proof of user for over 100 years.]—Where a usage for over 100 years is proved, the ct. is almost bound to presume a legal origin for it, & will not as a rule set it aside.—ROBERTS v. LONDON CORPN. (1883), 49 L. T. 455; 31 W. R. 529, C. A.

PART I. SECT. 4.

35 i. General rule.—Must be reasonable.]—Where a custom excluding or limiting the general rule of law is set

up, a ct. should not decide that it exists unless such ct. is satisfied of its reasonableness.—**KUAR SEN v. MAMMAN** (1895), 1 L. R. 17 All. 87.—**IND.**

35 ii. — —.]—Customs to have the virtue & force of law should have a reasonable commencement.—TAN-ISTRY CASE (1608), Dav. Ir. 28.—**IR.**

47. — Unless rebutted.]—Where the liability of a frontager to keep the sea wall on his land in repair at his sole expense has long been asserted, & has long been submitted to on his part, it will be presumed to have originated under a local custom or *ratione tenuræ* or in some other legal way, unless & until it is proved that it cannot have had a legal origin.—LONDON & NORTH WESTERN RY. v. FOBHING LEVELS SEWERS COMRS. (1896), 66 L. J. Q. B. 127; 75 L. T. 629; 42 Sol. Jo. 128, D. C.

48. —.]—From time immemorial the owners of boats & small craft had been in the habit of fixing moorings for their vessels in the foreshore of a certain part of the river Thames within the port of London:—Held: a legal origin for such immemorial custom whether a grant from the Crown, or from the lord of the manor, or former regulations of the authorities of the port of London, could, & ought to be presumed.—A-G. v. WRIGHT, [1897] 2 Q. B. 318; 66 L. J. Q. B. 834; 77 L. T. 295; 46 W. R. 85; 13 T. L. R. 480; 8 Asp. M. L. C. 320, C. A.

Annotation.—Refd. Denaby & Cadeby Main Collieries v. Anson, [1911] 1 K. B. 171.

49. —.]—(1) There may be a lawful & valid custom for the inhabitants of a parish to have a churchway or marketway through the demesne of a manor which is within the parish.

(2) Rights or alleged rights which have been long enjoyed are deemed to have had a legal origin if such be possible, which, in the absence of proof that it is modern, is deemed to have commenced beyond legal memory. A regular usage of twenty years unexplained & uncontradicted is sufficient to warrant a jury in finding the existence of an immemorial custom & from such modern usage, unless the contrary appear, the jury ought to presume the immemorial existence of the right (JOYCE, J.).

(3) The only serious contention on the part of pltf. has been that even if the disputed way be a churchway it is not a churchway for the parishioners generally but only by virtue of a manorial custom for a limited number of the occupiers of tenements in the manor. There is not on the evidence any ground for contending that the use of the path in question was or had been at any time so limited. The disputed way was & is by immemorial custom a churchway or path for the inhabitants generally of the parish of I. (JOYCE, J.).—BROCKLEBANK v. THOMPSON, [1903] 2 Ch. 344; 72 L. J. Ch. 626; 89 L. T. 209; 19 T. L. R. 285.

Annotation.—Refd. Derry v. Sanders, [1919] 1 K. B. 223.

SECT. 5.—ESSENTIAL CHARACTERISTICS.

SUB-SECT. 1.—IMMEMORIAL EXISTENCE.

A. In General.

50. Essential to validity of custom.]—No usage can be part of law or have the force of a custom that is not immemorial (YATES, J.).—MILLAR v. TAYLOR (1769), 4 Burr. 2303; 98 E. R. 201.

Annotations.—Mentd. Boulton v. Bull (1795), 2 Hy. Bl. 463; Beckford v. Hood (1798), 7 Term Rep. 620; Whittingham v. Wooler (1817), 2 Swan. 428; Abernethy v. Hutchinson (1825), 1 H. & Tw. 28; Barnett v. Glossop (1835), 1 Scott. 621; Chappell v. Purday (1841), 4 Y. & C. Ex. 485; Colburn v. Simms (1843), 2 Hare. 543; Chappell v. Purday (1845), 14 M. & W. 303; Albert (Prince) v. Strange, A-G. v. Strange (1849), 2 De G. & Sm. 652;

Novello v. Sudlow (1852), 12 C. B. 177; Jefferys v. Boosey (1854), 4 H. L. Cas. 815; Cumberland v. Copeland (1861), 7 H. & N. 118; Reade v. Conquest (1861), 9 C. B. N. S. 755; Caird v. Sime (1887), 12 App. Cas. 326; Philip v. Pennell, [1907] 2 Ch. 577; Mansell v. Valley Printing Co., [1908] 2 Ch. 441; Monckton v. Gramophone Co. (1913), 106 L. T. 84; Moore Filter Co. v. Great Boulder Proprietary Gold Mines (1921), 38 R. P. C. 239; Rhondda's Claim, [1922] 2 A. C. 339.

51. —.]—TYSON v. SMITH, No. 5, ante.

52. —.]—A custom originating within time of memory, or an unreasonable custom, even though existing in fact, is void in law (WILLES, J.).—LONDON CORPN. v. COX (1867), L. R. 2 H. L. 239; 36 L. J. Ex. 225; 16 W. R. 44, H. L.; affg. S. C. sub nom. COX v. LONDON CORPN. (1863), 2 H. & C. 401, Ex. Ch.

Annotations.—Refd. Banque de Credit Commercial v. De Gas (1871), L. R. 6 C. P. 142. Mentd. Webster v. Webster (1862), 8 Jur. N. S. 1047; Morris v. Lantour, Cox etc., Garnishees (1864), 3 New Rep. 475; Frith v. Guppy (1866), L. R. 2 C. P. 32; Shea v. United Slock & Burial Soc. of St. Patrick (1867), 17 L. T. 176; Buccleuch v. Metropolitan Board of Works (1870), L. R. 5 Exch. 221; Byrne v. Guano Consignment Co., Weguelin etc., Garnishees (1872), 25 L. T. 935; Cooke v. Gill (1873), L. R. 8 C. P. 107; Quartly v. Timmins (1874), L. R. 9 C. P. 416; Chambers v. Green (1875), L. R. 20 Eq. 552; Jacobs v. Brett (1875), L. R. 20 Eq. 1; Wirth v. Austen (1875), 32 L. T. 669; Worthington v. Jeffries (1875), L. R. 10 C. P. 379; Bridge v. Branch (1876), 1 C. P. D. 633; Hawes v. Paveley (1876), 1 C. P. D. 418; Oram v. Brearey (1877), 2 Ex. D. 346; Serjeant v. Dale (1877), 2 Q. B. D. 558; Appleford v. Judkins (1878), 3 C. P. D. 489; Atwood v. Sellar (1879), 4 Q. B. D. 342; London Corpn. v. London Joint Stock Bank (1881), 6 App. Cas. 393; Combe v. De la Bere (1882), 22 Ch. L. 316; Chadwick v. Ball (1885), 14 Q. B. D. 855; R. v. Shropshire County Court Judge (1887), 20 Q. B. D. 242; Broad v. Perkins (1888), 21 Q. B. D. 533; Read v. Brown (1888), 59 L. T. 605; Moore v. Gangee (1890), 25 Q. B. D. 244; British South Africa Co. v. Companhia de Moçambique, [1893] A. C. 602; Farquharson v. Morgan, [1894] 1 Q. B. 552; Watson v. Petis (No. 2), [1899] 1 Q. B. 430; Falkingham v. Victorian Railways Comr., [1900] A. C. 452; Payne v. Hogg (1900), 82 L. T. 584; McIntosh v. Simpkins (1901), 84 L. T. 21; R. v. Triestram, [1902] 1 K. B. 816; Re Cundall & Vavasour (1906), 95 L. T. 483; Norwich Corpn. v. Norwich Electric Tram. Co., [1906] 2 K. B. 119; Board v. Board, [1919] A. C. 956; Re Clifford & O'Sullivan, [1921] 2 A. C. 570; St. Magnus-the-Martyr, etc., Parochial Church Council v. London Diocese Chancellor, [1923] P. 38.

53. —.]—Applt. was charged under Highway Act, 1835 (c. 50), s. 72, with obstructing a public footway. He had put up a stall for the sale of refreshments at a statute sessions for the hiring of servants; this had been done for more than fifty years, & the statute sessions had been held before 5 Eliz. c. 4. Applt. thereupon contended that he had a right by custom to erect his stall in the same way as at a fair, or, at all events, that he *bonâ fide* claimed such a right, & the justices' jurisdiction was therefore ousted. The justices having convicted applt.:—Held: the justices were right; for as the statute sessions were introduced by the Statutes of Labourers, the first of which was in the reign of Edward III., there could be no such custom by immemorial usage as was claimed.—SIMPSON v. WELLS (1872), L. R. 7 Q. B. 214; 41 L. J. M. C. 105; 26 L. T. 163; 36 J. P. 774.

Annotation.—Refd. Mercer v. Denne, [1904] 2 Ch. 534.

54. — Mere acquiescence insufficient.]—SHAFTO v. BOLCKOW, VAUGHAN & CO. & ECCLESIASTICAL COMRS. (1888), 4 T. L. R. 508.

55. —.]—MERCER v. DENNE, No. 22, ante.

56. —.]—The tenants on certain ancient copyhold messuages within a manor had since 1599 asserted a custom for them to fish in certain waters within the manor, but there were continued protests by the lord of the manor & farmers. As

PART I. SECT. 5, SUB-SECT. 1.—A.

50 i. Essential to validity of custom.]—A custom, to be valid, must be ancient.—LALA v. HIRA SINGH (1878),

I. L. R. 2 All. 49.—IND.

50 ii. —.]—A custom to be valid must be immemorial.—MAHAMAYA DEBI v. HARIDAS HALDAR (1914), I. L. R. 42 Calc. 455.—IND.

50 iii. —.]—No custom can exist, without the grand essential of custom, antiquity beyond the memory of man.—RE CASHMAN FISHERY SERVANTS (1854), 4 Nfld. L. R. 11.—NFLD.

Sect. 5.—Essential characteristics: Sub-sect. 1, A. & B. (a) & (b).]

far back as living memory went the tenants had habitually fished without interruption by the lord of the manor, & some of them had let the fishing & did not regard their rights as limited to catching fish for their own consumption. In an action by the owner of two of the messuages, which had been turned into fee simple, against the lords of the manor & their fishing tenant, for a declaration that pltf. had a right of fishing for consumption of the occupants of the messuages:—*Held*: pltf. had failed to prove the existence of an immemorial usage amounting to a legal custom, & as the alleged usage had been without reference to the needs of the occupants of the messuages pltf. had failed to prove a reasonable usage, & therefore he was not entitled to the declaration asked for.

Resting mainly on negative evidence, that is the evidence from documents, where one would expect to find it, of mention of the alleged custom, & on the continual protest by the lord or the farmer when tenants asserted the custom & a document of 1599 which itself indicated that there was no such custom I have come to the conclusion that pltf. has failed to prove existence of an immemorial usage which alone could be what is legally known as a custom (WARRINGTON, J.).—*PAYNE v. ECCLESIASTICAL COMRS. & LONDON* (1913), 30 T. L. R. 167.

57. Time of legal memory.]—*CHAPMAN v. SMITH*, No. 62, *post*.

58. —.]—The general law as to a custom is, that if you show its existence at a distant time, & there is no evidence that at any certain time it did not exist, a jury may infer that it went back as far as the reign of Richard I., which is the time of legal memory.—*LEUCKART v. COOPER* (1835), 7 C. & P. 119, N. P.; *subsequent proceedings* (1836), 3 Bing. N. O. 99.

Annotations.—*Refd.* *Dresser v. Bosanquet* (1862), 32 L. J. Q. B. 57; *Re Cutford, Ex p. Carr v. Ford & Canning* (1894), 43 W. R. 159. *Mentd.* *Kaltenbach v. Lewis* (1883), 24 Ch. D. 54.

59. —.]—Where the substantial question to be tried is the existence of a custom, affirmed by deft., he is entitled to begin, although plffs.' counsel alleges that he seeks to recover real damages.

Time of legal memory is before the first year of the reign of Richard I. You are to require proof, as far back as living memory goes of a continuous, peaceable & uninterrupted user of the custom, & then you should inquire whether any document or memorial of more ancient times is produced, tending to disprove the existence of the custom at that early period to which the law looks back. As to the argument addressed to you touching the unreasonableness of the custom, although you are not called on to say whether this be a reasonable custom or not, for that is a matter of law, not submitted by the present pleadings to your decision, still you may properly thus far look to the nature of the custom, that if you find it greatly affecting the rights of private property, you may fairly expect & require that it should be supported by evidence proportionately strong & convincing (TINDAL, C.J.).—*BASTARD v. SMITH* (1838), 2 Mood. & R. 129, N. P.

60. —.]—*HAMMERTON v. HONEY*, No. 9, *ante*.

61. —.]—As time went on the limitation fixed by Statute of Westminster, 1275 (c. 39), became attended with the inconvenience arising from the impossibility of carrying back the proof of possession or enjoyment to a period, which after a generation or two ceased to be within the

reach of evidence. But here the Legislature not intervening, the judges provided a remedy by holding that if the proof was carried back as far as living memory would go, it should be presumed that the right claimed had existed from time of legal memory, that is to say from the time of Richard I. (COCKBURN, C.J.).—*ANGUS v. DALTON* (1877), 3 Q. B. D. 85; 47 L. J. Q. B. 163; 38 L. T. 510; 42 J. P. 452; *reusd.* on other grounds (1878), 4 Q. B. D. 162, C. A.; *sub nom.* *DALTON v. ANGUS* (1881), 6 App. Cas. 740, H. L.

Annotations.—*Mentd.* *Rivers v. Adams* (1878), 3 Ex. D. 361; *Sturges v. Bridgman* (1879), 11 Ch. D. 852; *Norfolk v. Arbuthnot* (1880), 5 C. P. D. 390; *Lemaitre v. Davis* (1881), 10 Ch. D. 281; *Duke v. Courage* (1882), 46 J. P. 453; *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633; *Bell v. Love* (1883), 10 Q. B. D. 547; *Hughes v. Percival* (1883), 8 App. Cas. 443; *Tone v. Preston* (1883), 24 Ch. D. 739; *Reddell v. Payne* (No. 2) (1885), 53 L. T. 21; *Russell v. Watts* (1885), 55 L. J. Ch. 158; *Harris v. De Pinna* (1886), 33 Ch. D. 238; *Bass v. Gregory* (1890), 25 Q. B. D. 481; *Dicker v. Popham, Radford* (1890), 63 L. T. 379; *Crawford v. Consett L. B.* (1891), 55 J. P. Jo. 218; *Perry v. Eames, Salaman v. Eames, Mercers' Co. v. Eames*, [1891] 1 Ch. 658; *Corbett v. Jonas*, [1892] 3 Ch. 137; *Haigh v. West* (1893), 62 L. J. Q. B. 432; *Wheaton v. Maple*, [1893] 3 Ch. 48; *Chastey v. Ackland* (1895), 72 L. T. 845; *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335; *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; *Simpson v. Godmanchester Corpn.*, [1897] A. C. 696; *Blake v. Woolf*, [1898] 3 Q. B. 426; *Southwark & Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603; *Jordeson v. Sutton, Southcoates & Drypool Gas Co.*, [1899] 2 Ch. 217; *Penny v. Wimbledon U. C.* (1899), 68 L. J. Q. B. 704; *Gardner v. Hodgson's Kingston Breweries Co.*, [1900] 1 Ch. 592; *Smith v. Baxter*, [1900] 2 Ch. 138; *G. N. Ry. v. I. R. Comrs.*, [1901] 1 K. B. 416; *Edinburgh & District Water Trustees v. Clippens Oil Co.* (1902), 87 L. T. 275; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557; *A.-G. v. Antrobus* (1905), 74 L. J. Ch. 599; *Kine v. Jolly*, [1905] 1 Ch. 480; *Cribb v. Kynoch*, [1907] 2 K. B. 548; *Cable v. Bryant*, [1908] 1 Ch. 259; *Hymann v. Van Den Bergh*, [1908] 1 Ch. 167; *Robinson v. Beaconsfield R. D. Co.*, [1911] 2 Ch. 188; *Padbury v. Holliday & Greenwood* (1912), 28 T. L. R. 494; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; *Howley Park Coal & Cannel Co. v. L. & N. W. Ry.*, [1913] A. C. 11; *Kirby v. Chessum* (1913), 30 T. L. R. 15; *Hall v. Manchester Corpn.* (1914) 111 L. T. 182; *Hurlstone v. L. Elec. Ry.* (1914), 30 T. L. R. 398; *Lyell v. Hothfield*, [1914] 3 K. B. 911; *Pwllbach Colliery Co. v. Woodman*, [1915] A. C. 634; *Cox v. Coulson*, [1916] 2 K. B. 177; *Schwann v. Cotton & Hayles* (1916), 85 L. J. Ch. 689; *Selby v. Whitbread*, [1917] 1 K. B. 736; *Cory v. Davies*, [1923] 2 Ch. 95.

B. Presumption of.

(a) General Rule.

62. Adoption by court.]—The ct. ought not, especially in cases of very extensive consequences, lightly to overturn & overthrow customary payments, that have prevailed for a great tract of years, which is commonly called time out of mind, or the memory of man, though I do not mean strictly according to the notion of law before the transportation of the King Richard I. (LORD HARDWICKE, C.).—*CHAPMAN v. SMITH* (1754), 2 Ves. Sen. 506; 28 E. R. 324.

Annotations.—*Refd.* *Atkyns v. Willoughby De Brooke* (1794), 2 Anst. 397; *Heaton v. Cooke* (1811), Wight. 281; *Strong v. Denchfield* (1823), 2 Y. & J. 594; *Raine v. Cairns* (1841), 4 Hare, 327.

63. —.]—*COCKSEGE v. FANSHAW*, No. 42, *ante*.

64. — Unless adverse inference irresistible.]—*MERCER v. DENNE*, No. 22, *ante*.

65. — Adverse inference not drawn.]—It is a maxim of the law of England to give effect to everything which appears to have been established for a considerable course of time, & to presume that what has been done was done of right, & not in wrong (POLLOCK, C.B.).—*GIBSON v. DOEG* (1857), 2 H. & N. 615; 27 L. J. Ex. 37; 30 L. T. O. S. 156; 21 J. P. 808; 6 W. R. 107; 157 E. R. 253.

Annotations.—*Apld.* *Hepworth v. Pickles*, [1900] 1 Ch. 108; *Re Summerson, Downie v. Summerson*, [1900] 1 Ch. 112. *Refd.* *Clippens Oil Co. v. Edinburgh & District Water*

Trustees, [1904] A. C. 64; Heath v. Deane, [1905] 2 Ch. 86. **Mentd.** Gibbon v. Payne (1905), 22 T. L. R. 54.

66. ————]—**Re SUMMERSON, DOWNIE v. SUMMERSON** (1899), [1900] 1 Ch. 112, n.; 69 L. J. Ch. 57, n.; 81 L. T. 819, n.

Annotations :—**Mentd.** Hepworth v. Pickles, [1900] 1 Ch. 108; Greenhalgh v. Brindley, [1901] 2 Ch. 324.

67. ————]—**HEPWORTH v. PICKLES**, [1900] 1 Ch. 108; 69 L. J. Ch. 55; 81 L. T. 818; 48 W. R. 184.

Annotation :—**Mentd.** Greenhalgh v. Brindley, [1901] 2 Ch. 324.

68. ———— **Though affirmative proof lacking—Provided legal origin possible.**—**R. v. ROLLETT**, No. 45, *ante*.

69. ———— **Unless unreasonable.**—It is a most convenient thing that every supposition, not wholly irrational, should be made in favour of long continued enjoyment (**BRAMWELL, L.J.**).—**PENRYN CORPN. v. BEST** (1878), 3 Ex. D. 292; 48 L. J. Q. B. 103; 38 L. T. 805; 42 J. P. 629; 27 W. R. 126, C. A.

Annotations :—**Refd.** London City Corpn. v. Low & Low, the Younger (1879), 28 W. R. 250; Manchester Corpn. v. Lyons (1882), 22 Ch. D. 287; Heath v. Deane, [1905] 2 Ch. 86; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140.

(b) *When presumed.*

70. **General rule.**—**LEUCKART v. COOPER**, No. 58, *ante*.

71. **Only on strong evidence—Similar to that for prescription.**—The evidence required to establish a case of immemorial user must be of the same character & as strong as would be required in a case of prescription (**LORD DAVEY**).—**MONTGOMERIE & CO., LTD. v. WALLACE-JAMES**, [1904] A. C. 73; 73 L. J. P. C. 25; 90 L. T. 1, H. L.

Annotations :—**Mentd.** Greville v. Parker, [1910] A. C. 335; Dominion Trust Co. v. New York Life Insce., [1919] A. C. 254; Mersey Docks & Harbour Board v. Proctor, [1923] A. C. 253.

72. **Regular user for 20 years—Unexplained & uncontradicted.**—A regular usage for 20 years, unexplained & uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom.—**R. v. JOLIFFE** (1823), 2 B. & C. 54; 3 Dow. & Ry. K. B. 240; 1 L. J. O. S. K. B. 232; 107 E. R. 303.

Annotations :—**Consd.** Morgan v. Palmer (1824), 2 B. & C. 729. **Refd.** Awkright v. Cantrell (1837), 7 Ad. & El. 565; Brocklebank v. Thompson, [1903] 2 Ch. 344.

73. ————]—**BROCKLEBANK v. THOMPSON**, No. 49, *ante*.

74. **Regular user for 65 years—Insufficient to raise presumption of immemorial existence.**—In *assumpsit* for money had & received, it was proved that Y. has been a borough from time immemorial, & that until the time of Queen Anne the chief officers of the corpn. were two bailiffs; & various charters had confirmed to them all the fees before received by them. By 1 Ann. stat. 2, c. 7, all fees payable to the bailiffs were to become payable to the mayor when the style of the corpn. should be changed, which was done by charter in the following year. At a meeting duly holden before deft., then mayor, he being by virtue of his office a justice of peace, & another justice for granting & renewing the licences of publicans, pltf. applied to have his licence renewed, & upon having it done, was required to pay, amongst other fees, the sum of 4s. to the mayor, which was proved to have been regularly paid for a period of 65 years :—**Held**: deft. was not entitled to take any such fee; for the payment for 65 years did not raise a presumption that it had been immemorially paid to the bailiffs or mayor of Y., inasmuch as licences were not granted until the reign of Edw. VI.—**MORGAN v. PALMER** (1824), 2 B. & C. 729; 4

Dow. & Ry. K. B. 283; 2 Dow. & Ry. M. C. 232; 2 L. J. O. S. K. B. 145; 107 E. R. 554.

Annotations :—**Refd.** Maule v. White, Maule v. Herbert, Maule v. Green (1896), 60 J. P. 567. **Mentd.** Waterhouse v. Keen (1825), 4 B. & C. 200; Cook v. Leonard (1827), 6 B. & C. 351; Butler v. Ford (1833), 1 Cr. & M. 662; Atlee v. Backhouse (1838), 3 M. & W. 633; Parker v. G. W. Ry. (1844), 7 Man. & G. 253; Steele v. Williams (1853), 8 Exch. 625; Hooper v. Exeter Corpn. (1887), 56 L. J. Q. B. 457.

75. **Uninterrupted modern user—In absence of evidence to contrary.**—The corpn. of T. in 1795 made a lease of the office of meter with all fees, etc., arising from the measuring of coal, etc., imported. It was proved that they had been accustomed for nearly sixty years to receive these payments upon all coal imported into the port. The judge told the jury that he was not aware that there was any rule of law to prevent them from presuming the immemorial existence of the right from the modern usage, but he did not expressly advise them that they ought to make such presumption unless some evidence to the contrary appeared, neither did he explain to the jury the nature of a port duty, & state that as such the claim in question might be referred to a modern grant :—**Held**: a new trial would be granted.—**JENKINS v. HARVEY** (1835), 1 Cr. M. & R. 877; 1 Gale, 23; 5 Tyr. 320; 5 L. J. Ex. 17; 149 E. R. 1336; *subsequent proceedings*, 2 Cr. M. & R. 393.

Annotations :—**Consd.** Brune v. Thompson (1843), 4 Q. B. 543; Newcastle-upon-Tyne (Master & Pilots) v. Bradley (1851), 2 E. & B. 428, n. **Refd.** Shephard v. Payne (1864), 16 C. B. N. S. 132; Bryant v. Foot (1868), L. R. 3 Q. B. 497. **Consd.** Northumberland v. Houghton (1870), 22 L. T. 491. **Refd.** Newcastle-upon-Tyne (Master Pilots) v. Hammond (1849), 4 Exch. 285; Mills v. Colchester Corpn. (1867), 36 L. J. C. P. 210; Norfolk v. Arbutnot (1879), 4 C. P. D. 290; Brocklebank v. Thompson, [1903] 2 Ch. 344. **Mentd.** Benjamin v. Andrews (1858) 5 C. B. N. S. 299; Brecon Markets Co. v. Neath & Brecon Ry. (1872), L. R. 7 C. P. 555.

76. ————]—On the trial of an action it appeared that inhabitants had from time immemorial taken water from a well. About fifty years before the action the *locus in quo* was inclosed under a special Inclosure Act. Neither in the special Act nor in the award of the comrs. was any mention made of this well or of any access to it. A verdict was given for defts. with leave to move. On a rule to enter verdict for pltf. :—**Held**: the right to take the water from the well was not extinguished by the enclosure; & whether the ancient right of access to the well for that purpose was or was not extinguished the inhabitants might in other modes legally get access to the well so that the fifty years' enjoyment *de facto* since the inclosure might have a legal origin.—**RACE v. WARD** (1857), 7 E. & B. 384; 26 L. J. Q. B. 133; 28 L. T. O. S. 288; 21 J. P. 678; 3 Jur. N. S. 512; 5 W. R. 288; 119 E. R. 1289.

Annotations :—**Consd.** Murphy v. Ryan (1868), 16 W. R. 678. **Refd.** Broadbent v. Ramsbotham (1856), 11 Exch. 602; Hall v. Nottingham (1875), 1 Ex. D. 1; Bower v. Sandford (1889), 5 T. L. R. 570; Mercer v. Denne, [1904] 2 Ch. 534. **Mentd.** Constable v. Nicholson (1863), 32 L. J. C. P. 240; Saltash Corpn. v. Goodman (1881), 29 W. R. 639; Pearce v. Scotcher (1882), 46 L. T. 342; Fitzhardinge v. Purcell, [1908] 2 Ch. 139; Schwann v. Cotton & Hayles (1916), 85 L. J. Ch. 689.

77. ————]—The immemorial existence of fees of an office may be presumed from uninterrupted modern usage, unless there be some evidence to the contrary.—**SHEPARD v. PAYNE** (1864), 16 C. B. N. S. 132; 33 L. J. C. P. 158; 10 L. T. 193; 28 J. P. 276; 10 Jur. N. S. 540; 12 W. R. 581; 143 E. R. 1075, Ex. Ch.

Annotations :—**Distd.** Bryant v. Foot (1868), L. R. 3 Q. B. 497. **Consd.** Northumberland v. Houghton (1870), 22 L. T. 491; Veley v. Portwes (1870), L. R. 5 Q. B. 573; A.-G. v. Horner (No. 2), [1913] 2 Ch. 140. **Refd.** Mills v. Colchester Corpn. (1867), L. R. 2 C. P. 476; Lawrence v. Hitch (1868), L. R. 3 Q. B. 521.

Sect. 5.—Essential characteristics: Sub-sect. 1, B. (b) & (c); sub-sect. 2, A.]

78. ———.]—BOWER v. SANDFORD (1889), 5 T. L. R. 570.

Annotation:—*Reid. Bradford Corp. v. Pickles, [1894] 3 Ch. 53.*

79. Long user—Over 100 years—Specific acts of enjoyment—Protest against infringement.]—Where a market for meat, etc., was proved to have been in existence in the reign of James I., proof that the grantees of the market had for the last hundred years appointed market lookers; that no butchers' shops had existed out of the market place until 1810; & that the shops then set up were objected to by the grantees:—*Held*: this was sufficient evidence of such immemorial right.—**MACCLESFIELD CORPN. v. PEDLEY (1833), 4 B. & Ad. 397; 1 Nev. & M. K. B. 708; 110 E. R. 504.**

Annotations:—*Reid. Macclesfield Corp. v. Chapman (1843), 12 M. & W. 18; Penryn Corp. v. Best (1878), 3 Ex. D. 292; London City Corp. v. Low & Low, the Younger (1879), 23 W. R. 250; Manchester Corp. v. Lyons (1882), 22 Ch. D. 287. Mentd. Devizes Corp. v. Clark (1835), 3 Ad. & El. 506; Brecon Corp. v. Edwards (1862), 1 H. & C. 51.*

80. ———.]—ROBERTS v. LONDON CORPN., No. 46, ante.

81. ——— As far as living memory goes.]—BASTARD v. SMITH, No. 59, ante.

82. ———.]—I think that what has been the custom as far back as living memory can go is right, & that which has existed for so long a time & has received the sanction of long usage is the true indication of the rights of the parties (COCKBURN, C.J.).—**GREENSLADE v. DARBY (1868), L. R. 3 Q. B. 421; 9 B. & S. 428; 37 L. J. Q. B. 137; 18 L. T. 463; 32 J. P. 437.**

Annotations:—*Mentd. Wallis v. Birks (1870), L. R. 5 C. P. 222; Winstanley v. North Manchester Overseers, [1910] A. C. 7; Fowke v. Borington, [1914] 2 Ch. 308.*

83. ——— Absence of countervailing evidence.]—HAMMERTON v. HONEY, No. 9, ante.

84. ———.]—ANGUS v. DALTON, No. 61, ante.

85. ———.]—The practice of oyster laying is traced back as far as living memory can go, & that is evidence of immemorial usage, & I cannot see how any valid objection can be raised to a practice so widespread & ancient (WILLS, J.).—**TRURO CORPN. v. ROWE, [1901] 2 K. B. 870; 70 L. J. K. B. 1026; 85 L. T. 422; 65 J. P. 806; 50 W. R. 151; 17 T. L. R. 773; on appeal, [1902] 2 K. B. 709.**

Annotation:—*Mentd. Foster v. Warblington U. C., [1906] 1 K. B. 648.*

86. ——— Notwithstanding possible variation in extent.]—(1) An immemorial custom for fishermen, inhabitants of a parish, to spread their nets to dry on the land of a private owner situate near the sea in the parish, at all times necessary or proper for the purposes of the trade or business of a fisherman:—*Held*: to be a valid legal custom.

(2) Land added by accretion in consequence of the gradual & imperceptible recession of the sea, will become subject to the custom.

(3) It is contended that the evidence shows that a considerable part of the beach, now eleven acres in extent, was at the time of Richard I. covered

by the sea & therefore could not have been used for drying nets. In the view of the law this was the same close as that which was affected by local law in the time of Richard I. It is urged that this extension of the area renders the custom uncertain, & if the sea should further recede, unreasonable. The argument could not be assented to. The proved usage of cutting nets is sufficient evidence of a custom to dry nets treated with suitable materials in preparation for fishing (COZENS-HARDY, L.J.).

(4) Those who are entitled to the benefit of a custom ought not to be deprived of that benefit simply because they take advantage of modern inventions or new operations, so long as they do not thereby throw an unreasonable burden on the landowner (STIRLING, L.J.).

(5) It may be perfectly reasonable in favour of commerce & navigation to invade private property forming part of the beach, because it is so convenient to dry the nets wet & heavy with sea water on the nearest part of the beach suitable for such a purpose (VAUGHAN WILLIAMS, L.J.).—**MERCER v. DENNE, [1905] 2 Ch. 538; 74 L. J. Ch. 723; 93 L. T. 412; 70 J. P. 65; 54 W. R. 303; 21 T. L. R. 760; 3 L. G. R. 1293, C. A.**

Annotations:—*As to (3) Reid. Re Petition of Right, [1915] 3 K. B. 649. Generally, Reid. Johnson v. Clark, [1908] 1 Ch. 303. Mentd. Assheton-Smith v. Owen (1905), 94 L. T. 42; Itamsgate Corp. v. Debling (1906), 70 J. P. 132; Fitzhardinge v. Purcell (1908), 77 L. J. Ch. 529; Re Fountaine, Fountaine v. Amherst (1909), 78 L. J. Ch. 648; North Staffordshire Ry. v. Hanley Corp. (1909), 73 J. P. 477; Heyne v. Fischel (1913), 110 L. T. 264; Collis v. Amphlett (1918), 118 L. T. 466.*

As to proof of custom, see Sect. 9, post.

(c) Rebuttal of.

87. Ancient documents—Tending to disprove custom.]—BASTARD v. SMITH, No. 59, ante.

88. ——— Grant of right by deed in 1646—No evidence of prior enjoyment.]—The inhabitants of a town cannot prescribe for an easement in *alieno solo*, as stallage, or claim exemption by grant, & where a charter for a market was granted to A. in 1639, & in 1646 a deed was executed between the grantee of the market, & certain persons representing the inhabitants, which contained a clause exempting the inhabitants from toll, & there was evidence of exemption subsequent to the deed, but no evidence of any exemption before, or of any market being in existence in 1639:—*Held*: it was a misdirection to direct the jury that they must infer the exemption originated in some custom independent of the deed.—**LOCKWOOD v. WOOD (1845), 1 New Prac. Cas. 293; 15 L. J. Q. B. 36; 6 L. T. O. S. 147; 10 J. P. 424; 10 Jur. 158.**

89. ——— Indicating non-existence.]—PAYNE v. ECCLESIASTICAL COMRS. & LONDON, No. 56, ante.

90. User under licence — Not as of right.]—A claim of a right to obtain from a corp. a licence to fish in an oyster-fishery belonging to them, under an alleged custom for the corp. to grant such a license, under rules made by them, to oyster-dredgers living in a certain district & having served a certain apprenticeship, upon payment of a reasonable fee, is bad, not because of the

PART I. SECT. 5, SUB-SECT. 1.—B. (b).

81 i. Long user—As far as living memory goes.]—Evidence showing exercise of a right in accordance with an alleged custom as far back as living testimony can go, raises the presumption, though only a rebuttable one, as to the immemorial existence of the custom.—**MAHAMAYA DEBI v. HARIDAS**

HALDAR (1914), I. L. R. 42 Cal. 455.—IND.

e. ——— Not exercised by permission, stealth or force.]—It is open to a ct. to infer from long enjoyment not exercised by permission, stealth or force, the existence of a custom.—**SHADI LAL v. MUHAMMAD ISHAQ KHAN (1910), I. L. R. 33 All. 257.—IND.**

PART I. SECT. 5, SUB-SECT. 1.—B. (c).

90 i. User under licence—Not as of right.]—If after considering the evidence the ct. comes to the conclusion that an alleged custom is enjoyed as a result of permission given or that it is exercised by stealth or force, the ct. is entitled to find against the custom.—**SHADI LAL v. MUHAMMAD ISHAQ KHAN (1910), I. L. R. 33 All. 257.—IND.**

uncertainty of the fee, but because if it is not lawful to fish without such licence, the claim is precarious, & not as of right, being an enjoyment by the leave & license of the corpn. at their will & pleasure as owners of the fishery; & long enjoyment in order to establish a right by custom must be as if right & not by leave asked from time to time.—*MILLS v. COLCHESTER CORPN.* (1867), L. R. 2 C. P. 476; 36 L. J. C. P. 210; 16 L. T. 626; 15 W. R. 955; *affd.* (1868), L. R. 3 C. P. 575, Ex. Ch.

Annotations:—*Refd.* *Bryant v. Foot* (1868), L. R. 3 Q. B. 497; *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521.

91. Impossibility of existence — During period named.—Applt. owned, at the date of the passing of the Salmon Fishery Act, 1861 (c. 109), certain fishing engines called putchers, which were fixed to the soil of the river between high & low water, & therefore only covered during a certain part of the 24 hours. They were in the manor of A., of which applt. was the lord, & which was proved to be a part of the manor of B., granted by Henry II., to M. Engines of a similar description were proved to be lawfully used in several parts of the manor of B., & in 1610 there was a conveyance of the manor of A., “with all that free fishing & several fishing,” in the river S. so far as the manor of A. extended. Applt. proved that he used some of the engines for 45 & others for 25 years. The comrs. having, in the absence of other evidence of immemorial usage, or that the fisheries were of ancient right, decided that they did not come within the exemption & having ordered them to be removed:—*Held*: they were justified in not inferring that they were legal by immemorial usage.—*HOLFORD v. GEORGE* (1868), L. R. 3 Q. B. 639; 9 B. & S. 815; 37 L. J. Q. B. 185; 18 L. T. 817; 32 J. P. 468; 16 W. R. 1201.

92. ———.]—*SIMPSON v. WELLS*, No. 53, *ante*.

93. ———.] — *HAMMERTON v. HONEY*, No. 9, *ante*.

94. ———.] **Onus of proof.** — *MERCER v. DENNE*, No. 22, *ante*.

95. ———.] — *RAMSGATE CORPN. v. DEBLING* (1906), 70 J. P. 132; 22 T. L. R. 369; 4 L. G. R. 495.

96. Incompatibility with law of land.—*HAMMERTON v. HONEY*, No. 9, *ante*.

97. Interruption. — *HAMMERTON v. HONEY*, No. 9, *ante*.

98. Recurring protests against user—By lord & farmers.—*PAYNE v. ECCLESIASTICAL COMRS. & LONDON*, No. 56, *ante*.

In manorial customs.—*See* COPYHOLDS, Vol. XIII., p. 31, Nos. 279–280.

SUB-SECT. 2.—REASONABLENESS.

A. In General.

Reasonable origin.—*See* Nos. 17, 26, 37, *ante*.

99. As proof of beginning of custom.—A custom

is good which binds residents & inhabitants within a manor to grind their corn at the lord's mill.

If no reason can be given, for the beginning of this, or of any other custom, yet *non sequitur*, this custom to be for this cause unreasonable, & against reason in the beginning of it, for that for some things no reason can be given; & as the rule is, *qui rationem in omnibus quaerit, rationem destruit* (COKE, C.J.).—*HIX v. GARDINER* (1614), 2 Bulst. 195; 80 E. R. 1062.

Annotations:—*Refd.* *Mitchel v. Reynolds* (1711), 1 P. Wms. 181; *Broadbent v. Wilks* (1742), Willes, 380.

100. Question of law.—In an action on the case upon a custom for not grinding at pltf.'s mills, pltf. may declare generally upon the custom for a certain toll, without specifying the particular toll, or the consideration for it, or that it is a reasonable toll, & a continuance of uniform payment & acquiescence is evidence of its reasonableness. The ct. shall judge under all the circumstances what is reasonable.—*GARD v. CALLARD* (1817), 6 M. & S. 69; 105 E. R. 1169.

Annotations:—*Refd.* *Mills v. Colchester Corpn.* (1867), L. R. 2 C. P. 476; *Lawrence v. Hitch* (1868), L. R. 3 Q. B. 521; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

101. ———.]—*BASTARD v. SMITH*, No. 59, *ante*.

102. Essential to validity of custom.—*NORTH v. WINSKELL* (1688), 2 Lut. 977; 125 E. R. 545.

103. ———.]—*TYSON v. SMITH*, No. 5, *ante*.

104. ———.]—*LONDON CORPN. v. COX*, No. 52, *ante*.

105. ———.]—*MERCER v. DENNE*, No. 22, *ante*.

106. ———.]—Action by a married woman to set aside a mtge. of her real estate, on the ground that it had been executed by her husband & herself without having been acknowledged by her. Defts. alleged that the property was held on burgage tenure, & that a local custom existed under which real estate so held by a married woman could be disposed of by her with the consent of her husband without her separate examination & acknowledgment:—*Held*: such a custom was inconsistent with the general principle of the common law that an exercise of free will was essential to alienation & contracts, & that a married woman was not in a position to exercise that free will. The custom was, therefore, unreasonable & bad, & the mtge. was void & did not operate to pass pltf.'s interest in her land.

It seems clear that a custom possible in law, because it is reasonable & otherwise fulfils the requisites of a good custom may be established by very slender evidence. No custom bad in law is susceptible of proof. It is clear that for a custom to be good it must be reasonable or at any rate not unreasonable. The words “reasonable” or “not unreasonable” imply an appeal to some criterion higher than the mere rules or maxims embodied in the common law, for it is no objection to a custom that it is not in accordance with these rules or maxims. . . . The alleged custom cannot be upheld, because it is unreasonable as conflicting with the general principles of the common law that an exercise of free will was essential to alienation

96 i. Incompatibility with law of land.—A custom can be upheld only so far as it is not in conflict with statute law.—*ARUMUGAM CHETTI v. JAGAVEERA RAMA VENKATSWARA ETTAPPA* (1905), 1 L. R. 28 Mad. 444.—*IND.*

96 ii. ———.]—*PHIBBS v. KEARNS* (1860), 11 I. C. L. R. 294; 12 Ir. Jur. 129.—*IR.*

PART I. SECT. 5, SUB-SECT. 2.—A.

100 i. Question of law.—The reasonableness or unreasonableness of a custom is a question of law.—*GURAI*

KAR v. KUARMONT SINGHA MANDHATA (RANI) (1915), 19 C. W. N. 1188.—*IND.*

102 i. Essential to validity of custom.—A custom must be reasonable.—*HURPURSHAD v. SHEO DYAL* (1876), L. R. 3 Ind. App. 259.—*IND.*

102 ii. ———.]—*LALA v. HIRA SINGH* (1878), 1 L. R. 2 All. 49.—*IND.*

102 iii. ———.]—*KUAR SEN v. MAMMAN* (1895), 1 L. R. 17 All. 87.—*IND.*

102 iv. ———.]—If a ct. comes to the conclusion that an alleged custom is unreasonable it is entitled to find

against the custom.—*SHADI LAL v. MUHAMMAD ISHAQ KHAN* (1910), 1 L. R. 33 All. 257.—*IND.*

102 v. ———.]—*MAHAMAYA DEBI v. HARIDAS HALDAR* (1914), 1 L. R. 43 Cal. 455.—*IND.*

102 vi. ———.]—*RANDIEST v. RAAPF* (1889), 5 H. C. 402.—*S. AF.*

1. Repugnancy to common law—Not unreasonable.—Although a custom should be repugnant to the rule of common law this doth not prove it to be unreasonable.—*TANISTRY CASE* (1608), Dav. Ir. 28.—*IR.*

Sect. 5.—Essential characteristics: Sub-sect. 2, A., B. & C.; sub-sect. 3, A.]

& contracts (PARKER, J.).—JOHNSON *v.* CLARK, [1908] 1 Ch. 303; 77 L. J. Ch. 127; 98 L. T. 129; 24 T. L. R. 156; 52 Sol. Jo. 115.

—Customs of the manor.]—See COPYHOLDS, Vol. XIII., p. 27.

107. Custom partly unreasonable—Void in toto.]—HARBIN *v.* GREEN (1616), Hob. 189; 1 Brownl. 18; Moore, K. B. 887; 80 E. R. 336.

*Annotations:—*Reid. Drake *v.* Wigglesworth (1752), Willes, 654; Griffith *v.* Williams (1752), Say. 56. *Mentd.* Prince *v.* Molt (1696), 2 Salk. 663.

108. ———.]—If any part of a custom as laid be unreasonable, the whole will be void.—WILKES *v.* BROADBENT (1745), 2 Stra. 1224; 1 Wils. 63; 93 E. R. 1146; *affg.* S. C. *sub nom.* BROADBENT *v.* WILKS (1742), Willes, 360.

*Annotations:—*Consd. Hilton *v.* Granville (1845), 5 Q. B. 701. *Reid.* Carlyon *v.* Lovering (1857), 1 H. & N. 784; Rogers *v.* Taylor (1857), 1 H. & N. 706; Salisbury *v.* Gladstone (1861), 9 H. L. Cas. 692. *Mentd.* R. *v.* White & Ward (1757), 1 Burr. 333; Da Costa *v.* Clarke (1801), 2 Bos. & P. 376; Clement *v.* Lewis (1822), 10 Price, 181; Gillingham *v.* Waskett (1824), M'Cle. 198; Gwynne *v.* Burnell (1840), 6 Bing. N. C. 453.

109. Evidence of reasonableness—Uniform payment & acquiescence.]—GARD *v.* CALLARD, No. 100, *ante.*

B. Test of.

Reasonable origin.]—See Nos. 17, 26, 37, *ante.*

110. General rule.]—TYSON *v.* SMITH, No. 5, *ante.*

111. ———.]—JOHNSON *v.* CLARK, No. 106, *ante.*

112. Reasonable commencement.]—PALMOUTH (LORD) *v.* GEORGE, No. 4, *ante.*

113. ———.]—Not if founded on wrong & usurpation.]—TYSON *v.* SMITH, No. 5, *ante.*

114. ———.]—Not from accident or indulgence.]—In truth I believe that when it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage even though it may have existed immemorially, must have resulted from accident or indulgence & not from any right conferred in ancient times on the party setting up the custom (LORD CRANWORTH).—SALISBURY (MARQUIS) *v.* GLADSTONE (1861), 9 H. L. Cas. 692; 34 L. J. C. P. 222; 4 L. T. 849; 8 Jur. N. S. 625; 9 W. R. 930; 11 E. R. 900, H. L.

*Annotations:—*Consd. Warrick *v.* Queens College, Oxford (1871), 6 Ch. App. 716; Mercer *v.* Denno, [1904] 2 Ch. 534; Johnson *v.* Clark, [1908] 1 Ch. 303. *Reid.* Blowett *v.* Jenkins (1882), 12 C. B. N. S. 16; Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633; Tucker *v.* Linger (1883), 52 L. J. Ch. 941; Heath *v.* Deane, [1905] 2 Ch. 86. *Mentd.* Constable *v.* Nicholson (1863), 14 C. B. N. S. 230; Hammer *v.* Chance (1865), 11 L. T. 667; Lingwood *v.* Gyde (1866), L. R. 2 C. P. 72; Portland *v.* Hill (1866), L. R. 2 Eq. 765; Hall *v.* Byron (1877), 4 Ch. D. 667; A-G. for Isle of Man *v.* Mylchreest (1879), 4 App. Cas. 294.

115. Custom benefiting community generally—Although prejudicial to private person.]—TYSON *v.* SMITH, No. 5, *ante.*

116. Custom benefiting individual—At expense of community.]—TYSON *v.* SMITH, No. 5, *ante.*

Destruction of subject-matter—Claim to profit à prendre in soil of another.]—See EASEMENTS & PROFITS À PRENDRE.

PART I. SECT. 5, SUB-SECT. 2.—B.

115. Custom benefiting community generally—Although prejudicial to private person.]—A custom may be prejudicial to the interest of a particular person & reasonable also when it is for the benefit of the commonwealth in general.—TANISTRY CASE (1608), Dav. Ir. 28.—IR.

PART I. SECT. 5, SUB-SECT. 2.—C.

g. City Corporation electing free-

men—Rejection of petition by one of two branches of corporation.]—The return to a *mandamus* stated that the corpn. of D. was a corpn. by prescription, & stated a custom, that "every person, etc., must, before he can be admitted a freeman, have been approved of by two branches of the corpn.; the Lord Mayor for the time being & aldermen, & the sheriffs for the time being & comrs., sitting in different apartments at an assembly

C. In Particular Instances.

117. Customary tenant sinking pit, depositing rubbish etc.—On lands of other customary tenants.]

—A custom that when the customary tenant of a manor has coal mines lying under the freehold lands of other customary tenants, he may sink pits in those lands to get the coals, may lay rubbish etc. on the land near to such pits, such lands being customary tenements & parcel of the manor:—*Held:* to be a bad custom as being uncertain & unreasonable.

That every custom must be certain is laid down as a rule in all the books that treat of customs. It must be certain, because if it be not certain, it cannot be proved to have been time out of mind, for how can anything be said to have been time out of mind when it is not certain what it is (WILLES, J.).—BROADBENT *v.* WILKS (1742), Willes, 360; 125 E. R. 1214; *affd.* *sub nom.* WILKES *v.* BROADBENT (1745), 2 Stra. 1224.

*Annotations:—*Consd. Hilton *v.* Granville (1845), 5 Q. B. 701. *Reid.* Carlyon *v.* Lovering (1857), 1 H. & N. 784; Salisbury *v.* Gladstone (1861), 9 H. L. Cas. 692. *Reid.* Rogers *v.* Taylor (1857), 1 H. & N. 706. *Mentd.* R. *v.* White & Ward (1757), 1 Burr. 333; Da Costa *v.* Clarke (1801), 2 Bos. & P. 376; Clement *v.* Lewis (1822), 10 Price, 181; Gillingham *v.* Waskett (1824), M'Cle. 198; Gwynne *v.* Burnell (1840), 6 Bing. N. C. 453.

118. Levying execution—On anything upon land of deceased—Within the honour—To pay sums due by heir.]—HILL *v.* BUNNING (1660), 1 Sid. 17; 82 E. R. 943.

*Annotation:—**Mentd.* Banks *v.* Angell (1838), 7 Ad. & El. 843.

119. Grinding all corn—Spent or sold by inhabitants—At particular mill.]—HARBIN *v.* GREEN (1616), Hob. 189; Brownl. 18; Moore, K. B. 887; 80 E. R. 336.

*Annotations:—*Drake *v.* Wigglesworth (1752), Willes, 654. *Reid.* Griffith *v.* Williams (1752), Say. 56. *Mentd.* Prince *v.* Molt (1697), 2 Salk. 663.

120. ———.]—CORITON & HARVEY *v.* LITHEY (1670), 1 Vent. 167; 2 Keb. 803, 822; 86 E. R. 114; *sub nom.* CORYTON *v.* LITHEYBYE, 2 Wms. Saund. 112; *sub nom.* LITHEYBURY *v.* CORITON, 2 Lev. 27.

*Annotations:—**Mentd.* Iveson *v.* Moore (1699), 1 Ld. Raym. 486; Bullythorp *v.* Turner (1744), Willes, 475; Weller *v.* Baker (1769), 2 Wils. 414; Barratt *v.* Collins (1825), 10 Moore, C. P. 446; Forster *v.* Lawson (1826), 11 Moore, C. P. 360; Foley *v.* Addenbrooke (1843), 4 Q. B. 197; Adams *v.* Andrews (1850), 15 L. T. O. S. 499; Bail *v.* Mellor (1850), 19 L. J. Ex. 279; Metcalfe *v.* Hetherington (1855), 11 Exch. 257; Laing *v.* Whaley (1858), 3 H. & N. 675; Rogers *v.* Taylor (1858), 30 L. T. O. S. 321; Dunncliff *v.* Mallet (1859), 7 C. B. N. S. 209; Dent *v.* Turpin (1861), 2 John. & H. 139; Ormerod *v.* Todmorden Joint Stock Mill Co. (1883), 11 Q. B. D. 155; Hannay *v.* Smurthwaite (1893), 69 L. T. 677.

121. ———.]—Within parish.]—A custom, that all the householders in the parish of A. shall grind all their corn which shall be used by them ground within the parish, is good; but a custom that they shall grind all their corn used or sold is bad.—DRAKE *v.* WIGLESWORTH (1752), Willes, 654; 125 E. R. 1369.

*Annotations:—**Reid.* Mills *v.* Colchester Corpn. (1867), L. R. 2 C. P. 476; Lawrence *v.* Hitch (1868), L. R. 3 Q. B. 521. *Mentd.* Richardson *v.* Graham, [1908] 1 K. B. 39.

122. ———.]—Reasonableness of toll.]—GARD, *v.* CALLARD, No. 100, *ante.*

123. Restricting employment of foreigners.]—A custom in the City of London, that a freeman of

of the corpn., notwithstanding that such person, the son of a freeman may be himself a freeman or free brother of one of the said minor guilds." It then stated a custom, that the person applying for admission "should present a petition to each branch of the corpn., who exercised a discretionary right of complying with or refusing the prayer of such petition, without assigning or being required to assign any reason; & that the opinion of the

the city shall not set on work, in the manual occupation of a butcher, a foreigner to the liberties of the City, is good.—*SHAW v. POYNTER* (1834), 2 Ad. & El. 312; 4 Nev. & M. K. B. 290; 4 L. J. K. B. 16; 111 E. R. 121.

124. Victualler erecting booth—When fair held—Common or waste land.]—*TYSON v. SMITH*, No. 5, *ante*.

125. ——— Highway.]—To a count in trespass for breaking down & removing pltf.'s booth, deft. pleaded that there was a public highway over a close called A., & that the booth had been wrongfully erected across the highway, & obstructing the same. Replication, that the close was in the borough of B., an immemorial borough, & that an immemorial fair was every year held in the close, & that there was an immemorial custom in the borough, that a victualler had during the fairs been used to enter upon any part of the close used for the purpose of such fair, & to erect a booth there. On demurrer:—*Held*: the custom was reasonable.

The existence of a fair is treated in our law books as a matter of public convenience & the reasons for so considering it are also entirely of a public nature. If, therefore, the custom disclosed in the replication may have had a legal origin, there seems to be nothing unreasonable in it, as abridging a public right without a countervailing benefit. Such benefit may be well supposed to arise from the accommodation afforded to the persons frequenting the fair (*LORD DENMAN, C.J.*).—*ELWOOD v. BULLOCK* (1844), 6 Q. B. 383; 13 L. J. Q. B. 330; 3 L. T. O. S. 298; 8 J. P. 473; 8 Jur. 1044; 115 E. R. 147.

Annotations.—*Distd.* *Simpson v. Wells* (1872), L. R. 7 Q. B. 214. *Refd.* *Gerring v. Barfield* (1864), 16 C. B. N. S. 597; *Arnold v. Blaker* (1871), L. R. 6 Q. B. 433. *Mentd.* *Dawes v. Hawkins* (1866), 7 Jur. N. S. 262; *Neeld v. Hendon* U. D. C. (1899), 81 L. T. 405; *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140.

126. Depositing refuse from tin mines—In another's stream.]—Declaration for fouling & sending rubbish down a natural stream of water running through pltf.'s lands. Pleas, justifying under a prescriptive right founded on a user of twenty & forty years respectively, & also by custom to wash away, by means of the stream above pltf.'s lands, the sand, stones, rubbish, & other stuff which became dislodged or severed in the course of working the tin mine of deft., & getting the tin & tin ore:—*Held*: (1) the custom alleged was not indefinite or unreasonable, the user being limited to the necessary working of the mine; (2) such a user might be the subject-matter of a grant, & therefore the pleas were good.—*CARLYON v. LOVERING* (1857), 1 H. & N. 784; 26 L. J. Ex. 251; 28 L. T. O. S. 356; 5 W. R. 347; 156 E. R. 1417.

Annotations.—*As to* (2) *Refd.* *Rogers v. Taylor* (1857), 26 L. J. Ex. 203; *Gaved v. Martyn* (1865), 19 C. B. N. S. 732.

127. Rights in alleno solo—Exercising & training horses—On land of another—At all times of the year.]—In answer to an action for trespass with horses on pltf.'s land in the manor of L., defts. pleaded a custom of the manor, by which the

inhabitants of whom defts. were several of the parish of L., in & adjacent to the manor, by themselves or their servants, at all reasonable times of the year, were alleged to be entitled to enter the land for the purpose of training & exercising horses thereon:—*Held*: (1) the alleged custom was unreasonable, as it deprived the owner of the enjoyment of his property for a very considerable period of the year; (2) the claim was too extensive & too indefinite to be sustained.—*SOWERBY v. COLEMAN* (1867), L. R. 2 Exch. 96; 36 L. J. Ex. 57; 15 L. T. 667; 31 J. P. 263; 15 W. R. 451. *Annotation*.—*As to* (2) *Refd.* *Brooklobank v. Thompson*, [1903] 2 Ch. 344.

128. ——— Holding horse races—On Ascension Day—Lands outside parish.]—A custom for all the freemen & citizens of a neighbouring city to hold horse races over the close of M. on Ascension Day in every year is good.—*MOUNSEY v. ISMAY* (1863), 1 H. & C. 729; 1 New Rep. 288; 32 L. J. Ex. 94; 7 L. T. 717; 27 J. P. 454; 9 Jur. N. S. 306; 11 W. R. 270; 158 E. R. 1077; *subsequent proceedings* (1865), 3 H. & C. 486.

Annotations.—*Distd.* *Sowerby v. Coleman* (1867), L. R. 2 Exch. 96. *Refd.* *Hall v. Nottingham* (1875), 45 L. J. Q. B. 50. *Mentd.* *Met. Ry. v. Fowler*, [1892] 1 Q. B. 165.

129. ——— Innocent & lawful recreation—At any time of the year.]—*HALL v. NOTTINGHAM*, No. 8, *ante*.

130. ——— Drying nets—On land of another.]—*LOCKWOOD v. WOOD*, No. 6, *ante*.

131. ——— On nearest suitable part of beach—Though private property.]—*MERCER v. DENNE*, No. 86, *ante*.

132. Making grips at side of road for drainage—Obstructing passage of highway.]—The owner of a building estate granted to the purchaser of one of the lots the right to pass over the several roads made or to be made through the estate, as if the roads were public roads. Two of the roads were gravelled for cart & carriage traffic, & there was a strip of grass land on either side. Pltf. was accustomed to walk along these grass strips to & from his house. The owner of the estate caused the grass strips to be intersected by grips, for the purpose of draining the road, but really, as the ct. decided upon the evidence, for the purpose of preventing persons from passing along the sward. The owner of the road produced evidence showing that on rural roads in the same neighbourhood it was usual to make such grips for the purpose of drainage:—*Held*: the custom attempted to be set up was unreasonable, & the grips amounted to an obstruction.—*NICOL v. BEAUMONT* (1883), 53 L. J. Ch. 853; 50 L. T. 112.

133. Catching fish—Without reference to needs of particular messuage.]—*PAYNE v. ECCLESIASTICAL COMRS. & LONDON*, No. 56, *ante*.

SUB-SECT. 3.—CERTAINTY.

A. General Rule.

134. Essential to validity of custom.]—*BROADBENT v. WILKS*, No. 117, *ante*.

sheriffs & comrs. on such petition should be taken by ballot only; & that without such approval no person had been admitted a freeman:—*Held*: the custom that either branch of the corp'n. might, without assigning any reason, reject a petition for admission to freedom, was not unreasonable, & the custom to reject or elect by ballot was not unreasonable.—*R. v. DUBLIN CORPN.* (1826), Batt. 628.—*IR.*

h. Sale of pigs—Deduction of broken weight & one shilling for carriage.]—Pltf. had sold to deft. three pigs by dead weight at 43s. per cwt., the

weight being 1 cwt. 1 qr. 27 lbs.; deft. claimed to be entitled by custom to pay at a less rate for the broken weight & to deduct one shilling per pig for carriage:—*Held*: such custom, if it existed, would be unreasonable.—*MYLES v. LITTLE* (1903), 37 L. L. T. 192.—*IR.*

PART I. SECT. 5, SUB-SECT. 3.—A.

134 i. Essential to validity of custom.]—A custom must be certain.—*HURFURSHAD v. SHEO DYAL* (1876), L. R. 3 Ind. App. 259.—*IND.*

134 ii. ———.]—*JACHMAN RAI v. AKBAR KHAN* (1877), 1 L. R. 1 All. 440.—*IND.*

134 iii. ———.]—*LALA v. HIRA SINGH* (1878), 1 L. R. 2 All. 49.—*IND.*

134 iv. ———.]—A custom to be valid must be certain in respect of its nature generally.—*MAHAMAYA DEBI v. HARIDAS HALDAR* (1914), 1 L. R. 42 Calc. 455.—*IND.*

134 v. ———.]—Customs to have the virtue & force of law should be certain, not ambiguous.—*TANISTRY CASE* (1608), Dav. Ir. 28.—*IR.*

Sect. 5.—Essential characteristics: Sub-sect. 3, A., B., C. & D.; sub-sect. 4.]

135. —.]—*TYSON v. SMITH*, No. 5, *ante*.

136. —.]—**Degree of certainty.**—*CHAMPNEYS v. BUCHAN*, No. 23, *ante*.

137. —.]—*SHAFTO v. BOLCKOW, VAUGHAN & CO. & ECCLESIASTICAL COMRS.*, No. 54, *ante*.

138. —.]—*MERCER v. DENNE*, No. 22, *ante*.

— **Custom of the manor.**—*See* COPYHOLDS, Vol. XIII., p. 80, No. 1020.

B. As to Time and Subject-Matter.

139. **Time—Custom to pay “at usual time”**—**Usual time not specified.**—A custom within a parish to pay 10*d.* for churching women after child-birth, at the time of churching them, or the usual time when they should be churched, not specifying that usual time:—*Held*: not good.

Now if the custom found the unreasonable or uncertain *ct.* below must not be suffered to proceed & this usual time is quite uncertain (*per* *JUR.*).—*TAYLOR v. SCOTT* (1729), *Fitz-G.* 55; 94 E. R. 651; *sub nom.* *NAYLOR v. SCOTT*, 2 *Ld. Raym.* 1558; 1 *Barn. K. B.* 159.

Annotation:—*Refd.* *Patten v. Castleman* (1753), 1 *Lee*, 387.

140. **Subject-matter—Custom to play “any rural sports” on private close.**—*MILLECHAMP v. JOHNSON* (1746), *Willes*, 205, *n*; 125 E. R. 1133.

Annotations:—*Consd.* *Hall v. Nottingham* (1875), 33 *L. T.* 697. *Refd.* *Mounsey v. Ismay* (1865), 3 *P. & C.* 486. *Mentd.* *Mercer v. Denne*, [1905] 2 *Ch.* 538.

141. — **Custom to enjoy “any innocent or lawful recreation.”**—*HALL v. NOTTINGHAM*, No. 8, *ante*.

142. — **Custom to take “drifted sand.”**—A custom for all the inhabitants of a particular parish, to take sand which had been drifted upon *pltf.*'s close from the sea shore:—*Held*: bad.

This appears to me to be an uncertain, absurd & indefinite custom. There is nothing to point out the limit as to where the sand commences, which has been drifted by the wind, & where the original soil ends (*WILLIAMS, J.*).—*BLEWETT v. TREGONNING* (1835), 3 *Ad. & El.* 554; 1 *Har. & W.* 431, 432; 5 *Mev. & M. K. B.* 234, 308; 4 *L. J. K. B.* 223, 234; 111 E. R. 524.

Annotations:—*Consd.* *Race v. Ward* (1855), 4 *E. & B.* 702. *Refd.* *Clayton v. Corby* (1843), 14 *L. J. Q. B.* 364; *Rogers v. Brenton* (1847), 10 *Q. B.* 26; *A.-G. v. Mathias* (1858), 4 *K. & J.* 579; *Sowerby v. Coleman* (1867), *L. R.* 2 *Exch.* 96; *Brooklebank v. Thompson*, [1903] 2 *Ch.* 344. *Mentd.* *De La Warr v. Miles* (1881), 17 *Ch. D.* 535.

143. — **Custom to deposit refuse from tin mine.**—*CARLYON v. LOVERING*, No. 126, *ante*.

C. As to Locality.

Custom defined—As to local common law.—*See* Sect. 1, *ante*.

144. **General rule.**—A man cannot prescribe a custom *per totam Angliam*, for if it be *per totam Angliam* it is the common law & not a custom.—*ANON* (1543), *Bro. N. C.* 56; 73 E. R. 871.

PART I. SECT. 5, SUB-SECT. 3.—C.

144*i.* **General rule.**—A custom to be valid must be certain in respect of the locality where it is alleged to obtain.—*MAHAMAYA DEBI v. HARIDAS HALDAR* (1914), 1 *L. R.* 42 *Calo.* 455.—*IND.*

PART I. SECT. 5, SUB-SECT. 3.—D.

151*i.* **General rule.**—A custom to be valid must be certain in respect of the persons whom it is alleged to affect.—*MAHAMAYA DEBI v. HARIDAS HALDAR* (1914), 1 *L. R.* 42 *Calo.* 455.—*IND.*

k. **Local inhabitants—Right to use**

mineral springs.—A custom for inhabitants of the surrounding country as of right to drink the water of certain mineral springs is bad, as being too large, & not confined to any particular class of persons.—*GRAND HOTEL CO. v. CROSS* (1879), 44 *U. C. R.* 153.—*CAN.*

l. **Right to public to water from a well.**—In an action by a sanitary authority, claiming that a well situate on private property was vested in them under Public Health (Ireland) Act, 1878, c. 52, s. 74, the *ct.* was satisfied on the evidence that the well

145. —.]—A custom must extend to a district, & cannot be limited to a particular close of land.—*BERESFORD v. BACON* (1685), 2 *Lut.* 1317; 125 E. R. 728.

146. —.]—*JONES v. ROBIN*, No. 7, *ante*.

147. —.]—*MERCER v. DENNE*, No. 22, *ante*.

148. **City & its suburbs.**—A custom which extends to the suburbs of a city, is good.—*HARRIS v. WAKEMAN* (1755), *Say* 254; 96 E. R. 871.

Annotation:—*Mentd.* *Hesketh v. Braddock* (1766), 3 *Burr.* 1847.

149. **Custom in one parish—To do something in another.**—*R. v. ROLLETT*, No. 45, *ante*.

150. **Custom in several parishes—To exercise right in one.**—A custom for the inhabitants of several adjoining or contiguous parishes to exercise the right of recreation over land situate in one of such parishes is bad.

Where a custom is asserted as regards the inhabitants of a particular parish, then, if the evidence goes to show that the privilege has been exercised by the inhabitants of other parishes, the proof is inconsistent with the allegation, & the case falls on that ground (*KEKEWICH, J.*).—*EDWARDS v. JENKINS*, [1896] 1 *Ch.* 308; 65 *L. J. Ch.* 222; 73 *L. T.* 574; 60 *J. P.* 167; 44 *W. R.* 407; 40 *Sol. Jo.* 52.

Annotations:—*Refd.* *Brooklebank v. Thompson*, [1903] 2 *Ch.* 344; *Heaven v. Crutchley* (1903), 1 *L. G. R.* 473.

D. As to Persons.

151. **General rule.**—A custom extending to every one is too general.—*FAIRLEY v. ROCH* (1686), 1 *Lut.* 891; 125 E. R. 489.

152. —.]—A custom that may be general, & such a one as may extend to every subject, whether a citizen or a stranger, is not warranted by the common law, & is void.—*SHERBORN v. BOSTOCK* (1729), *Fitz-G.* 51; 94 E. R. 648.

Annotations:—*Refd.* *Fitch v. Rawling* (1795), 2 *Hy. Bl.* 393. *Mentd.* *Horton v. Beckman* (1796), 6 *Term Rep.* 760; *Clark v. Denton* (1830), 1 *B. & Ad.* 92.

153. **Local inhabitants.**—*FOISTON v. CRACH-ROODE* (1587), 4 *Co. Rep.* 31 *b*; 76 E. R. 962.

Annotations:—*Refd.* *Gateward's Case* (1607), 6 *Co. Rep.* 59 *b*; *R. v. Ecclesfield* (1818), 1 *B. & Ald.* 348; *Derry v. Sanders*, [1919] 1 *K. B.* 223. *Mentd.* *R. v. Churchill* (1825), 6 *Dow. & Ry. K. B.* 635.

154. —.]—*Pltf.* stated that M. was an ancient parish, having an old parish church & consisting of one vill called A. & three other vills, & set forth a custom to make a general rate to reimburse the churchwardens their expenses; & for the inhabitants of A. to raise two-thirds of such rates, & the inhabitants of the three other vills, the other third:—*Held*: the custom was well alleged & a reasonable one, for the word inhabitant was to be construed according to the subject-matter, & included all such persons, & those only, as by law were liable to the payment of church rates.—*BURTON v. WILEDAY* (1737), *Andr.* 32; 95 E. R. 284.

155. — **User of churchway—Or marketway.**—*GATEWARD'S CASE*, No. 17, *ante*.

was freely used, without hindrance or interruption, as far back as living memory went; that it was so used principally by the inhabitants of some neighbouring houses; but that such user was not confined to such inhabitants but was free to all persons who had occasion to resort to the well, & that a path existed during all that time, affording access to the well from a public road:—*Held*: a right in the public to enter & take water from the well was too wide to be the subject of a custom.—*DUNGARVAN GUARDIANS v. MANSFIELD*, [1897] 1 *I. R.* 420.—*IR.*

156. ————.]—Inhabitants may allege prescription for a way to church or market, which are of necessity, & in matter of discharge, as *in modo decimandi*, or to be quit of toll; but not in matter of profit or charge in another soil (*per Cur.*).—*BAKER v. BREREMAN* (1635), Cro. Car. 418; 79 E. R. 964.

Annotations.—*Refd.* *Paine v. Partridge* (1690), 1 Show. 243; *Cronther v. Oldfield* (1705), 1 Salk. 364; *Fitch v. Rawling* (1795), 2 Hy. Bl. 393; *Lockwood v. Wood* (1844), 6 Q. B. 50. *Mentd.* *A.-G. v. Acton L. B.* (1882), 33 W. R. 153; *Mercer v. Denne*, [1904] 2 Ch. 534.

157. ————.]—*BROCKLEBANK v. THOMPSON*, No. 49, *ante*.

158. ————.]—*THROWER'S CASE* (1672), 1 Vent. 208; 86 E. R. 140.

Annotations.—*Refd.* *R. v. Sainthill* (1705), 2 Ld. Raym. 1174; *R. v. Brookes* (1754), Say. 167; *Batten v. Gedyo* (1889), 41 Ch. D. 507.

159. ————.]—A churchway, being a way the rights over which exist by custom in favour of a limited class of the public, no landowner can dedicate a road with only such rights as the public would have over a churchway.

More than sixty years ago the tenant in fee in remainder of a settled estate, being desirous of improving an old churchway leading across the estate to the parish church, divested the churchway & in substitution for it laid out a new road over the estate, partly at his own expense & partly by subscriptions from the parishioners. The road had ever since been continuously used as a highway for all purposes by the public without any serious inference till quite recently. The remainderman acquiesced in the user until his death, & the road had been occasionally repaired by the parish authorities. There was no evidence that the tenant for life, who had died in 1851, had any knowledge of the user of the road by the public:—*Held*: as a presumption of law arising from the long user of the new road coupled with the existence of persons competent to dedicate, there had been a dedication of the road to the public, not as a church path, but as an ordinary highway.

I agree that the evidence has been too wide to prove the existence of a churchway; it is a public highway or nothing (*WARRINGTON, J.*).—*FARQUHAR v. NEWBURY RURAL COUNCIL*, [1908] 2 Ch. 586; 78 L. J. Ch. 170; 100 L. T. 17; 72 J. P. 445; 7 L. G. R. 364; *affd.*, [1909] 1 Ch. 12, C. A.

160. ————.]—*Right of recreation*.—A prescription that all the inhabitants of the vill, time out of memory, had used to dance in another's close at all times of the year at their free will for their recreation:—*Held*: a good custom.—*ABBOT v. WEEKLY* (1665), 1 Lev. 176; 83 E. R. 357.

Annotations.—*Consd.* *Bell v. Wardell* (1740), Willes, 202; *Mounsey v. Ismay* (1863), 1 H. & C. 729. *Fold.* *Hall v. Nottingham* (1875), 1 Ex. D. 1. *Refd.* *Fitch v. Rawling* (1795), 2 Hy. Bl. 393; *Race v. Ward* (1855), 4 E. & B. 702; *Mercer v. Denne*, [1904] 2 Ch. 534. *Mentd.* *Lockwood v. Wood* (1844), 6 Q. B. 50; *Mounsey v. Ismay* (1865), 3 H. & C. 486.

161. ————.]—*MILLECHAMP v. JOHNSON* (1746), Willes, 205, n; 125 E. R. 1133.

Annotations.—*Consd.* *Mounsey v. Ismay* (1863), 1 H. & C. 729; *Hall v. Nottingham* (1875), 1 Ex. D. 1. *Mentd.* *Mounsey v. Ismay* (1865), 3 H. & C. 486; *Mercer v. Denne*, [1905] 2 Ch. 538.

162. ————.]—A custom for all the inhabitants of a parish to play at all kinds of lawful games, sports & pastimes in the close of A. at all seasonable times of the year, at their free will & pleasure, is good. But a similar custom, for all persons for the time being, being in the parish, is bad.

How that which may be claimed by all the inhabitants of England can be the subject of a custom, I cannot conceive. Customs must in

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their nature be confined to individuals of a particular description, & what is common to all mankind, can never be claimed as a custom (*BULLER, J.*).

—*FITCH v. RAWLING* (1795), 2 Hy. Bl. 393; 126 E. R. 614.

Annotations.—*Fold.* *Coventry v. Willes* (1863), 3 New Rep. 119; *Hall v. Nottingham* (1875), 1 Ex. D. 1. *Consd.* *Edwards v. Jenkins*, [1896] 1 Ch. 308. *Refd.* *Tyson v. Smith* (1838), 9 Ad. & El. 406; *Mounsey v. Ismay* (1863), 1 H. & C. 729; *Betts v. Thompson* (1870), 23 L. T. 427; *Warrick v. Queen's College, Oxford* (1870), L. R. 10 Eq. 105; *Bourke v. Davis* (1889), 44 Ch. D. 110; *Mercer v. Denne*, [1905] 2 Ch. 538; *A.-G. v. Sewell* (1918), 88 L. J. K. B. 425. *Mentd.* *R. v. Ecclesfield* (1818), 1 B. & Ald. 348; *The Harriot* (1842), 1 Wm. Rob. 439; *Lockwood v. Wood* (1844), 6 Q. B. 50; *Mortimer v. Moore* (1845), 8 Q. B. 294; *Race v. Ward* (1855), 3 C. L. R. 744; *London Corp. v. Cox* (1867), L. R. 2 H. L. 239.

163. ————.]—*HALL v. NOTTINGHAM*, No. 8, *ante*.

164. ————.]—A right of recreation by custom upon the land of another cannot exist as a right in the public generally, but must be confined to the inhabitants of a particular district.—*BOURKE v. DAVIS* (1889), 44 Ch. D. 110; 62 L. T. 34; 38 W. R. 167; 6 T. L. R. 87.

Annotations.—*Refd.* *Edwards v. Jenkins*, [1896] 1 Ch. 308. *Mentd.* *A.-G. v. Antrobus*, [1905] 2 Ch. 188; *A.-G. v. Sewell* (1918), 88 L. J. K. B. 425.

165. ————.]—*EDWARDS v. JENKINS*, No. 150, *ante*.

166. ————.]—*Right to hold & witness horse races*.—To a declaration in trespass, *deft.* pleaded that at the time of the alleged trespasses there was, & of right ought to have been, a common & public highway over & along the land of *plffs.* for all persons to go & return on foot at such times of the year as horse races were held on the land, at their free will & pleasure, for the purpose of witnessing the races. There were other pleas to the same declaration, averring that races had from time immemorial been held on the land mentioned in the declaration, & setting up customary rights for all the Queen's subjects to go upon the land for the purpose of witnessing these races:—*Held*: these pleas were bad, as there could not be customary rights extending to all the Queen's subjects.—*COVENTRY (EARL) v. WILLES* (1863), 3 New Rep. 119; 9 L. T. 384; 28 J. P. 453; 12 W. R. 127.

Annotations.—*Consd.* *Edwards v. Jenkins*, [1896] 1 Ch. 308. *Refd.* *Bourke v. Davis* (1889), 44 Ch. D. 110.

167. ————.]—*MOUNSEY v. ISMAY*, No. 128, *ante*.

168. ————.]—*Exercising & training racehorses*.—*SOWERBY v. COLEMAN*, No. 127, *ante*.

169. ————.]—*LANCASHIRE v. HUNT* (1894), 10 T. L. R. 448; *affd.* 11 T. L. R. 49; *subsequent proceedings* (1895), 11 T. L. R. 341, C. A.

—*Claiming rights of common*.—*See COMMONS & RIGHTS OF COMMON*, Vol. XI., p. 36, Nos. 480–486.

170. “*Poor householders*”—*Vold for uncertainty*.—A custom for poor & indigent householders living in A. to cut & carry away rotten boughs & branches in a chase in A. cannot be supported, the description of the persons entitled being too vague.—*SELBY v. ROBINSON* (1788), 2 Term Rep. 758; 100 E. R. 409.

Annotations.—*Refd.* *Rivers v. Adams* (1878), 3 Ex. D. 361. *Mentd.* *Mortimer v. Moore* (1845), 8 Q. B. 294.

SUB-SECT. 4.—CONTINUITY.

171. *General rule*.—*HAMMERTON v. HONEY*, No. 9, *ante*.

Sect. 5.—Essential characteristics: Sub-sect. 4. Sects. 6, 7, 8 & 9: Sub-sect. 1.]

172. Essential to validity of custom.]—TYSON v. SMITH, No. 5, *ante*.

173. —.]—MERCER v. DENNE, No. 22, *ante*.

174. Interruption of enjoyment or possession only—For 150 years—Does not destroy custom.]—A custom, proved to have existed from time immemorial till 1689, must be taken to exist still, if there be no further evidence proving or disproving its existence.

On an issue bringing into question the existence of a certain custom of London evidence was given of its exercise from an early period down to 1689; but no proof of its having been exercised, or interfered with, at any later time. The jury found that the custom existed to 1689:—*Held*: this was a verdict for defts., who alleged the custom, & the judge did rightly in ordering it to be entered, & refusing to ask the jury whether it had existed after 1689.

The finding of the jury, that the custom had existed till 1689, was the same in effect as if they had found that it had existed till last week, unless something appeared to show that it had been legally abolished (LORD DENMAN, C.J.).—SCALES v. KEY (1840), 11 Ad. & El. 819; 3 Per. & Dav. 505; 113 E. R. 625.

175. — For 10 or 20 years—Does not destroy custom.]—MERCER v. DENNE, No. 22, *ante*.

Extinguishment of custom.]—See Sect. 13, *post*.

Enjoyment of custom.]—See Sect. 7, *post*.

Proof of custom.]—See Sect. 9, *post*.

SECT. 6.—VALIDITY IN PARTICULAR INSTANCES.

Reasonableness in particular instance.]—See Sect. 5, sub-sect. 2, C., *ante*.

Customs claiming profits à prendre.]—See EASEMENTS & PROFITS À PRENDRE.

Customs of London.]—See METROPOLIS.

176. To distrain—Anything in "such & such a vill"—Bad.]—HILL v. BUNNING (1660), 1 Sid. 17; 82 E. R. 943.

Annotation:—*Mentd.* Banks v. Angell (1838), 7 Ad. & El. 843.

177. — Anything upon the land—Good.]—HILL v. BUNNING (1660), 1 Sid. 17; 82 E. R. 943.

Annotation:—*Mentd.* Banks v. Angell (1838), 7 Ad. & El. 843.

178. — Various goods of great value—For small penalty—Bad.]—MOIR v. MUNDAY (1755), Say. 181; 96 E. R. 845.

Annotation:—*Mentd.* Hutchins v. Chambers (1758), 1 Burr. 679.

See, further, DISTRESS.

179. Inhabitants taking best anchor & cable in case of wreck—In return for care of living & burial of dead—Good.]—SIMPSON v. BITHWOOD (1691), 3 Lev. 307; 83 E. R. 703.

180. Bellman entitled to share of every sack opened—In return for sweeping streets & market—Good.]—HILL v. HANKS, No. 26, *ante*.

181. Town crier entitled to exclusive privilege—Proclaiming auction sales—Goods brought into borough—Good.]—JONES v. WATERS (1835), 1

Cr. M. & R. 713; 1 Gale, 5; 5 Tyr. 361; 4 L. J. Ex. 109; 149 E. R. 1267.

182. Unreasonable marriage fees—Bad.]—THOMPSON v. DAVENPORT (1701), 2 Lut. 1059; 3 Salk. 86; 125 E. R. 589.

183. Paying churching fees—Whether church or not—Bad.]—NAYLOR v. SCOTT (1729), 2 Ld. Raym. 1558; 1 Barn. K. B. 159; 92 E. R. 510; *sub nom.* TAYLOR v. SCOTT, Fitz-G. 55.

Annotation:—*Refd.* Patten v. Castleman (1753), 1 Lee, 387.

184. To charge duties on ships—Entering harbour—Good.]—NAPPER v. MANSELL (1622), cited 1 Sid. at p. 18; 82 E. R. 944.

185. — Passing by certain wharf—Bad.]—HASPERT v. WILLS (1670), 1 Mod. Rep. 47; 1 Vent. 71; 86 E. R. 722; *sub nom.* HASBORN v. WILLS, 2 Keb. 624; *sub nom.* HASKET v. MILLS, 2 Keb. 665; *sub nom.* HESHORD v. WILLS, 1 Sid. 454.

Annotations:—*Mentd.* Nottingham Corp'n. v. Lambert (1738), Wiles, 111; Jenkins v. Harvey (1835), 2 Cr. M. & R. 393.

186. Clerk of market destroying meat—Exposed for sale in market—Good.]—CLARK & PARISH v. TITTERTON (1840), 4 J. P. 238.

187. Working mines—Destroying tenants' buildings—Without compensation—Bad.]—HILTON v. GRANVILLE (EARL) (1844), 5 Q. B. 701; 1 Dav. & Mer. 614; 13 L. J. Q. B. 193; 2 L. T. O. S. 419; 8 Jur. 311; 114 E. R. 1414.

Annotations:—*Consd.* Blackett v. Bradley (1862), 1 B. & S. 940. *Refd.* Humphries v. Brogden (1850), 12 Q. B. 739; Carlyon v. Lovering (1857), 1 H. & N. 784; Rowbotham v. Wilson (1857), 8 E. & B. 123; Rogers v. Taylor (1858), 6 W. R. 249; Salisbury v. Gladstone (1861), 9 H. L. Cas. 692; Buccleuch v. Wakefield (1870), L. R. 4 H. L. 377; Hall v. Byron (1877), 4 Ch. D. 667; Bell v. Love (1883), 10 Q. B. D. 547; Consett Industrial & Provident Soc. v. Consett Iron Co., [1922] 2 Ch. 135. *Mentd.* Hilton v. Whitehead (1848), 12 Q. B. 734; Smart v. Morton (1855), 5 E. & B. 30; Williams v. Bagnall (1866), 15 W. R. 272; Taylor v. Shafto (1867), 16 L. T. 205; Liddy v. Kennedy (1871), L. R. 5 H. L. 134; Hext v. Gill (1872), 7 Ch. App. 699; Buchanan v. Andrew (1873), L. R. 2 Sc. & Div. 286; Gill v. Dickinson (1880), 5 Q. B. D. 159.

188. — Destroying tenants surface—Good.]—BUCCLEUCH (DUKE) v. WAKEFIELD (1870), L. R. 4 H. L. 377; *sub nom.* WAKEFIELD v. BUCCLEUCH (DUKE), BUCCLEUCH (DUKE) v. WAKEFIELD, 39 L. J. Ch. 441; 23 L. T. 102; 34 J. P. 724, H. L.

Annotations:—*Refd.* Hall v. Byron (1877), 4 Ch. D. 667. *Mentd.* Hext v. Gill (1872), 7 Ch. App. 699; Mordue v. Durham (1873), 42 L. J. C. P. 114; Aspden v. Seddon (1874), 10 Ch. App. 396, n.; Benfieldside, L. B. v. Consett Iron Co. (1877), 47 L. J. Q. B. 491; Dalton v. Angus (1881), 6 App. Cas. 740; Love v. Bell (1884), 9 App. Cas. 286; A.-G. v. Welsh Granite Co. (1887), 35 W. R. 617; Shafto v. Boickow, Vaughan & Ecol. Comrs. (1888), 4 T. L. R. 527; Thompson v. Mein, [1893] W. N. 202; Bell v. Dudley, [1895] 1 Ch. 182; Westmoreland v. New Sharlston Colliery Co. (1898), 79 L. T. 716; Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305; St. Catharine's College, Cambridge v. Greensmith, [1912] 2 Ch. 289; St. Catharine's College, Cambridge v. Rowe, [1916] 1 Ch. 73; Thomson v. St. Catharine's College, Cambridge, etc., [1919] A. C. 468; Weldon v. Butterley Co., [1920] 1 Ch. 130; Consett Industrial & Provident Soc. v. Consett Iron Co., [1922] 2 Ch. 135; Consett Waterworks Co. v. Ritson, [1922] 2 Ch. 187, n.

See, generally, MINES & MINERALS.

Mining rights under Inclosure Acts.]—See COMMONS & RIGHTS OF COMMON, Vol. XI., p. 61, Nos. 888 *et seq.*

Right to let down surface.]—See COMMONS & RIGHTS OF COMMON, Vol. XI., p. 63, Nos. 898 *et seq.*

PART I. SECT. 5, SUB-SECT. 4.

172 i. Essential to validity of custom.]—A custom is not established by one instance.—TOTA RAM v. MOHUN LALI (1867), 2 Agra, 120.—IND.

172 ii. —.]—A custom to be valid must be continued & acquiesced in.—LALA v. HIRA SINGH (1878), 1 L. R.

2 All. 49.—IND.

172 iii. —.]—A custom cannot be established by a few instances or by instances of recent date.—KAKARLA ABRAYYA v. VENKATA PAPAYYA RAO (1905), 1 L. R. 29 Mad. 24.—IND.

172 iv. —.]—A custom to be valid must have continued without interruption since its immemorial origin.—

MAHAMAYA DERI v. HARIDAS HALDAR (1914), 1 L. R. 42 Cal. 455.—IND.

172 v. —.]—KUNHAMBI v. KALANTHAR (1914), 1 L. R. 38 Mad. 1052.—IND.

172 vi. —.]—Customs to have the virtue & force of law should have an uninterrupted continuance.—TANISTRY CASE (1608), Dav. Ir. 28.—IR.

Customs of the manor.]—*See* COPYHOLDS, Vol. XIII., pp. 27–28, Nos. 218–243.

Customs as to perambulating boundaries.]—*See* BOUNDARIES, FENCES & PARTY-WALLS, Vol. VII., p. 321.

Commoners right to take rabbits or game on waste of manor.]—*See* COMMONS, & RIGHTS OF COMMON, Vol. XI., p. 41, No. 573.

To exclude persons from selling marketable articles—On market days.]—*See* MARKETS & FAIRS.

SECT. 7.—ENJOYMENT.

189. General rule.]—MILLS v. COLCHESTER CORPN., No. 90, *ante*.

190. —.]—MONTGOMERIE & CO., LTD. v. WALLACE-JAMES, No. 71, *ante*.

Interruption of.]—*See* Sect. 5, sub-sect. 4, *ante*.

191. Extension of—General customs.]—General customs may extend to new things which are within the reason of those customs (HOLT, C.J.).—LONDON CITY v. VANACKER (1699), Carth. 480; Holt, K. B. 431; 1 Ld. Raym. 496; 5 Mod. Rep. 438; 12 Mod. Rep. 269; 1 Salk. 142; 90 E. R. 876.

Annotations:—Consd. Mercer v. Denne, [1905] 2 Ch. 538. *Refd.* Vinter's Co. v. Passay (1757), 1 Burr. 235. *Mentd.* London City v. Wood (1701), 12 Mod. Rep. 669; Bosworth v. Herne (1737), Lee temp. Hard. 405; Hosketh v. Brad-dock (1766), 3 Burr. 1847; R. v. Westwood (1825), 2 E. & B. 856; Eastern Archipelago Co. v. R. (1853), 2 H. & B. 856; London Joint Stock Bank v. London Corpn. (1875), 1 C. P. D. 1.

192. — Use of modern inventions.]—MERCER v. DENNE, No. 86, *ante*.

193. — Accretion to land subject to custom.]—MERCER v. DENNE, No. 86, *ante*.

Interpretation of customs.]—*See* Sect. 8, *post*.

SECT. 8.—INTERPRETATION.

194. Construed strictly.]—BOWSER v. COLLINS (1482), Jenk. 138; Y. B. 22 Edw. 4, fo. 30, pl. 11; 145 E. R. 97.

Annotation:—*Refd.* London Corpn. v. Cox (1867), 36 L. J. Ex. 225.

195. — Custom binding on covenantor—Not extended to executors.]—WADE & BEMBOES CASE (1583), 1 Leon. 2; 74 E. R. 2.

196. — Custom for eldest sister to inherit—Not extended to eldest aunt or niece.]—RATCLIFFE & CHAPLINS CASE (1610), 4 Leon. 242; 74 E. R. 847.

Annotations:—*Apld.* Denn v. Spray (1786), 1 Term Rep. 466. *Refd.* Muggleton v. Barnett (1858), 30 L. T. O. S. 247.

197. — Descent from customary tenant.]—(1) A particular custom as to the descent from a customary tenant will not apply when the tenant dies before admission, but the descent must be according to the common law.

(2) If the custom is alleged to be according to the tenure of borough English, the ct. will take notice of all the incidents of the custom of borough English; but if the incidents of the custom only

are alleged, the ct. will not go beyond the allegations.—RIDER v. WOOD (1855), 1 K. & J. 644; 3 Eq. Rep. 1064; 24 L. J. Ch. 737; 69 E. R. 618.

Descent of copyholds—Who is customary heir.]—*See* COPYHOLDS, Vol. XIII., p. 109, Nos. 1333 *et seq.*

198. "Seasonable time"—Rights of owner of soil—Right of recreation.]—Justification in trespass under a custom for all the inhabitants of a town to walk & ride over a close of arable land at all seasonable times in the year:—*Held*: bad, because it appeared that the trespass was committed when the corn was standing, though *deft.* averred that it was a seasonable time.

It was said that by "seasonable times" was meant in good weather, when it did not rain, snow or hail, & when it would be seasonable to ride out for the preservation of health, as the custom is laid to be. But the word "seasonable" will admit here of no such construction; for it is ridiculous to say that "unseasonable" was meant in respect to the person claiming the right. But "unseasonable" must necessarily mean in respect to the owner of the soil; otherwise the custom would be a very strange one, that all the inhabitants of the town of N. might ride over *plf's.* corn & grass at all the times of the year which would be to say that the inhabitants of N. had a right to take away from *pltf.* all the profits of his own land (WILLES, C.J.).—BELL v. WARDELL (1740), Willes, 202; 125 E. R. 1131.

Annotations:—Consd. Mounsey v. Ismay (1863), 1 H. & C. 729. *Refd.* Darbshire v. Parker (1805), 6 East, 2; Sowerby v. Coleman (1867), L. R. 2 Exch. 96; Hall v. Nottingham (1875), 1 Ex. D. 1. *Mentd.* Selby v. Bardons (1832), 3 B. & Ad. 2; Mortimer v. Moore (1845), 8 Q. B. 294; Mercer v. Denne (1905), 74 L. J. Ch. 723.

Customs of the manor.]—*See* COPYHOLDS, Vol. XIII., pp. 31–32, Nos. 283–287.

SECT. 9.—PROOF.

SUB-SECT. 1.—IN GENERAL.

199. Necessity for—No inference from existence of similar custom elsewhere—Adjacent parishes.]—In a question upon the custom of tithing in the parish of A., evidence that such a custom exists in the adjacent parishes, is not admissible. *Secus*, if the custom be laid as the general custom of the whole county.—FURNEUX v. HUTCHINS (1778), 2 Cowp. 807; 98 E. R. 1373.

200. — Customs of England & Jersey.]—The existence of a feudal custom in one country, as England, affords no legal inference of its existence in another country, as Jersey.

Those who claim a feudal burden are bound to establish, by evidence of the custom of the country where the claim is read, that such a burden does exist (LEACH, M.R.).—A.-G. v. SYMONDS (1830), 1 Knapp, 390; 12 E. R. 368, P. C.

Custom of other manors.]—*See* COPYHOLDS, Vol. XIII., p. 29, Nos. 258–266.

201. — Direct proof—Custom to compensate for damage—Not in definition of legal damage.]—A custom to compensate for a species of damage which does not fall within the ordinary definition

PART I. SECT. 7.

*m. Extension of—Increasing customary tolls.]—*A right to levy bridge custom existed under ancient charters, the Scottish Parliament confirming same, "as it has been in use to be exacted." At different times the magistrates in whom the right existed, had issued tables of bridge customs conforming for the most part with one

another, but in 1854 they attempted to introduce certain new duties & to increase existing ones:—*Held*: they were not entitled so to do.—MAXWELL v. PROVOST OF DUMFRIES (1866), 4 Macph. (Ct. of Sess.) 764.—SCOT.

PART I. SECT. 8.

194 i. Construed strictly.]—A custom must be construed strictly.—HUR-

PURSHAD v. SHRO DYAL (1876), L. R. 3 Ind. App. 259.—IND.

PART I. SECT. 9, SUB-SECT. 1.

*n. Necessity for—Whether existence of custom elsewhere admissible.]—*Evidence of the custom at T., the contract being made in C.:—*Held*: properly rejected.—WILLIAMS v. CORBY (1880), 5 A. R. 626.—CAN.

Sect. 9.—Proof: Sub-sects. 1 & 2, A. & B.]

of legal damage, & which is not *ejusdem generis* with that of which proof was given, needs for its establishment at least some direct proof of its existence, & ought not to be inferred from the fact of ordinary damage to the surface of the land in the legal sense of the words having been always paid for (LORD PENZANCE).—BALLACORKISH SILVER, LEAD & COPPER MINING CO. v. HARRISON (1873), L. R. 5 P. C. 49; *sub nom.* BALLACORKISH MINING CO. v. DUMBELL, 43 L. J. P. C. 19; 29 L. T. 658; 38 J. P. 148; *sub nom.* DUMBELL v. BALLACORKISH SILVER, LEAD & COPPER MINING CO., 22 W. R. 277, P. C.

Annotations:—*Reid*. A.-G. for Isle of Man v. Mylchreest (1879) 4 App. Cas. 294. *Mentd.* Eardley v. Granville (1876), 3 Ch. D. 826.

202. — Where custom not sufficiently notorious—Judicial notice not taken.]—(1) A custom with regard to the hiring of domestic servants, to the effect that, in the absence of special contract, there is a right on the part of either the master or the servant, to determine the service, at the end of the first calendar month, by notice given at or before the expiration of the first fortnight, is not a notorious custom of which the cts. will take judicial notice; but, where such a custom is relied on, its existence must be proved by evidence in each particular case.

A custom is what is so well known & understood that in transacting business it is unnecessary to mention it, because it is so well known that it must be taken to be incorporated in every contract, unless something to the contrary is said. For instance, there is the custom of a month's notice or a month's wages, which is so well known that every person who is hired as a domestic servant is taken to be engaged on those terms, unless there is an express stipulation to the contrary. The question as to existence of a custom is a question of fact, & it is necessary to prove the custom in each case, until eventually it becomes so well understood that the cts. take judicial notice of it. Once it is admitted that there is a custom, it becomes clear that the custom may change, & a new custom may become notorious, so as to be incorporated into every contract, unless it is expressly excluded. Then there comes a further stage, where the custom need no longer be proved, but the ct. will take judicial notice of it. In the present case the custom certainly has not got to the stage of being judicially noticed, but the ct. must in each case have evidence of the custom, & must form an opinion on that evidence. Here the county ct. judge has formed an opinion, & we cannot review his finding (CHANNELL, J.).

(2) Such a custom is not unreasonable, & therefore, if, in any particular case, its existence were sufficiently proved by evidence, the ct. would, give effect to it.—*MOULT v. HALLIDAY*, [1898] 1 Q. B. 125; 67 L. J. Q. B. 451; 77 L. T. 794; 62

J. P. 8; 46 W. R. 318; 14 T. L. R. 109; 42 Sol. Jo. 117, D. C.

Annotation:—*As to* (1) *Consd.* *George v. Davies*, [1911] 2 K. B. 445.

— **Judicial notice.]—***See* Sect. 9, sub-sect. 2, B., *post*.

203. What must be proved—Past instances of user.]—CHAMBERLAYN v. SYMONDS (1740), Barn. Ch. 98; 27 E. R. 570, L. C.

204. Onus — On party alleging custom.]—Proof of the custom lies on the party alleging it.—CALDECOTT v. SMYTHIES (1837), 7 C. & P. 808, N. P.

205. Cannot sustain custom bad in law.]—JOHNSON v. CLARK, No. 106, *ante*.

206. Declaration of deceased person—Corporator as to custom of corporation.]—*Semble*: declarations of deceased corporators are evidence in support of a custom to exclude foreigners from the corp.—DAVIES v. MORGAN (1831), 1 Cr. & J. 587; 1 Tyr. 457; 9 L. J. O. S. Ex. 153; 148 E. R. 1557.

207. — Rector as to customs of parish.]—

(1) The parish of P. consisted of six several townships or hamlets, each of which had its own churchwarden & collected its own church rates. In 1848 W., by Order in Council, was created a separate rectory, & thenceforth ceased to be part of the parish of P., or to furnish a churchwarden or contribute any rates thereto. The evidence of the custom as to the appointment of churchwardens was as follows: In the township of P. the outgoing churchwardens presented to the rector the names of two persons, of whom the rector chose one to be churchwarden for the ensuing year. In each of the other townships, the selection of the persons submitted to the rector's choice was made at a meeting of the ratepayers of the township. As to P., this course was not always strictly adhered to, the churchwarden for the time being was sometimes, when circumstances rendered it convenient, requested by the rector to continue in office for another year. Upon a special case, in which it was agreed that ct. should draw inferences of fact:—*Held*: the custom was valid & sufficiently proved, notwithstanding the occasional deviations & the severance of the township of W. from the rest of the parish of P. did not affect the validity of the ancient custom.

(2) Declarations of a deceased rector were received as evidence of the custom.—*BREMNER v. HULL* (1866), L. R. 1 C. P. 748; Har. & Ruth. 800; 35 L. J. C. P. 332; 15 L. T. 352; 12 Jur. N. S. 648; 14 W. R. 964.

Annotations:—*Generally*, *Mentd.* Edney & Lunn v. Smallbones (1869), 21 L. T. 506; R. v. Green (1874), 31 L. T. 543.

208. Documentary — Record produced from proper source.]—A book produced from the muniment room of the corp. of London is receivable as evidence of a custom of London.—*BRUIN v. KNOTT* (1843), 12 Sim. 436; 6 Jur. 885; 59 E. R.

203 I. What must be proved—Past instances of user.]—Custom can only be inferred from a large number of individual acts, & the only proof of the existence of a custom must be by the multiplication or aggregation of a great number of particular instances.—*ANDERSON v. WADEY* (1899), 20 N. S. W. L. R. 412.—*AUS*.

203 II. — —.]—The best proof of custom is instances in which it has been acted on.—*LACIMAN RAI v. AKBAR KHAN* (1877), 1 L. R. 1 All. 440.—*IND*.

o. — In case of custom modifying the general law.]—Where it is sought to establish the existence of a custom, modifying or varying the

general law, the kind of evidence that ought to be regarded is evidence showing that the right claimed by custom was more or less contested & the contest abandoned by some one who if the custom had not existed, would have been entitled; or evidence showing that generally in the district the custom was followed to the exclusion of persons who, if it had not been for the custom, would presumably have enforced their right under the general law.—*RAMA NAND v. SURGIANI* (1894), 1 L. R. 16 All. 221.—*IND*.

204 I. Onus—On party alleging custom.]—The existence of a custom must be clearly proved & the onus of proving such existence lies upon the person

alleging it.—*VAN BREDA v. JACOBS*, [1921] App. D. 330.—*S. AF*.

203 I. Documentary—Record produced from proper source.]—The ct. will not acknowledge a custom of the Lord Mayor & Sheriff's ct., which is not certified by the Recorder. A certificate which does not come in an authenticated form & merely looks as if made to meet the occasion will not be recognised or acted upon.—*SIMMONDS v. ANDREWS* (1839), 1 Jebb & S. 531.—*IR*.

p. — Not newspapers.]—News-papers are not sufficient evidence to prove immemorial custom.—*RAI MANIK CHAND v. MADHORAM* (1869), 3 B. L. R. P. C. 5.—*IND*.

q. Sufficiency of—Final decree.]—

1200; *subsequent proceedings* (1845), 1 Ph. 572, L. C.

Annotation.—*Mentd.* *Brown v. Smith* (1878), 10 Ch. D. 377.

— *Of manorial customs.*—*See* COPYHOLDS, Vol. XIII., pp. 28–29, Nos. 244–254.

209. *Of user*—*Not to be wider than alleged custom*—*Excessive user cannot be rejected.*—*HAMMERTON v. HONEY*, No. 9, *ante*.

210. ————*]*—*BROCKLEBANK v. THOMPSON*, No. 49, *ante*.

211. ————*]*—*FARQUHAR v. NEWBURY RURAL COUNCIL*, No. 159, *ante*.

212. ————*]*—*Action brought by the lord of certain manors adjoining the Severn, a tidal & navigable river, for trespass on the foreshore, parcel of the manors, in a boat & on foot, for the purpose of shooting wild duck. Deft. denied that the foreshore was parcel of the manors, &, even if it were, he claimed the right to go upon the foreshore & shoot & carry away wild duck on the ground of immemorial user, as an inhabitant of the manors, being a wild fowler by occupation, by virtue of a custom of the manors.*

The only evidence of any exercise of the alleged right by persons being wild fowlers by trade is the evidence of an exercise by deft., his father, & by two others. It is not proved that any of these with the exception of deft. & his father, for some short period, lived in any part of the local area in which the alleged custom is said to prevail. It is proved that in exercising the alleged right none of them confined himself to shooting on the lands in question. Further, others not being wild fowlers by trade also exercised the alleged right. The user proved, therefore, is more extensive than the custom alleged (*PARKER, J.*).—*FITZHARDINGE (LORD) v. PURCELL*, [1908] 2 Ch. 139; 77 L. J. Ch. 529; 99 L. T. 154; 72 J. P. 276; 24 T. L. R. 564.

Annotation.—*Mentd.* *Secretary of State for India in Council v. Sri Rajah Chelikani Rama Rao* (1916), 85 L. J. P. C. 222.

213. ————*Not continuous or general.*—*An alleged right in the inhabitants of a parish to take gravel without stint from the bed of a river, the property in which was in pltf.*—*Held*: bad in law.

The result of the evidence is that the parish officials have taken gravel, but not that others have done so with any continuity or as a general practice (*SWINFEN EADY, J.*).—*HOUGH v. CLARK & HALL* (1907), 23 T. L. R. 682; 5 L. G. R. 1195.

Of reputation—*In manorial customs.*—*See* COPYHOLDS, Vol. XIII., p. 29, Nos. 255–257.

214. *Sufficiency of*—*Two witnesses.*—*It is laid down by the writers of best authority that there must be at least two witnesses to prove a custom, & that they must assign acts done as the ground of their belief (SIR WILLIAM SCOTT).*—*THE TWEED GEBROEDERS* (1801), 3 Ch. Rob. 336.

215. ————*Only part of custom.*—*Evidence of reputation of the custom of a manor, that, in default of sons, the eldest daughter, &, in default also of daughters, the eldest sister, & in case of the*

death of all, the descendants of the eldest daughter or sister respectively of the person last seised should take, is proper to be left to the jury of the existence of such a custom, as applied to a great nephew (the grandson of an eldest sister) of the person last seised; although the instances in which it was proved to have been put in use extended no further than those of eldest daughter & eldest sister, &, the son of an eldest sister.—*DOE d. FOSTER & JAMIESON v. SISSON* (1810), 12 East, 62; 104 E. R. 25.

Annotations.—*Consd.* *Locke v. Colman* (1836), 1 My. & Cr. 423. *Reid*. *Muggleton v. Barnett* (1857), 2 H. & N. 653; *Re Chenoweth, Ward v. Dweller* (1902), 71 L. J. Ch. 739.

216. ————*Existence proved prior to but not within living memory.*—*SCALES v. KEY*, No. 174, *ante*.

217. ————*May be of slender character*—*If custom otherwise good.*—*JOHNSON v. CLARK*, No. 100, *ante*.

— *In manorial customs.*—*See* COPYHOLDS, Vol. XIII., pp. 30–31, Nos. 269–278.

Of immemorial existence.—*See* Sect. 5, sub-sect. 1, B. (b) & (c), *ante*.

SUB-SECT. 2.—JUDICIAL NOTICE.

A. In General.

218. *Whether judicial notice taken*—*Unless custom pleaded.*—*The ct. is not bound to take notice of customs unless pleaded.*—*HUNT v. HARGILL* (1719), Fortes. Rep. 347; 92 E. R. 884; *sub nom.* *HARGILL v. HUNT*, 11 Mod. Rep. 304.

219. ————*General custom.*—*R. v. YARBOROUGH (LORD)*, No. 12, *ante*.

Pleading generally, see Sect. 10, *post*.

220. ————*Private customs in private places.*—*ANON.*, No. 2, *ante*.

— *Usages.*—*See* Part II., Sect. 4, sub-sect. 2, *post*.

— *Law merchant.*—*See* Part II., Sect. 2, *post*.

— *Customs of London.*—*See* METROPOLIS.

B. Local Customs of Descent.

221. *Borough English.*—*The law takes notice of the custom of borough English & gavelkind, what they are, & the incidents thereunto, & the consequences upon such a custom (BRIDGMAN, C.J.).*—*PAYNE v. BARKER* (1662), O'Bridg. 18; 124 E. R. 445; *sub nom.* *HALE v. —*, cited in 2 Ld. Raym. 1025; 1 P. Wms. 66; *sub nom.* *FANE v. BARR*, cited in 1 Salk. 243; 6 Mod. Rep. 121.

Annotations.—*Consd.* *Clements v. Scudamore* (1703), 1 P. Wms. 63; *Rider v. Wood* (1855), 1 K. & J. 644. *Mentd.* *Trash v. Wood* (1839), 4 My. & Cr. 324; *Doe d. Hamilton v. Clift* (1840), 12 Ad. & El. 566; *Mallinson v. Siddle* (1870), 39 L. J. Ch. 426; *Re Hudson, Cassels v. Hudson*, [1908] 1 Ch. 655.

222. ————*]*—*The common law takes notice of these customs of gavelkind & borough English (HOLT, C.J.).*—*CLEMENTS v. SCUDAMORE* (1703), 1

The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom.—*GURDAYAL MAL v. JHANDU MAL* (1888), 1 L. R. 10 All. 585.—*IND.*

r. ————*]*—*Decrees of competent cts. are good evidence of the existence of customs of succession in particular communities.*—*BA'I SANTOK v. BA'I SANTOK* (1894), 1 L. R. 20 Bom. 53.—*IND.*

s. ————*]*—*Judicial decisions in which a custom has been recognised are good evidence of the existence of such custom.*—*SHIMBU NATH v.*

GAYAN CHAND (1894), 1 L. R. 16 All. 379.—*IND.*

PART I. SECT. 9, SUB-SECT. 2.—A.

t. *Whether judicial notice taken.*—*Once a custom is proved, cts. are entitled to recognise its existence.*—*DAHYABHAI MOTIRAM v. CHUNILAL KESHORDAS* (1913), 1 L. R. 38 Bom. 183.—*IND.*

a. ————*]*—*In the absence of judicial decisions, the ct. may take judicial notice of any general custom which is not only well established but*

reasonable in itself.—*SEAVILLE v. COLLEY* (1891), 9 S. C. 39.—*S. AF.*

b. ————*]*—*The custom among the Maoris that on the death of a chief or person of importance a tangi or funeral feast should be held, & that its cost should be borne by the property of the dead person, seeing that it is a general & immemorial custom, not contrary to any statute, not unreasonable, & is considered morally binding upon them & not merely optional by the Maoris themselves, is a custom which ought to be recognised by the ct. as law.*—*PUBLIC TRUSTEE v. LOASBY* (1908), 27 N. Z. L. R. 801.—*N. Z.*

Sect. 9.—Proof: Sub-sect. 2, B. Sects. 10 & 11: Sub-sects. 1, 2, 3, 4, 5 & 6. Sects. 12 & 13.]

P. Wms. 63; Holt, K. B. 124; 6 Mod. Rep. 120; 2 Ld. Raym. 1024; 1 Salk. 243; 24 E. R. 295.

Annotations:—Mentd. Hartop v. Hoare (1743), 2 Stra. 1187; Doe d. Norfolk v. Saunders (1783), 3 Doug. K. B. 303; Locke v. Colman (1836), 1 My. & Cr. 423; Trash v. Wood (1839), 4 My. & Cr. 324; Doe d. Hamilton v. Clift (1840), 12 Ad. & El. 566; Rider v. Wood (1855), 1 K. & J. 644; Hook v. Hook (1862), 1 Hem. & M. 43; Re Smart, Smart v. Smart (1881), 18 Ch. D. 165; Re Hudson, Cassels v. Hudson, [1908] 1 Ch. 655.

223. — Not if only incidents of custom alleged.]—RIDER v. WOOD, No. 197, ante.

224. Gavelkind.]—PAYNE v. BARKER, No. 221, ante.

225. —.]—CLEMENTS v. SCUDAMORE, No. 222, ante.

226. —.]—The custom of gavelkind is the common law of the land in Kent, & its extension to collaterals, is, therefore, a question for the judge & need not be proved by usage as in the case of a manorial custom which is in contravention of the common law.—Re CHENOWETH, WARD v. DWELLEY, [1902] 2 Ch. 488; 71 L. J. Ch. 739; 86 L. T. 890; 50 W. R. 663; 18 T. L. R. 702; 46 Sol. Jo. 634.

See, now, Law of Property Act, 1922 (c. 10), s. 148.

SECT. 10.—PLEADING AND PRACTICE.

227. Pleading—Customs of London—Right of all citizens to use privilege.]—In pleading a custom of London, it is sufficient to say that every citizen may use the customary privilege.—R. v. BAGSHAW (1634), Cro. Car. 347; 79 E. R. 904.

Annotation:—Mentd. Hutchins v. Player (1663), O. Bridg. 272.

Customs of London generally, *see* METROPOLIS.

228. — Custom must be substantially laid.]—LOVE v. — (1615), 1 Roll. Rep. 193; 81 E. R. 425.

229. — —.]—Though the Ct. of Ch. does not take customs so strictly certain as Cts. of law, yet it requires them to be substantially laid.—CARTE v. BAILL (1747), 3 Atk. 406; 2 Eag. & Y. 103; 26 E. R. 1086, L. C.

Annotations:—Mentd. Ekins v. Dormer (1747), 3 Atk. 534; Kennicott v. Watson (1814), 2 Price, 250, n.; Jesus College v. Gibbs (1835), 1 Y. & C. Ex. 145.

230. — Allegation must be positive.]—Custom to remove from a corpn. *ad libitum*, good, but that must be returned positively.—R. v. COVENTRY CORPN. (1698), 2 Salk. 430; 1 Ld. Raym. 391; 91 E. R. 373.

231. — — & how custom applicable—Rule adhered to in equity.]—CHAMPNEYS v. BUCHAN, No. 23, ante.

232. — Allegation must be in specific terms.]—Semble: a special custom must be stated with particularity.—BENNET v. EVANS (1673), 1 Freem. K. B. 314; 89 E. R. 232.

233. — Not “some such custom.”]—A bill for tithes & laying custom for the parishioners to give notice of setting out tithes, or that there is some such custom, is bad & will be dismissed with costs.—BEAVER v. SPRATLEY (1734), Bunb. 333; 145 E. R. 691.

234. — Necessity to aver that case within the custom.]—A justification under a custom must contain averments to show that deft.'s case is within the custom.—LINCOLN (BP.) v. ATWOOD

(1673), 1 Freem. K. B. 101; 89 E. R. 74; *sub nom.* LINCOLN (BP.) v. ALTON, HAMMOND & LONG, 3 Keb. 161; *sub nom.* LINCOLN (BP.) v. ALLEN, Cart. 204.

235. — Particular exceptions must be stated.]—Custom ill set forth for want of stating the particular exceptions to it.—GRIFFIN v. BLANDFORD (1774), 1 Cowp. 62; 98 E. R. 968.

Annotation:—Reid. Drewell v. Towler (1832), 1 L. J. K. B. 228.

236. — Allegation of existence from time immemorial sufficient—Without stating how custom originated.]—R. v. ROLLETT, No. 45, ante.

237. — How far a traverse necessary—In replication to plea of custom.]—If a custom be pleaded, another custom repugnant to it cannot be replied without a traverse, but a custom or matter consistent with it may, without a traverse.—KENCHIN v. KNIGHT (1740), 1 Wils. 253; 95 E. R. 603; *sub nom.* KINCHIN v. KNIGHT, 1 Wm. Bl. 49; cited in 2 Wils. 101.

Annotations:—Reid. Ball v. Herbert (1789), 3 Term Rep. 253; Parkin v. Radcliffe (1798), 1 Bos. & P. 282; Weedon v. Woodbridge (1850), 19 L. J. Q. B. 217.

238. — Mutual remedies for breach of complementary customs.]—Where there was a custom for a corpn. to keep the bulwarks & prisms of a borough in repair, & a custom for the corpn. to receive from the inhabitants, in consideration thereof, a certain duty called tanestry:—Held: inasmuch as the corpn. & inhabitants were under mutual duties to each other, for breach of which they had mutual remedies, the two customs were to be considered as distinct customs & not one as parcel of the other, & in such cases it was not necessary for the party who traversed one custom to traverse, or take any notice of, the other.—GRIFFITH v. WILLIAMS (1752), Say. 56; 1 Wils. 338; 96 E. R. 801.

Annotation:—Mentd. Giles v. Groves (1848), 12 Q. B. 721.

239. — Unnecessary where custom embodied in bye-law—Right to distrain.]—Where a deft. justifies taking a distress by virtue of a bye-law made under a customary right, if the bye-law ordains the distress, he need not show a customary right to distrain.—LAMBERT v. THORNTON (1696), 1 Ld. Raym. 91; 91 E. R. 957.

240. Right to begin—Existence of custom substantial issue for trial.]—BASTARD v. SMITH, No. 59, ante.

Parties—Bill to establish manorial custom.]—See COPYHOLDS, Vol. XIII., p. 31, Nos. 281–282.

SECT. 11.—CUSTOMARY RIGHTS IN ALIENO SOLO.

SUB-SECT. 1.—IN GENERAL

See, generally, EASEMENTS & PROFITS A PRENDRE.

241. Nature of—Not an easement.]—A claim by custom, for all the freemen & citizens of a neighbouring city to run horseraces over certain land on Ascension Day in every year is not a claim to an easement within the meaning of Prescription Act, 1832 (c. 71), s. 2.—MOUNSEY v. ISMAV (1865), 3 H. & C. 486; 34 L. J. Ex. 52; 12 L. T. 26; 11 Jur. N. S. 141; 13 W. R. 521; 159 E. R. 621.

Annotations:—Reid. Sowerby v. Coleman (1867), L. R. 2 Exch. 96; Mercer v. Denne, [1905] 2 Ch. 538. **Mentd.** Shuttleworth v. Le Fleming (1865), 19 C. B. N. S. 687; Hall v. Nottingham (1875), 54 L. J. Q. B. 50; Met. Ry. v. Fowler, [1892] 1 Q. B. 165.

PART I. SECT. 10.

237 i. Pleading—How far a traverse necessary—In replication to plea of custom.]—In case for loss of goods, deft. pleaded a custom in navigating

Lake O. to carry cargo on deck. The replication did not expressly admit or expressly traverse the custom:—Held: under these pleadings, the custom was put in issue.—PATERSON v. BLACK (1848), 5 U. C. R. 481.—CAN.

PART I. SECT. 11, SUB-SECT. 1.

241 i. Nature of—Not an easement.]—A right to a profit in the soil of another cannot be claimed by custom.—MACNAMARA v. HIGGINS (1854), 4 I. C. L. R. 326; 7 Ir. Jur. 39.—IR.

242. — **Quasi-easement.**]—**BROCKLEBANK v. THOMPSON**, No. 49, *ante*.

243. **Effect of variation in user.**]—**MERCER v. DENNE**, No. 86, *ante*.

Essential characteristics of.]—*See* Sect. 5, *ante*.

SUB-SECT. 2.—PROFITS À PRENDRE.

See EASEMENTS & PROFITS À PRENDRE.

SUB-SECT. 3.—RIGHTS OF COMMON.

See COMMONS & RIGHTS OF COMMON, Vol. XI, p. 35, Nos. 462 *et seq.*

SUB-SECT. 4.—RIGHTS OF RECREATION.

Must be in limited class.]—*See* Nos. 8, 160–162, 164, 166, 169, *ante*.

“Seasonable time”—**Construction of.**]—No. 198, *ante*.

SUB-SECT. 5.—RIGHTS TO WATER.

See EASEMENTS & PROFITS À PRENDRE; WATERS & WATERCOURSES.

244. **Claim by inhabitants—Water for domestic use.**]—Water as it issues from a well or spring is not to be considered as produce of the soil so as to make the right to take it *in alieno solo*, for domestic purposes a *profit à prendre*. Such right is an easement only & may be claimed by custom.

Action for breaking pltf.'s close. Plea: justifying under a custom from time immemorial for all the inhabitants of the township in which pltf.'s close was situate to take water from a well or spring in that close & carry the same to their houses, to be used for domestic purposes. On demurrer:—*Held*: the custom as stated in the plea was good.

The reason why a *profit à prendre* cannot be supported by a custom in an indefinite number of people is that the subject of the *profit à prendre* would in that case be liable to be entirely destroyed (LORD CAMPBELL, C.J.).—**RACE v. WARD** (1855), 4 E. & B. 702; 24 L. J. Q. B. 153; 24 L. T. O. S. 270; 19 J. P. 563; 1 Jur. N. S. 704; 3 W. R. 240; 3 C. L. R. 744; 119 E. R. 259; *subsequent proceedings* (1857), 7 E. & B. 384.

Annotations:—*Consd.* Saltash Corp'n. v. Goodman (1881), 29 W. R. 639. *Refd.* Broadbent v. Ramsbotham (1856), 11 Exch. 602; Constable v. Nicholson (1863), 32 L. J. C. P. 240; Hall v. Nottingham (1875), 45 L. J. Q. B. 50; Pearce v. Scotcher (1882), 46 L. T. 342; Bower v. Sandford (1889), 5 T. L. R. 570; Mercer v. Denne, [1904] 2 Ch. 534. *Mentd.* Fitzhardinge v. Purcell, [1908] 2 Ch. 139; Schwann v. Cotton & Hayles (1916), 85 L. J. Ch. 689.

245. — — — — —.]—The inhabitants of a certain district were entitled by custom to the flow of water from a certain spring to a spout in the public highway, & to take water therefrom to use for domestic purposes. Deft., a proprietor of land through which the water flowed from the spring to the spout, abstracted & diverted the water on divers occasions so as substantially & sensibly to diminish the flow of water to the spout. Pltfs.

being inhabitants of a house within the district brought an action against deft. for wrongfully obstructing the flow of water. It appeared that many of the inhabitants had been put to inconvenience on divers occasions by failing to find water on going to the spout, while the flow was so diminished; but the jury found that pltfs. had not personally suffered any actual inconvenience or damage by want of water:—*Held*: pltfs. could maintain their action without having suffered actual damage individually, for the acts of deft., if continued, would be evidence of a right existing in him in derogation of the rights of the inhabitants of the district, among the number of whom were pltfs.—**HARROP v. HIRST** (1868), L. R. 4 Exch. 43; 38 L. J. Ex. 1; 19 L. T. 426; 33 J. P. 103; 17 W. R. 164.

Annotations:—*Refd.* Hammerton v. Dysart, [1916] 1 A. C. 57. *Mentd.* Wilts & Berks Canal Navigation Co. v. Swindon Waterworks Co. (1873), 29 L. T. 722; George v. Lysaght & Meade-King (1883), 49 L. T. 49; Goodhart v. Hyett (1883), 25 Ch. D. 182; Bower v. Sandford (1889), 5 T. L. R. 570; Brocklebank v. Thompson, [1903] 2 Ch. 314; McCartney v. Londonderry & Lough Swilly Ry., [1904] A. C. 301.

246. — — — — —.]—**BOWER v. SANDFORD** (1889), 5 T. L. R. 570.

Annotation:—*Refd.* Bradford Corp'n. v. Pickles, [1894] 3 Ch. 53.

SUB-SECT. 6.—RIGHTS OF WAY.

See, generally, EASEMENTS & PROFITS À PRENDRE.

Must be in limited class.]—*See* Nos. 17, 49, 156, 158, 159, *ante*.

Obstruction to perambulation of boundaries.]—*See* BOUNDARIES, FENCES & PARTY-WALLS, Vol. VII., p. 321, Nos. 413–418.

SECT. 12.—CUSTOMS OF LONDON.

See METROPOLIS.

SECT. 13.—EXTINGUISHMENT OF CUSTOM.

Customs of London.]—*See* METROPOLIS.

Manorial customs.]—*See* COPYHOLDS, Vol. XIII., p. 32, Nos. 291–292.

247. **How effected—By statute—Local customs of descent.**]—A. seised in fee of land in borough English makes a feoffment “according to common law usage.” These words have no effect; for customs which go with the land as in this case & as to gavelkind & such like customs as fix & order the descent of inheritances can be altered only by Parliament.—**ANON.** (1559), Jenk. 220; 145 E. R. 151.

248. — — — — —.]—**HAMMERTON v. HONEY**, No. 9, *ante*.

249. — — — — —.]—**Affirmative statute.**]—A custom to elect a scavenger in the Borough Ct. of Southwark is taken away by an Act of Parliament ordaining that scavengers shall be chosen in London & Westminster, & the liberties thereof, according to the ancient usages thereof, & appointing a new form of election in all other places; for the statute being affirmative destroys a local custom inconsistent with it.—**LONDON**

PART I. SECT. 11, SUB-SECT. 5.
e. **Claim by occupiers—Water for irrigation purposes.**]—Pltfs. were lessees from a zamindar of his entire zamindari, & were in occupation of lands depending for irrigation on a tank into which a natural stream emptied itself. Defts.

were tenants in the zamindari, holding, under a lease prior to that of pltfs., land supplied with water by an irrigation channel from the stream. Defts. erected a dam across the stream when it was low, & this had the effect of diverting all the water into the irriga-

tion channel supplying their land. Defts. pleaded that the dam had been erected in exercise of an established customary right of easement:—*Held*: the customary easement was reasonable.—**ORR v. RAMAN CHETTI** (1895), L. L. R. 18 Mad. 320.—**IND.**

Sect. 13.—Extinguishment of custom. Part II.
Sect. 1.]

CORPN. v. GATFORD (1675), 2 Mod. Rep. 39; 86 E. R. 928; *sub nom.* ANON., Freem. K. B. 203.

Negative statutes—Customs of London.]

—See METROPOLIS.

250. ——— Materiality of distinction between affirmative & negative statutes.]—By Solrs. Act, 1843 (c. 73), s. 27, attornies of the superior cts. of law at Westminster are entitled to be admitted as attornies in any inferior ct. of law in England & Wales. *Mandamus* to the Mayor & Aldermen of London to admit A., an attorney of a "certain inferior ct. within the City of London, called the Lord Mayor's Ct., on signing the roll of the said ct." The return stated the Lord Mayor's Ct. to be an immemorial ct. of record, having by custom jurisdiction as a ct. of law & a ct. of equity, with immemorial & peculiar privileges, which were set forth; & that there had been immemorially four attornies only, who enjoyed the exclusive right of practising in that ct., & some of those duties were peculiar & that their offices were the subject of purchase & sale & that there was not & never had been a roll for the applicant to sign. It was contended for pltf. that the affirmative general words of Solrs. Act, 1843 (c. 73), s. 27, did not repeal the custom of the city, but it was submitted in reply that, assuming the custom to be good, it could not avail against the statute.

The words "negative" & "affirmative" statutes mean nothing. The question is whether they are repugnant or not to that which before existed (ALDERSON, B.).—LONDON CORPN. v. R. (1848), 13 Q. B. 30; 17 L. J. Q. B. 330; 13 J. P. 3; 13 Jur. 33; 116 E. R. 1174; *sub nom.* LONDON CORPN. v. ASHURST, 11 L. T. O. S. 271, Ex. Ch.

Annotations:—*Mentd.* Skelton v. Rushby (1849), 4 Exch. 545; *Ex p.* Millard (1850), 15 L. T. O. S. 285; *lt. v.* S. E. Ry. (1853), 4 H. L. Cas. 471.

251. ——— Direct statutory enactment.]—Testator, domiciled & resident at the time of his death in the province of York, made a will, by which he appointed exors., who did not take the residue of his personal estate beneficially, but made no disposition of the beneficial interest in that residue:—*Held*: the residue was to be distributed according to Stat. Distributions, & not according to the custom.—FITZGERALD v. FIELD (1826), 1 Russ. 416; 4 L. J. O. S. Ch. 170; 38 E. R. 162.

Annotations:—*Refd.* Ploxford v. Brown (1856), 2 K. & J. 426. *Mentd.* Fry v. Sherborne (1829), 3 Sim. 243; *Whatford v.* Moore (1837), 3 My. & Cr. 270; *Swallow v.* Bluns (1855), 1 K. & J. 417.

252. ———.]—Long usage is of no avail against plain statutory enactments, & it can be binding on parties only as the interpreter of a doubtful law, & as affording a contemporaneous exposition. Where a statute, expressive as to some points, is silent as to others, usage may well supply the defect, if not inconsistent with express directions of the statute.—DUNBAR MAGISTRATES v. ROXBURGHE (DUCHESS) (1835), 3 Cl. & Fin. 335; 6 E. R. 1462, H. L.

Annotation:—*Refd.* Lord Advocate v. Walker Trustees, [1912] A. C. 95.

253. ———.]—As against a plain statutory enactment no usage, however long continued, can prevail.—LORD ADVOCATE v. WALKER TRUSTEES, [1912] A. C. 95; 106 L. T. 194; 28 T. L. R. 101, H. L.

254. ——— General words insufficient.]—Beerhouse Act, 1830 (c. 64), for permitting the general sale of beer by retail in England, does not supersede the custom of a borough, that no person shall carry on the trade of an alehouse-keeper therein who is not a burgess.—LEICESTER

CORPN. v. BURGESS (1833), 5 B. & Ad. 246; 2 Nev. & M. K. B. 131; 1 Nev. & M. M. C. 202; 2 L. J. K. B. 187; 110 E. R. 783.

Annotation:—*Consd.* R. v. Green (1874), 30 L. T. 255.

255. ——— In private Act.]—As a rule, existing customs or rights are not to be taken away by mere general words in an Act of Parliament. But without words especially abrogating them, they may be abrogated by plain directions to do something which is wholly inconsistent with them; & this may be the case though the Act is a private Act of Parliament, & though the particular custom may have been confirmed years before, by a verdict in a ct. of law.—GREEN v. R. (1876), 1 App. Cas. 513; 35 L. T. 495; 41 J. P. 196, H. L.; *reversg.* S. C. *sub nom.* R. v. GREEN (1874), 31 L. T. 543, Ex. Ch.

256. ——— Words repugnant to continued existence of custom.]—By a local Act, 9 Geo. 4, c. liv., comrs. were appointed for improving the town of B. That Act was repealed by the B. Improvement Act, 1852, which incorporated Towns Improvement Clauses Act, 1847 (c. 34), & enacted that all property & all rights & privileges vested in the comrs. under 9 Geo. 4, c. liv., should be transferred to the corpn. of B., to which was entrusted the duty of carrying into execution the new Act; that the council made good all damage to any buildings or lands by reason of carrying into execution any of the provisions of the Act, & pay to the owners & occupiers such amount of compensation for such injury as should be agreed upon or ascertained in the manner provided by Lands Clauses Act. In an action against the corpn. of B., by a mill-owner for depriving him of a flow of water to his mill, by casting mud & rubbish into the sewers & streams running into the river, defts. justified, first, under a twenty years' user partly by the comrs. under 9 Geo. 4, c. liv., & partly by themselves, of cleansing the streets from mud, etc., & of throwing such part thereof, as from its liquid state could not conveniently be carried away, into the sewers & streams; secondly, as the servants of the inhabitants, in whom a similar custom to cleaning the streets & dispose of the rubbish was alleged:—*Held*: if the custom had ever existed or could be supported, it was destroyed by Towns Improvement Clauses Act, 1847 (c. 34), s. 97, which rendered it unlawful for any person not employed by the council to remove dirt from the street.—EVANS v. BIRMINGHAM CORPN. (1853), 21 L. T. O. S. 182; 17 J. P. 422; 1 C. L. R. 858.

257. ———.]—GREEN v. R., No. 255, *ante*.

258. ——— Customary charge on tithes—Allotment of land in lieu of tithes.]—An ancient custom existed for the owner of rectorial tithes, as a charge thereon, to provide a bull & a boar for the use of the parishioners. In 1830 an Act of Parliament was passed for extinguishing tithes in the parish, whereby land was allotted to the owner of the tithes in lieu & satisfaction of the tithes, the Act making no mention of the custom:—*Held*: the charge which attached to the ownership of the tithes was not shifted to the ownership of the substituted land, & the owners of the land could not be compelled to observe the custom.—LANCHBURY v. BODE, [1898] 2 Ch. 120; 67 L. J. Ch. 196; 78 L. T. 14; 62 J. P. 248; 14 T. L. R. 178.

Annotation:—*Mentd.* *Re* Alms Corn Charity, Charity Comrs. v. Bode, [1901] 2 Ch. 750.

Customs of London.]—See METROPOLIS.

259. ———.]—Not by canon.]—By special custom, parishioners may choose churchwardens notwith-

standing the canons of King James in the year 1603.—*WARNER'S CASE* (1619), Cro. Jac. 532; 79 E. R. 456.

260. — [A prohibition having been granted to the spiritual ct. on the grounds that it had proceeded to swear a parish clerk named by the parson, according to the late canon that the parson of the church should have the placing of the clerk, when he ought to be named by the vestry:—*Held*: this was a good custom & the canon could not take it away.—*JERMYN'S CASE* (1623), Cro. Jac. 670; 79 E. R. 580.

Annotations:—*Mentd.* Peak v. Bourne (1732), 2 Stra. 942; Pitts v. Evans (1738), 7 Mod. Rep. 254.

261. — Not by continued non-user.]—*SCALES v. KEY*, No. 174, *ante*.

262. — Not by interruption of possession for ten or twenty years.]—*MERCER v. DENNE*, No. 22, *ante*.

263. — Statutory repeal of custom as regards one of six divisions of parish—Custom as to remainder unaffected.]—*BREMNER v. HULL*, No. 207, *ante*.

264. — Custom merged in statutory right.]—Where an Act of Parliament, according to its true construction, has embraced & confirmed a right which previously existed by custom or prescription, such right becomes thenceforth a statutory right,

& the lower right by custom & prescription is merged in & extinguished by the higher title of the Act of Parliament.

By prescription appts. had the right to take certain tolls. That right was an important right, & a right which in early times was not infrequently exercised. But the moment the Act of 9 Geo. 2, c. xv., was passed that right was gone. It is, therefore, clear that the nature of the right itself is completely altered in turning it into a statute & the right must continue, by virtue of the statute, without any power of revival or reverter back to its original nature. If that is the true view it is hopeless to contend that the original franchise of these appts. has continued by reason of the statute which gave them the new right being repealed. On the contrary, the effect of that is that all their right is gone (*LORD HALSBURY, C.*).—*NEW WINDSOR CORPN. v. TAYLOR*, [1899] A. C. 41; 68 L. J. Q. B. 87; 63 J. P. 164; 15 T. L. R. 67; *sub nom.* WINDSOR CORPN. v. TAYLOR, 79 L. T. 450, H. L.; *affg.* S. C. *sub nom.* TAYLOR v. NEW WINDSOR CORPN., [1898] 1 Q. B. 186, C. A.

Annotations:—*Refd.* A.-G. v. Reynolds, (1911) 2 K. B. 888. *Mentd.* A.-G. v. De Keyser's Royal Hotel, [1920] A. C. 508.

265. Repeal of statute—Does not revive custom.]—*NEW WINDSOR CORPN. v. TAYLOR*, No. 264, *ante*.

Part II.—Usages Generally.

SECT. 1.—IN GENERAL.

266. Defined—Evidence of agreement to deal upon particular terms.]—Usage is no more than evidence of an agreement to deal upon particular terms.

Where a general, continued & undisputed usage in favour of a wharfinger's general lien is clearly established, the inhabitants of the place, dealing with the wharfinger, must be presumed to know the usage, to acquiesce in it, & to adopt it into their dealings. But the acquiescence in the usage must be general; a majority of instances is not sufficient to render it binding upon every individual.

There may be a usage in one place varying from that which prevails in another. Where the usage is general, & prevails to such an extent that the party contracting with a wharfinger must be supposed conversant of it, then he will be bound by the terms of that usage. But then it should be generally known to prevail at that place (*BAYLEY, J.*).—*HOLDERNESS v. COLLINSON* (1827), 7 B. & C. 212; 1 Man. & Ry. K. B. 55; 6 L. J. O. S. K. B. 17; 108 E. R. 702.

Annotation:—*Refd.* Dresser v. Bosanquet (1862), 11 W. L. 116.

267. — General & prevailing course of business.]—Usage of trade is a general & prevailing course of business, & witnesses who are called to prove it should cause their minds to revolve over instances known to them of its having been acted upon.—*HALL v. BENSON* (1836), 7 C. & P. 711, N. P.

268. — Tacitly imported by parties into contract.]—A known rule & habit of dealing in a particular trade constitutes such a custom in relation to contracts in that trade, as to be the basis & form part of every agreement between parties connected with such trade, when the contrary is not expressed.

Where plffs.' agent granted a licence to carry on for two years mining works on ground not opened, & watched the working until the adventure proved successful, & then plffs. objected that, according to the custom of that district, the agent had no right to grant a licence for more than one year:—*Held*: plffs. were precluded from then objecting by reason of their having stood by without interfering with defts.' works.—*HARRISON v. AMES* (1850), 15 L. T. O. S. 321, L. C.

269. — [JUGGOMOHUN GHOSE v. MANICKCHUND, No. 30, *ante*.

270. — [A custom in a particular market that a broker who has purchased, & is purchasing, goods of a particular kind, in his own name, may take portions of those goods & supply them to principals who have employed him in his character of broker to buy such goods for them, is one of a peculiar nature, & cannot be supported as against a principal not proved to have been acquainted with it when he gave his order.

R., a merchant in Liverpool, gave orders to a tallow broker in London to buy certain quantities of tallow for him. The broker did not buy the specified quantities from any person, though he sent bought notes in the usual form: "Bought

PART II. SECT. 1.

267 i. Defined—General & prevailing course of business.]—An opinion held by men engaged in a particular profession as to their legal position & occasionally acted upon, is a very different thing from a commercial custom so universally acknowledged & so widely

accepted as to become one of the generally recognised usages of the business in which it prevails.—*FREEMAN v. STANDARD BANK OF SOUTH AFRICA, LTD.*, [1905] T. H. 26.—S. AF.

d. Pleading.]—If a right of action be founded upon a usage, which is in derogation of a general rule of law,

the usage must be set forth in the pleading; but if it be founded on an usage which is not in derogation of a general rule of law, but which modifies an exception to & brings the case within the general rule, it is not necessary to set it forth in the pleading.—*HURLEY v. MILWARD* (1839), Jo. & Car. 224.—IR.

Sect. 1.—In general. Sect. 2.]

of A. on your account," but, before & after the order, he bought from various persons, in his own name, larger quantities of tallow, proposing to allot to R. the quantities R. had desired to be bought. On R.'s refusal to accept, the broker sold the tallow, & brought an action for the differences:—*Held*: though the evidence showed such a mode of dealing to be the usage in the London tallow market, the action was not maintainable against a principal who did not appear to have had knowledge of its existence.

Customs of trade, as distinguished from other customs, are generally courses of business invented or relied upon in order to modify or evade some application which has been laid down by the cts., of some rule of law to business, & which application has seemed irksome to some merchants; & when some such course of business is proved to exist in fact, & the binding effect of it is disputed, the question of law seems to be, whether it is in accordance with fundamental principles of right & wrong. A stranger to a locality, or trade, or market, is not held to be bound by the custom of such locality, trade, or market, because he knows the custom, but because he has elected to enter into transactions in a locality, trade, or market wherein all who are not strangers do know & act upon such custom. The question, therefore, I submit, in the present case is, whether the alleged custom is not too much in favour of the brokers who set it up, whether it does not pass beyond due freedom & degenerate into injustice. If the custom which exists in fact is not unjust, as against principals ignorant of it, your Lordships will uphold it, however much it departs from the rules hitherto recognised by the cts. as applicable to the contract of employment between principals & brokers, but if it so far breaks from those rules as to be unjust to such principals in such contract, your Lordships will pronounce it to be void as a custom (BRETT, J.).—ROBINSON v. MOLLETT (1875), L. R. 7 H. L. 802; 44 L. J. C. P. 362; 33 L. T. 544, H. L.; *reversg.* S. C. *sub nom.* MOLLETT v. ROBINSON (1872), L. R. 7 C. P. 84, Ex. Ch.; (1870), L. R. 5 C. P. 646.

Annotations:—*Apld.* Perry v. Barnett (1885), 15 Q. B. D. 388. *Consd.* Beckhushon & Gibbs v. Hamblet, [1900] 2 Q. B. 18. *Distd.* Levitt v. Hamblet, [1901] 2 K. B. 53; Scott & Horton v. Godfrey, [1901] 2 K. B. 726. *Refd.* Tetley v. Shand (1871), 25 L. T. 658; Sachs v. Spielman (1889), 5 T. L. R. 487; Anderson v. Beard, [1900] 2 Q. B. 260; Matveleff v. Crossfield (1903), 51 W. R. 365; Johnson v. Kearley, [1908] 2 K. B. 514. *Mentd.* Armstrong v. Stokes (1872), L. R. 7 Q. B. 598; R. v. Christian (1873), 43 L. J. M. C. 1; Hollins v. Fowler (1875), L. R. 7 H. L. 757; *Re* Simpson, *Ex p.* Morgan (1876), 34 L. T. 329; *Re* Rogers, *Ex p.* Rogers (1880), 15 Ch. D. 207; May & Hart v. Angell (1898), 14 T. L. R. 551.

271. ———.]—MOULT v. HALLIDAY, No. 202, *ante*.

Notoriety of usages.—*See* Sect. 3, sub-sect. 1, *post*.

272. Need not be universal.]—It is enough, if a custom is a prevailing usage; it is not necessary that it should be an universal one (SIR GEORGE ROSE).—*Re* ASHTON & CROSSLEY, *Ex p.* SCARTH (1840), 1 Mont. D. & De G. 240; 4 Jur. 826, Ct. of R.

273. Loss of right to claim benefit of.—By delay —[in compliance.]—Where goods are sold by sample, evidence of a custom of trade as to returning or making an allowance for such of the goods as do not answer the sample, is receivable. But in such a case the vendee cannot claim the benefit of the custom, if he have not elected to comply with it within a reasonable time.—COOKE v. RIDDELIEN (1844), 1 Car. & Kir. 561, N. P.

274. ——— Or acquiescence.]—HARRISON v. AMES, No. 268, *ante*.

Exclusion, modification & extinguishment.—*See* Sect. 8, *post*.

Distinguished from custom.—*See* Part I., Sect. 3, *ante*.

SECT. 2.—RECOGNITION OF USAGES—THE LAW MERCHANT.

275. Defined.]—GOODWIN v. ROBERTS, No. 31, *ante*.

276. Receives judicial notice.]—PEIRSON v. POUNTEYS (1608), Yelv. 135; 1 Brownl. 102; 80 E. R. 91.

277. ———.]—BELASYSE v. HESTER (1697), 2 Lut. App. 1589; 125 E. R. 873; *sub nom.* BEL-LASIS v. HESTER, 1 Ld. Raym. 280.

Annotations:—*Mentd.* Story v. Atkins (1726), 2 Ld. Raym. 1427; Coleman v. Sayer (1728), 1 Barn. K. B. 303; R. v. Adderley (1780), 2 Doug. K. B. 463; Hill v. White & Williams (1839), 8 Scott, 249; Young v. Higgon (1840), 6 M. & W. 49; Dundalk Western Ry. v. Tapster (1841), 2 Ry. & Can. Cas. 586.

278. ——— Part of common law.]—The custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice; & if any doubt arise to them about the custom, they may send for the merchants to know the custom, as they may send for the civilians to know their law (HOBART, C.J.).—VANHEATH v. TURNER (1621), Win. 24; 124 E. R. 20.

279. ———.]—The custom of merchants is part of the common law, & the cts. will take judicial notice of it without being specially pleaded. CARTER v. DOWNTISH (1689), 1 Show. 127; 3 Mod. Rep. 220; Carth. 83; 89 E. R. 492.

Annotations:—*Fold.* Williams v. Williams (1693), Carth. 269. *Refd.* Mogadara v. Holt (1691), 1 Show. 317.

280. ———.]—The custom of merchants is part of the common law, of which the cts. will take judicial notice, & the custom need not be set forth specially in the declaration.—WILLIAMS v. WILLIAMS (1693), Carth. 269; 9 E. R. 759, Ex. Ch.

Annotation:—*Consd.* Goodwin v. Roberts (1875), L. R. 10 Exch. 337.

281. ———.]—Custom of merchants, or law of merchants is the law of the kingdom & is part of the common law (FOSTER, J.).

The custom of merchants is part of the law of England, & cts. of law must take notice of it as such. There may indeed be some questions depending upon customs among merchants, where if there be a doubt about the custom, it may be fit & proper to take the opinion of merchants thereupon; yet that is only where the law remains doubtful. Even there the custom must be proved by facts, not by opinion only, & it must also be subject to the control of law (WILMOT, J.).—EDIE v. EAST INDIA CO. (1761), 2 Burr. 1216; 1 Wm. Bl. 295; 97 E. R. 797.

Annotations:—*Consd.* Crouch v. Credit Foncier of England (1873), L. R. 8 Q. B. 374; Biddell v. Clemens Horst Co., [1911] 1 K. B. 934. *Refd.* Goodwin v. Roberts (1875), L. R. 10 Exch. 337; Bechuanaland Exploration Co. v. London Trading Bank, [1898] 2 Q. B. 658. *Mentd.* Sigourney v. Lloyd (1828), 8 B. & C. 622; Cunliffe v. Whitehead (1837), 3 Bing. N. C. 828; Brown v. De Winton, Gay v. Lander (1848), 6 C. B. 336; Maxwell v. Deare (1854), 23 L. T. O. S. 1.

282. ———.]—The law of merchants & the law of the land is the same; a witness cannot be admitted to prove the law of merchants. We must consider it as a point of law (LORD MANSFIELD, C.J.).—PILANS & ROSE v. VAN MIEROP & HOPKINS (1765), 3 Burr. 1663; 97 E. R. 1035.

Annotations:—*Mentd.* Rann v. Hughes (1764), 7 Term Rep. 350, n.; Master v. Miller (1791), 4 Term Rep. 320; Tate v. Hilbert (1793), 2 Ves. 111; Vez v. Emery (1799), 5

Ves. 141; Johnson v. Collings (1800), 1 East, 98; Clarke v. Cook (1803), 4 East, 57; Jones v. Ashburnham (1804), 4 East, 455; Mendizabal v. Machado (1833), 3 L. J. C. P. 70; Easton v. Pratchett (1835), 4 Tyr. 472; Re Bentley, Ex p. Bolton (1838), 2 Deac. 537; Bank of Ireland v. Archer (1843), 11 M. & W. 383; Re Agra & Masterman's Bank, Ex p. Asiatic Banking Corp'n. (1807), 16 L. T. 162.

283. — [CROUCH v. CREDIT FONCIER OF ENGLAND, No. 464, post.

284. — Engrafted or incorporated into common law.]—GOODWIN v. ROBERTS, No. 31, ante.

285. — [—]—It is no doubt true that the character of negotiability can only be attached to a contract by the law merchant or by a statute; & it is also true that in determining whether a usage has become so well established as to be binding on the cts. of law, the length of time during which the usage has existed is an important circumstance to take into consideration; but it is to be remembered that in these days usage is established more quickly than it was in days gone by; more depends on the number of the transactions which help to create it than on the time over which the transactions are spread, & it is probably no exaggeration to say that nowadays there are more business transactions in an hour than there were in a week a century ago. Therefore the comparatively recent origin of this class of securities [debenture bonds] in my view creates no difficulty in the way of holding that they are negotiable by virtue of the law merchant. It is also to be remembered that the law merchant is not fixed & stereotyped; it has not yet been arrested in its growth by being moulded into a code. Our common law, of which the law merchant is but a branch, has in the hands of the judges the same facility of adapting itself to the changing needs of the general public. Thus it has been found convenient to treat securities like those in question in this action as negotiable, & the cts. often, recognising the wisdom of the usage, have incorporated it in what is called the law merchant, & have made it part of the common law of the country (BIGHAM, J.).—EDELSTEIN v. SCHULER & Co., [1902] 2 K. B. 144; 71 L. J. K. B. 572; 87 L. T. 204; 50 W. R. 493; 18 T. L. R. 597; 46 Sol. Jo. 500; 7 Com. Cas. 172.

Annotations.—Consd. Webb, Hale v. Alexandria Water Co. (1905), 21 T. L. R. 572. Refd. Clayton v. Le Roy, [1911] 2 K. B. 1031.

286. — Jus gentium.]—In an action by the indorsee against the drawer of a bill of exchange, if the declaration allege a custom to be that the drawer is liable on non-payment by the acceptor, & it appears that the bill was not presented until after it was due, yet pltf. shall recover, for the drawer always remains liable, & the setting forth of the custom shall be rejected as surplusage.

Though pltf. hath alleged a custom contrary to the fact, yet that is but surplusage, for it is no more than the law of merchants, & that is *jus gentium*, & we are to take notice of it (EYRES, J.).—MOGADARA v. HOLT (1691), 1 Show. 317; Holt, K. B. 113; 89 E. R. 597; sub nom. MEGGADOW v. HOLT, 12 Mod. Rep. 15.

287. — If sufficiently general.]—We take notice of the laws of merchants that are general, not of those that are particular usages (HOLT, C.J.).—LETHULIER'S CASE (1692), 2 Salk. 443; 91 E. R. 384.

Annotations.—Refd. Anderson v. Pitcher (1800), 2 Bos. & P. 164. Mentd. Gordon v. Morley, Campbell v. Bordieu (1747), 2 Stra. 1265; Shore v. Wilson (1842), 9 Cl. & Fin. 355.

288. — [—]—The law takes notice of the custom of merchants.—HAWKINS v. CARDY (1698), 1 Ld. Raym. 360; 1 Carth. 466; 91 E. R. 1137.

Annotation.—Refd. Edie v. East India Co. (1761), 2 Burr. 1216.

289. — [—]—The cts. will take notice of the

custom of merchants. Upon stating a bill of exchange it is not necessary to aver that it was made according to the custom of merchants.—ERESKINE v. MURRAY (1728), 2 Ld. Raym. 1542; 92 E. R. 500; sub nom. EVESKYN v. MERRY, 1 Barn. K. B. 87.

Annotations.—Refd. Gillett v. Roxburgh (1837), 6 L. J. Ex. 195. Mentd. Lumley v. Palmer (1734), 7 Mod. Rep. 216.

290. — [—]—The general lien of bankers is part of the law merchant, & is to be judicially noticed.—BRANDAO v. BARNETT (1846), 12 Cl. & Fin. 787; 3 C. B. 519; 8 E. R. 1622, II. L.; revsg. S. C. sub nom. BARNETT v. BRANDAO (1843), 6 Man. & G. 630, Ex. Ch.; restg. S. C. sub nom. BRANDAO v. BARNETT (1840), 1 Man. & G. 908.

Annotations.—Consd. Gibson v. Small (1853), 4 H. L. Cas. 353; Goodwin v. Roberts (1875), L. R. 10 Exch. 337; Biddell v. Clemens Horst Co., [1911] 1 K. B. 934. Refd. Bank of Australasia v. Brellat (1847), 6 Moo. P. C. C. 152; Foley v. Hill (1848), 2 H. L. Cas. 28; Jones v. Peppercorne (1858), John. 430; Bock v. Gorrisson (1860), 2 De G. F. & J. 434; Hare v. Henty (1861), 10 C. B. N. S. 65; Crouch v. Credit Foncier of England (1873), L. R. 8 Q. B. 374; Leese v. Martin (1873), L. R. 17 Eq. 222; Misa v. Currie (1876), 1 App. Cas. 554; London Chartered Bank of Australia v. White (1879), 4 App. Cas. 413; Bechualand Exploration Co. v. London Trading Bank, [1898] 2 Q. B. 658; Hope v. Glendinning, [1911] A. C. 419. Mentd. Ireland v. Armstrong & Armstrong (1843), 1 L. T. O. S. 12; Cooper v. Shepherd (1846), 7 L. T. O. S. 282; Reynell v. Lewis, Wyld v. Hopkins (1846), 4 Ry. & Can. Cas. 351; Smart v. Sanders (1846), 3 C. B. 380; Thayer v. Lister (1861), 30 L. J. Ch. 427; Frith v. Forbes (1862), 31 L. J. Ch. 793; Wyld v. Radford (1863), 33 L. J. Ch. 51; Jeffries v. Agra & Masterman's Bank (1866), L. R. 2 Eq. 674; Webb v. Whimney (1868), 18 L. T. 523; Brinsmead v. Harrison (1871), L. R. 6 C. P. 584; Stumore v. Campbell, [1892] 1 Q. B. 314; Re London & Globe Finance Corp'n., [1902] 2 Ch. 416.

Banker's lien.]—See BANKERS & BANKING, Vol. III., pp. 285-293.

291. — [—]—Semble: the ct. will take judicial notice of the custom of brokers as part of the general custom of merchants.—JONES v. PEPPER-CORNE (1858), John. 430; 28 L. J. Ch. 158; 32 L. T. O. S. 240; 5 Jur. N. S. 140; 7 W. R. 103; 70 E. R. 490.

Annotations.—Refd. Inman v. Clare (1858), John. 769; Bock v. Gorrisson (1860), 2 De G. F. & J. 434; Leese v. Martin (1873), L. R. 17 Eq. 224; Re London & Globe Finance Corp'n., [1902] 2 Ch. 416; Hope v. Glendinning, [1911] A. C. 419. Mentd. Re Bowes, Strathmore v. Vane (1886), 33 Ch. D. 586.

See, further, AGENCY, Vol. I., pp. 519, 550, Nos. 2002-2004.

— Of trade usages.]—See Part II., Sect. 4, sub-sect. 2, post.

— Of custom.]—See Part I., Sect. 9, sub-sect. 2, ante.

— Of customs of London.]—See METROPOLIS.

292. Capable of expansion.]—GOODWIN v. ROBERTS, No. 31, ante.

293. — [—]—EDELSTEIN v. SCHULER & Co., No. 285, ante.

294. Must be reasonable.]—DODDERIDGE v. ANTONY (1622), Win. 52; 124 E. R. 44.

295. Need not be pleaded.]—CARTER v. DOWNISH, No. 279, ante.

296. — [—]—WILLIAMS v. WILLIAMS, No. 280, ante.

297. — [—]—Pltf. declared that *secundum consuetudinem ei usum mercatorum*, the acceptor of a bill was bound to pay, without showing the custom at large, & deft. demurred:—Held: it was a better way than to show the whole at large.—SOPER v. DIBLE (1697), 1 Ld. Raym. 175; 91 E. R. 1013.

Annotation.—Refd. Gillett v. Roxburgh (1837), 6 L. J. Ex. 195.

298. — [—]—ERESKINE v. MURRAY, No. 289, ante.

299. Proof of—Evidence of merchants.]—VANHEATH v. TURNER, No. 278, ante.

Sect. 2.—Recognition of usages—The law merchant.**Sect. 3: Sub-sect. 1, A. & B. (a) & (b).]**

300. — Not admitted.]—PILLANS & ROSE v. VAN MIEROP & HOPKINS, No. 282, ante.

301. May be of recent origin.]—Where a mercantile usage to treat as negotiable the debentures of an English co. has been proved, the ct. will give effect to such usage, notwithstanding that it may be of recent origin only.—**BECHUANALAND EXPLORATION CO. v. LONDON TRADING BANK, [1898] 2 Q. B. 658; 67 L. J. Q. B. 986; 79 L. T. 270; 14 T. L. R. 587; 3 Com. Cas. 285.**

Annotations.]—*Fold. Edelstein v. Schuler, [1902] 2 K. B. 144. Auld Webb, Hale v. Alexandria Water Co. (1905), 21 T. L. R. 572. Reid. Clayton v. Le Roy, [1911] 2 K. B. 1031.*

302. —.]—EDELSTEIN v. SCHULER & Co., No. 285, ante.

As to negotiability of bills of lading by the law merchant, *see* **BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS, Vol. VI., pp. 456, 457, Nos. 2911, 2912.**

As to negotiability of scrip or share warrants & certificates & transfers by law merchant, *see* **BANKERS & BANKING, Vol. III., pp. 129, 273, Nos. 49, 850; BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS, Vol. VI., p. 451, Nos. 2885, 2886.**

As to negotiability of colonial & foreign bonds to recover by law merchant, *see* **BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS, Vol. VI., pp. 446, 447, 448, Nos. 2863, 2870, 2872-4.**

As to general lien attaching by law merchant though cargo specifically appropriated, *see* **BANKRUPTCY & INSOLVENCY, Vol. V., p. 704, No. 6181.**

SECT. 3.—CHARACTERISTICS.**SUB-SECT. 1.—NOTORIETY—KNOWLEDGE AND ACQUIESCENCE OF PARTIES.****A. General Rule.**

Particular usages.]—See Part III., post.

303. Essential to validity.]—A custom to be good must be reasonable, certain & notorious (*FARWELL, L.J.*).—**DEVONALD v. ROSSER & SONS, [1906] 2 K. B. 728; 75 L. J. K. B. 688; 95 L. T. 232; 22 T. L. R. 682; 50 Sol. Jo. 616, C. A.**

Annotations.]—*Reid. Meek v. Port of London Authority (1918), 119 L. T. 196. Mentd. Hulme v. Ferranti, [1918] 2 K. B. 426; Kimber v. Gas Light & Coke Co. (1918), 16 L. G. R. 280; Turpin v. Victoria Palace (1918), 88 L. J. K. B. 569.*

304. Effect of—Evidence of contract.]—There are some things so commonly known & practices so universal that, without evidence other than the transaction itself, one infers a contract. What

the parties do is itself, where there is such a known course of dealing, evidence of their agreement. In such a case the mere actings of the parties in accordance with usage is of itself evidence of a contract.—**NELSON (JAMES) & SONS, LTD. v. NELSON LINE (LIVERPOOL), LTD., [1908] A. C. 108; 77 L. J. K. B. 456; 98 L. T. 322; 24 T. L. R. 315; 52 Sol. Jo. 278; 11 Asp. M. L. C. 1; 13 Com. Cas. 235, H. L.**

Annotations.]—*Reid. Whittall v. Rahtken's Shipping Co., [1907] 1 K. B. 783; British & Mexican Shipping Co. v. Lockett, [1911] 1 K. B. 264. Mentd. Re Royal Mail Steam Packet Co. & River Plate S.S. Co., [1910] 1 K. B. 600; Mawson Shipping Co. v. Beyer, [1914] 1 K. B. 304; Paterson Zochonis v. Elder Dempster, [1923] 1 K. B. 420.*

Effect of usages upon contracts.]—See Sect. 6, post.

B. Knowledge and Acquiescence.**(a) In General.**

Particular usages.]—See Part III., post.

Implied authority of agent to act according to custom or ordinary course of business.]—See AGENCY, Vol. I., p. 308, Nos. 310 et seq.

Usages of Stock Exchange.]—See STOCK EXCHANGE.

Usage must be reasonable.—To bind party ignorant of its existence.]—See Sect. 3, sub-sect. 3, post.

305. General rule.]—By a bill of lading of wool from Odessa, freight was to be paid in London, on delivery, at the rate of 80s. per cwt., gross weight, tallow, & other goods, grain or seed, in proportion, as per London Baltic printed rates:—*Held*: extrinsic evidence was admissible to show that, by the usage of the trade, the meaning of the bill of lading was that 80s. per cwt. of tallow was to be taken as the standard by which the rate of freight on all other goods was to be measured.

Whenever a man undertakes to perform a duty he undertakes to perform it with a reasonable degree of care & skill; & that, where the performance has reference to a particular trade, necessarily involves an obligation on the party to make himself acquainted by due inquiry with the usages of that trade (*WILLES, J.*).—**RUSSIAN STEAM-NAVIGATION TRADING CO. v. SILVA (1863), 13 C. B. N. S. 610; 143 E. R. 242.**

Annotation.]—*Mentd. Southampton Steam Colliery Co. v. Clarke (1870), L. R. 6 Exch. 53.*

306. —.]—ROBINSON v. MOLLETT, No. 270, ante.

307. Essential to bind party.]—A policy was effected on horses warranted free from mortality & jettison. In the course of the voyage in consequence of a storm, they all died. It was found in the special verdict that a certain usage with respect to such policies prevailed amongst the underwriters subscribing policies at Lloyd's Coffee-

PART II. SECT. 3, SUB-SECT. 1.—A.

303 i. Essential to validity.]—If a local custom or usage of a particular place, or class or persons, be relied on, it must be shown that the parties knew the custom, as it is not binding on those who are ignorant of it.—**BURKE v. BLAKE (1875), 6 P. R. 260.—CAN.**

303 ii. —.]—An alleged custom denied by most manufacturers in similar business cannot be considered uniform nor universal or binding upon the parties.—**LEGGAT v. MARSH (1899), 29 S. C. R. 739.—CAN.**

303 iii. —.]—A trade custom must be one known to all persons whose interests required them to have knowledge of its existence.—**PARSONS v. HART (1900), 30 S. C. R. 473.—CAN.**

303 iv. —.]—While an alleged local usage in order to be binding in business

contracts need not have existed from time immemorial, yet it must be notorious, certain, & above all things reasonable, & must not offend against the intention of any legislative enactment. Every usage must have acquired such notoriety in the business or among the class of persons affected by it that any person in that business, or among that class, who enters into a contract affected by it, must be assumed to have intended the usage to form part of the contract. No one who is ignorant of an alleged usage can be bound by it, if it appears to be unreasonable.—**THE FREIRA v. THE R. S., [1922] 1 W. W. R. 409.—CAN.**

303 v. —.]—A party setting up a usage must go the length of establishing that the usage was so universally acquiesced in that everybody in the trade knew it, or that it could have been ascertained if the party had taken

the pains to inquire.—*Re SPOTTEN & Co. (1877), 11 I. R. Eq. 412.—IR.*

303 vi. —.]—A custom of trade must be notorious.—**HOGARTH & SONS v. LEITH COTTON SEED OIL CO., [1909] S. C. 955.—SCOT.**

PART II. SECT. 3, SUB-SECT. 1.—B. (a).

305 i. General rule.]—Parties are bound by a custom assented to by them.—**SELIG v. NOWE (1903), 36 N. S. R. 99.—CAN.**

307 i. Essential to bind parties.]—A usage does not bind underwriters unless known to, or acquiesced in by them.—**HENNESSY v. NEW YORK MUTUAL MARINE INSURANCE CO. (1863), 5 N. S. R. (1 Old.) 259.—CAN.**

307 ii. —.]—Pltf.'s contract was to lay bricks by the thousand, but he sought to affix to it an alleged usage

house in London, & merchants & others effecting policies there, & that the policy in question was effected there, but it was not found that *pltf.* was in the habit of effecting policies at that place:—*Held*: this usage was not sufficient to bind *pltf.*—*GABAY v. LLOYD* (1825), 3 B. & C. 793; 5 Dow. & Ry. K. B. 641; 3 L. J. O. S. K. B. 116; 107 E. R. 927.

Annotations:—*Consd.* Bayliffe v. Butterworth (1847), 1 Exch. 425; Sweeting v. Pearce (1859), 7 C. B. N. S. 449. *Refd.* Bartlett v. Pentland (1830), 10 B. & C. 760; Maxwell v. Deane (1854), 23 L. T. O. S. 1; Sweeting v. Pearce (1861), 9 C. B. N. S. 534. *Mentd.* Allen v. Cameron (1833), 1 Cr. & M. 832; Robertson v. Jackson (1845), 2 C. B. 412; Taylor v. Dunbar (1869), L. R. 4 C. P. 206.

308. —.]—The usage in a particular place, or of a particular class of persons, cannot be binding on other persons, unless those other persons are acquainted with that usage & adopt it (*LORD TENTERDEN, C.J.*).—*BARTLETT v. PENTLAND* (1830), 10 B. & C. 760; L. & Welsb. 235; 8 L. J. O. S. K. B. 264; 109 E. R. 632.

Annotations:—*Refd.* Robertson v. Jackson (1845), 2 C. B. 412; Partridge v. Bank of England (1846), 9 Q. B. 396; Bayliffe v. Butterworth (1847), 1 Exch. 425; Sweeting v. Pearce (1859), 7 C. B. N. S. 449. *Mentd.* Scott v. Irving (1830), 1 B. & Ad. 605; Barker v. Greenwood (1837), 2 Y. & C. Ex. 414; Muttilloll Seal v. Deut (1853), 5 Moo. Ind. App. 328; Pearson v. Scott (1878), 9 Ch. D. 198.

309. —.]—A usage which would have the effect of making the broker & not the underwriter the debtor to the assured for the loss can be binding only on those who are acquainted with it & have consented to be bound by it (*LORD TENTERDEN, C.J.*).—*SCOTT v. IRVING* (1830), 1 B. & Ad. 605; 9 L. J. O. S. K. B. 89; 109 E. R. 912.

Annotations:—*Consd.* Sweeting v. Pearce (1861), 9 C. B. N. S. 534. *Refd.* Stewart v. Aberdeen (1838), 7 L. J. Ex. 292; Robertson v. Jackson (1845), 2 C. B. 412; Pearson v. Scott (1878), 9 Ch. D. 198. *Mentd.* Barker v. Greenwood (1837), 2 Y. & C. Ex. 414; Bayley v. Wilkins (1849), 7 C. B. 886; Elgood v. Harris, [1896], 2 Q. B. 491.

310. —.]—Lessees of a coal mine covenanted, with the lessors that they would, by a certain time, get all the demised coal in the township of B. "not deeper than or below the level of" the bottom of the A. mine under a certain point at the surface. In an action for breach of the covenant, a question arose whether "level" was used in the ordinary sense, of a horizontal plane, or in a peculiar sense, having reference to the drainage:—*Held*: evidence was admissible to show the understanding of the term "level," used as in the above lease, among coal-miners.

It may be that the lessees, or some of them, resided at places out of the district mentioned, & in which different customs prevail, & they may have had no idea of the understanding in this district. It is therefore possible, though perhaps not probable, that they did not mean to contract according to the custom proved (*LORD DENMAN, C.J.*).—*CLAYTON v. GREGSON* (1836), 5 Ad. & El. 302; 6 Nev. & M. K. B. 694; 1 Har. & W. 159; 4 L. J. K. B. 161; 111 E. R. 1180.

Annotations:—*Refd.* Shore v. A.-G. (1842), 5 Scott, N. R. 958; Sweeting v. Pearce (1859), 7 C. B. N. S. 449.

311. —.]—*KIRCHNER v. VENUS*, No. 467, *post*.

312. —.]—The usage or practice of Lloyd's Coffee-house, that persons insuring there are bound to admit payment of a loss to them, made by way of set-off, between their broker & underwriter, of the premiums due to the underwriter, against the loss, does not apply where they are not shown to be

personally cognisant of such usage.—*SWEETING v. PEARCE* (1861), 9 C. B. N. S. 534; 30 L. J. C. P. 109; 5 L. T. 79; 7 Jur. N. S. 800; 9 W. R. 343; 1 Mar. L. C. 134; 142 E. R. 210, Ex. Ch.

Annotations:—*Refd.* Bridges v. Garrett (1869), L. R. 4 C. P. 580; Gibson v. Hillstrom (1869), 21 L. T. 302; Pearson v. Scott (1878), 9 Ch. D. 198; Blackburn v. Mason (1893), 37 Sol. Jo. 283; Matveieff v. Crossfield (1903), 51 W. R. 365. *Mentd.* Catterall v. Hindle (1867), L. R. 2 C. P. 368; Emanuel v. Roberts (1868), 9 B. & S. 121; Grissell v. Bristowe (1868), L. R. 3 C. P. 112; Papè v. Westacott, [1894] 1 Q. B. 272; Legge v. Byas, Mosley (1901), 18 T. L. R. 137; Bradford v. Price (1923), 92 L. J. K. B. 871.

313. —.]—*ABBOTT v. BATES*, No. 744, *post*.

314. —.]—An alleged custom among stock-brokers that a member of the London Stock Exchange, who has sold shares on the instructions of a country broker, who is acting for an undisclosed principal, is entitled to set off against the price of the shares a debt due to him from the country broker in respect of previous Stock Exchange transactions is unreasonable, & therefore will not bind the principal of the country broker, unless he is proved to have known of the alleged custom, & agreed to be bound by it.—*BLACKBURN v. MASON* (1893), 68 L. T. 510; 9 T. L. R. 286; 37 Sol. Jo. 283; 4 R. 297, C. A.

Annotations:—*Refd.* Anderson v. Sutherland (1897), 13 T. L. R. 163. *Mentd.* Crossley v. Magniac, [1893] 1 Ch. 594.

315. —.]—A policy of insurance was effected on a cargo of tea by an insurance broker on behalf of *pltf.*, & *deft.*, a member of Lloyd's, subscribed the policy. In accordance with a custom at Lloyd's, the broker & *deft.* had a running account which was periodically settled, whereby premiums due to *deft.* were set off as against losses due to the broker. A loss under the policy was thus settled in an account. The broker, before paying *pltf.* the sum so due, became *bkpt.*, and *pltf.* sued *deft.*:—*Held*: *pltf.* was not bound by the custom unless he knew of its existence, & it lay on *deft.* to prove that *pltf.* knew of the custom.—*MATVIEFF & Co. v. CROSSFIELD* (1903), 51 W. R. 365; 19 T. L. R. 182; 47 Sol. Jo. 258; 8 Com. Cas. 120.

316. —.]—*Express notice*:—*Semble*: a person dealing with Lloyd's & having no express notice of the customs of Lloyd's regulating the authority of brokers is not bound by such customs.—*ACME WOOD FLOORING CO., LTD. v. MARTEN* (1904), 90 L. T. 313; 20 T. L. R. 229; 48 Sol. Jo. 262; 9 Com. Cas. 157.

317. —.]—A marine insurance policy contained the clause: "This policy being issued in England all losses & claims arising hereon are to be recoverable only according to the custom & usages of Lloyd's unless otherwise stipulated by the terms of the policy":—*Held*: a custom of Lloyd's, whereby the insurers were entitled to settle the amount of a claim in account with the brokers of the assured, did not bind the assured unless the assured knew of the custom.—*MCCOWIN LUMBER & EXPORT CO., INCORPORATED v. PACIFIC MARINE INSURANCE CO., LTD.* (1922), 38 T. L. R. 901.

Usages relating to insurance.—*See* INSURANCE.

318. Onus of proof of as to knowledge.—*MATVIEFF & Co. v. CROSSFIELD*, No. 315, *ante*.

(b) When presumed.

As affecting property in reputed ownership of bankrupt.—*See* BANKRUPTCY & INSOLVENCY, Vol. V., p. 803, Nos. 6863 *et seq.*

of bricklayers, that, in a contract to lay bricks by the thousand, unless kiln count is specified, the method of ascertaining the number of thousands is by measuring the wall. There was no evidence that this alleged usage was known to *deft.*, & he stated that it was not known to him:—*Held*: the

alleged usage was not binding on *deft.*—*ALLEN v. DRANE* (1910), 14 W. L. R. 622.—*CAN.*

307 iii. —.]—Where a custom is purely local, it cannot be taken to control or explain a written instrument unless it was known to both parties.—*HOLMAN v. PERUVIAN NITRATE CO.*

(1878), 5 R. (Ct. of Sess.) 657.—*SCOT.*

307 iv. —.]—A party cannot avail himself of an alleged local rule of trade if it is not shown that the other party knew of the rule or accepted any liability thereunder.—*COOMES v. MULLER*, [1913] E. D. L. 430.—*S. AF.*

Sect. 3.—Characteristics: Sub-sect. 1, B. (b); sub-sect. 2.]

Implied authority of agent to act according to custom or ordinary course of business.]—See AGENCY, Vol. 1., p. 308, Nos. 310 *et seq.*

Usages of Stock Exchange.]—See STOCK EXCHANGE.

Usages in relation to insurance.]—See INSURANCE.

Effect of usages upon contracts.]—See Sect. 6, *post.*

319. Usage universal & general—Impliedly adopted in contract.]—A lien may be implied either from previous dealings between the same parties upon the footing of such a lien, or even from a usage of the trade so general as that the jury must reasonably presume that the parties knew of & adopted it in their dealing.—*RUSHFORTH v. HADFIELD* (1806), 7 East, 224; 3 Smith, K. B. 221; 103 E. R. 86.

Annotations:—*Reid. Judson v. Etheridge* (1833), 3 Tyr. 954. **Mentd.** *United States Steel Products Co. v. G. W. Ry.*, [1916] 1 A. C. 189.

320. ———.]—There may be usages which will control the general law, if universal & well known, upon the principle that every one must be presumed to know & to act according to the general practice. But to control the law, such an usage must be general & consistent with itself (*ABBOTT, C.J.*).—*TODD v. REED* (1821), 3 Stark. 16, N. P.; *subsequent proceedings*, 4 B. & Ald. 210.

Annotations:—*Mentd.* *Scott v. Irving* (1830), 1 B. & Ad. 605; *Barker v. Greenwood* (1837), 2 Y. & C. Ex. 414; *Stewart v. Aberdeen* (1838), 4 M. & W. 211; *Bayley v. Wilkins* (1849), 7 C. B. 886; *Muttyloil Seal v. Dent* (1853), 5 Moo. Ind. App. 328; *Sweeting v. Pearce* (1861), 9 C. B. N. S. 534; *Catterall v. Hindle* (1866), L. R. 1 C. P. 186; *Pearson v. Scott* (1878), 9 Ch. D. 198.

321. ———.]—*HOLDERNESS v. COLLINSON*, No. 266, *ante.*

322. ———.]—If a party claim a lien on plates for his bill for printing from them, in order to establish it, he must show a course of dealing so general & uniform that persons must be supposed to form their contracts tacitly on the understanding that there is such a usage.—*BLEADEN v. HANCOCK* (1829), 4 C. & P. 152; *Mood. & M.* 465, N. P.

Annotation:—*Mentd.* *Steadman v. Hockley* (1846), 15 M. & W. 553.

323. ———.]—Pltf. was employed to sell ground rents by auction, on the terms of receiving a commission of one per cent. on sale. After he had advertised the sale, but before the day of sale, deft. sold the ground rents by private contract. Three auctioneers proved the custom of the trade to be, that after an auctioneer was employed & the property advertised by him, he was entitled to the full commission on a sale being effected, although not through his direct agency. The question left to the jury was, whether this custom was so notorious, that deft. must have known it, & that if so, it was engrafted in the contract. The jury found for pltf. for the full commission.—*RAINY v. VERNON* (1840), 9 C. & P. 559, N. P.

PART II. SECT. 3, SUB-SECT. 1.—B. (b).

319 i. Usage universal & general—Impliedly adopted in contract.]—To establish a trade usage it must appear that the usage is so well known & acquiesced in that it may be reasonably presumed to have been an ingredient, tacitly imported by the parties into the contract.—*SUMMERS v. COMMONWEALTH* (1918), 25 C. L. R. 144.—**AUS.**

319 ii. ———.]—When it is known what the general usage of trade is in

regard to any branch of business the parties are to be looked on as intending to contract with reference to it unless there is proof to the contrary.—*BROWN & McDONELL v. BROWNE* (1851), 9 U. C. R. 312.—**CAN.**

319 iii. ———.]—A custom of trade must be so notorious that persons should be held to enter into agreements with reference to it.—*PRICE v. BROWNE* (1891), 1 L. R. 14 Mad. 420.—**IND.**

319 iv. ———.]—*WHITCOMBE &*

324. ———.]—*R. v. STOKE UPON TRENT (INHABITANTS)*, No. 602, *post.*

325. ———.]—*HARRISON v. AMES*, No. 268, *ante.*

326. ———.]—In the absence of any custom, underwriters are liable for injury to a ship's bottom, caused not by the ordinary action of the winds & waves, but by their violent action in a storm; and it is doubtful whether evidence of a custom that they are not to be liable for injuries to the bottom or below the water-line, unless caused by striking against the ground, or some foreign substance other than water, is admissible to control the construction of the policy.

Such usage must be shown to be so general as that it must be taken to be known & submitted to by the insured (*MELLOR, J.*).

Evidence is not admissible to alter or to control the terms of a policy; a custom not to allow for a loss as caused by perils of the seas must be so well known & general, as that it must be supposed to have been in the mind of both parties to the policy, & they must be deemed to have contracted on that footing. It must therefore have been notorious & recognised & acted upon, & if it was often disputed, & compromised, it cannot have been such a custom. A custom must be reasonable, or it cannot be legal, even though general (*MELLOR, J.*).

A custom must be well recognised & established, not a thing done to-day & not done to-morrow, not enforced sometimes & sometimes compromised, but something so well understood, that without being expressed it attached to every contract of this nature (*MELLOR, J.*).—*HARRISON v. UNIVERSAL MARINE INSURANCE CO.* (1862), 3 F. & F. 190, N. P.

327. ———.]—Where a clerk is hired at a certain sum "per annum" simply, the hiring is a hiring for a year, & in absence of a custom to the contrary, he cannot be discharged before the end of the year. The custom must be general, of reasonable antiquity, uniform, & sufficiently notorious that people would make their contracts on the supposition that it exists.—*FOXALL v. INTERNATIONAL LAND CREDIT CO.* (1867), 16 L. T. 637, N. P.

328. ———.]—*NELSON v. DAHL*, No. 710, *post.*

329. ———.]—Where a custom is sought to be set up giving an implied leave to a captain to stow goods on deck, it is not sufficient to prove that the practice is a frequent one. The custom must be proved to be so general & universal in the trade, & in the particular port from which the goods are taken that every one shipping goods there must be taken to know that other people's goods, if not his goods, might probably be stowed on deck, & unless such custom is proved a captain has no authority to bind any one by a jettison of the deck cargo.—*NEWALL v. ROYAL EXCHANGE SHIPPING CO.* (1885), 33 W. R. 868; *sub nom.* *DIXON v. ROYAL EXCHANGE SHIPPING CO., LTD.*, 1 T. L. R. 490, C. A.; *affd. sub nom. ROYAL*

TOMBS v. TAYLOR (1907), 27 N. Z. L. R. 237.—**N.Z.**

319 v. ———.]—To establish a custom it must be proved that a course of dealing has acquired such a notoriety, has been so well established & has become so universal in the particular trade, that it must be taken to be incorporated into any contract that is entered into by the parties dealing in this particular business.—*FERRERA v. GINGELL, AYLIF & Co.* (1921), E. D. L. 374.—**AF.**

EXCHANGE SHIPPING Co. v. DIXON (1886), 12 App. Cas. 11, H. L.

Annotations.—*Refd.* *Re Sutro & Hellbut*, Symons, [1917] 2 K. B. 348. *Mentd.* *Tancred, Arrol v. Steel Co. of Scotland* (1890), 15 App. Cas. 125; *Diederichsen v. Farquharson*, [1898] 1 Q. B. 150; *Shaw v. Symmons*, [1917] 1 K. B. 799.

330. — Unless expressly included.]—*MOULT v. HALLIDAY*, No. 202, *ante*.

331. — Known to ordinary creditors of debtor in trade.]—*Re MATTHEWS, Ex p. POWELL*, No. 428, *post*.

332. — Occasional practice insufficient.]—To establish a custom to give the consignee notice either of arrival or expected arrival in the Newcastle trade, it must not be a mere occasional practice, but a practice binding upon all; it must not be limited, but must be universal & general, & applicable to every consignee (*COCKBURN, C.J.*).—*HOULDER v. GENERAL STEAM NAVIGATION CO.* (1862), 3 F. & F. 170, N. P.

333. — —.]—*HARRISON v. UNIVERSAL MARINE INSURANCE CO.*, No. 326, *ante*.

334. Known to particular profession or trade.]—If there is a general usage applicable to a particular trade or profession, persons employing one in such trade or profession will be taken to have dealt with him, according to that usage.—*SEWELL v. CORP* (1824), 1 C. & P. 392, N. P.

335. — Contract through agent.—Ignorance of principal.]—If there be at a particular place an established usage in the manner of dealing & making contracts, a person who is employed to deal or make a contract there has an implied authority to act in the usual way.

Pltf., a sharebroker at L., at the request of *deft.*, who resided at O., sold for him scrip shares to C., a L. broker, which were not delivered on the day agreed upon, & C. in consequence bought other scrip at the market price, & then claimed & received from the *pltf.* the difference between the contract & the market price. It was the usage amongst brokers at L. to be responsible, to each other, upon such contracts, of which usage *deft.* was cognisant:—*Held*: *deft.* was liable for such difference. *Semble*: he would be bound by such usage, though he might not be cognisant of it.

A person who authorises another to contract for him, authorises him to contract in the usual way.—*BAYLIFF v. BUTTERWORTH* (1847), 1 Exch. 425; 5 Ry. & Can. Cas. 283; 17 L. J. Ex. 78; 10 L. T. O. S. 167; 11 Jur. 1019; 154 E. R. 181.

Annotations.—*Refd.* *Pollock v. Stables* (1848), 12 Q. B. 765; *Sweeting v. Pearce* (1859), 7 C. B. N. S. 449; *Ireland v. Livingston* (1866), L. R. 2 Q. B. 99. *Mentd.* *Simpson v. Rand* (1848), 17 L. J. Ex. 146.

See, further, AGENCY, Vol. I., p. 308, Nos. 310 *et seq.*

336. —.]—*PLAICE v. ALLCOCK*, No. 593, *post*.

337. —.]—Payment of freight was provided for in a charterparty at the rate of "75s. per ton of fifty cubic feet delivered for cotton or wool," for the carriage of a cargo of cotton between Bombay & Liverpool. Before putting the bales of cotton on board at Bombay they are subjected to great pressure, & on being taken out of the hold of the vessel they expand to a considerable extent. Freight was claimed by *pltf.* on the measurement of the bales taken after they were unloaded at

Liverpool, which considerably exceeded the measurement as taken at Bombay. At the trial it was proved that it was the custom in the Bombay trade, under charterparties similarly worded, to pay freight on the measurement of goods taken before shipment. But it was not directly shown that *pltf.* was cognisant of such a custom:—*Held*: the evidence of usage was properly admitted, & parties entering into a contract connected with a particular trade must be presumed to be cognisant of the usage connected with it.—*BUCKLE v. KNOOP* (1867), L. R. 2 Exch. 125; 36 L. J. Ex. 49; 16 L. T. 231; 15 W. R. 588; 2 Mar. L. C. 491; *affd.*, L. R. 2 Exch. 333, Ex. Ch.

338. — Need not be known to general public.]

—In order to establish a custom it is sufficient to prove that it is known to the whole trade, & it need not be proved that the custom is notorious to the public generally.—*Re COUSTON, Ex p. WATKINS* (1873), 8 Ch. App. 520; 42 L. J. Bcy. 50; 28 L. T. 793; 21 W. R. 530, L. C. & L. J.

Annotations.—*Consd.* *Re Couston, Ex p. Vaux* (1874), 9 Ch. App. 602; *Re Hill* (1875), 1 Ch. D. 503, n.; *Re Matthews, Ex p. Powell* (1875), 1 Ch. D. 501. *Mentd.* *Re Jones, Ex p. Lovering* (No. 2) (1874), 9 Ch. App. 621; *Re Cohn, Ex p. Cohen* (1878), 38 L. T. 884; *Harris v. Truman* (1881), 7 Q. B. D. 340; *Re Parker, Ex p. Turquand* (1885), 14 Q. B. D. 636; *Colonial Bank v. Whitney* (1886), 11 App. Cas. 426; *Re Goetz, Jonas, Ex p. Trustee*, [1898] 1 Q. B. 787; *Sharman v. Mason*, [1899] 2 Q. B. 679; *Re Watson, Ex p. Atkin*, [1904] 2 K. B. 753; *Hollinshead v. Egan*, [1913] A. C. 564; *French v. Gething*, [1922] 1 K. B. 236.

339. — & persons likely to be creditors.]—A custom must be well proved & shown to be known not only to persons in the same trade, but to others who are likely to be creditors. A man could not make a custom for himself (*per CUR.*).—*Re HILL* (1875), 1 Ch. D. 503, n.

Annotations.—*Consd.* *Re Matthews, Ex p. Powell* (1875), 1 Ch. D. 501. *Refd.* *Re Rose, Ex p. Linnell* (1888), 4 T. L. R. 255.

SUB-SECT. 2.—CERTAINTY.

Usages of Stock Exchange.]—*See* STOCK EXCHANGE.

As to particular usages.]—*See* Part III., *post*.

340. Essential to validity of usage.]—The usage of a trade must be certain & uniform, to make it binding on transactions in such trade.

Evidence admitted of usage in the cloth trade for goods to be sent for inspection.—*WOOD v. WOOD* (1823), 1 C. & P. 59, N. P.

341. —.]—*PLAICE v. ALLCOCK*, No. 593, *post*.

342. —.]—*FOXALL v. INTERNATIONAL LAND CREDIT CO.*, No. 327, *ante*.

343. —.]—*DAUN v. CITY OF LONDON BREWERY CO.*, No. 597, *post*.

344. —.]—*ABBOTT v. BATES*, No. 744, *post*.

345. —.]—*NELSON v. DAHL*, No. 710, *post*.

346. —.]—A contract in writing for the sale of barley at an agreed price per bushel provided that the barley at the time of shipment under the contract was to be "about as per sample," & contained an arbn. clause. The buyers having rejected the barley for inferiority to the sample,

PART II. SECT. 3, SUB-SECT. 2.

340i. Essential to validity of usage.]—Where the custom alleged is not shown to be certain it is not binding.—*PRICE v. BROWNE* (1891), 1 L. R. 14 Mad. 420.—*IND.*

340ii. —.]—Where a section of the Mahomedan community had been for many years in the habit of burying their dead near a darga in *pltf.*'s land,

& *pltf.* sued for an injunction restraining them from exercising this right in future:—*Held*: the right of burial claimed by *defts.* was not an easement but a customary right, which, being confined to a limited class of persons & a limited area of land, was sufficiently certain to be recognised as a valid local custom.—*MOHDIN v. SHIVLINGAPPA* (1899), 1 L. R. 23 Bom. 666.—*IND.*

340iii. —.]—A custom of trade must be definite & certain.—*HOGARTH & SONS v. LEITH COTTON SEED OIL CO.*, [1909] S. C. 955.—*SCOT.*

e. — Where custom doubtful.]—Where a custom of trade is doubtful the ct. is thrown upon the general principle of law.—*ANDERSON v. LAURIE & CO.* (1853), 1 W. R. 268.—*SCOT.*

Sect. 3.—Characteristics: Sub-sects. 2 & 3.]

the sellers relied before the arbitrator upon a custom of the London Corn Exchange, applicable to such contracts, by which the buyer was not entitled to reject for difference or variation in quality, unless the same was excessive or unreasonable, & was so found by arbn. under the contract. The arbitrator found that the barley was not "about as per sample," so as to entitle the sellers to insist upon payment of the full contract price without any allowance; but that the inferiority was not excessive or unreasonable, nor so great as to amount to a difference of description, & he awarded that the buyers were not entitled to reject the barley, but must accept it with an allowance in price in respect of the inferiority:—*Held*: the custom was good in law, not being unreasonable or uncertain or in contradiction of the written contract, & the award must therefore be upheld.

The fact that this custom depends in its operation upon what the tribunal which has to deal with it thinks to be reasonable does not make it in law uncertain so as to prevent any effect being given to it (CHANNELL, J.).—*Re WALKERS, WINSER & HAMM & SHAW, SON & Co.*, [1904] 2 K. B. 152; 73 L. J. K. B. 325; 90 L. T. 454; 53 W. R. 79; 20 T. L. R. 274; 48 Sol. Jo. 277; 9 Com. Cas. 174.

347. —.]—DEVONALD v. ROSSER & SONS, No. 303, *ante*.

See, also, AGRICULTURE, Vol. II., p. 32, No. 183; *BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS*, Vol. VI., p. 11, No. 18.

348. Degree of certainty.—As certain as written contract.—NELSON v. DAHL, No. 710, *post*.

349. Variation in different localities.—HOLDERNESS v. COLLINSON, No. 268, *ante*.

SUB-SECT. 3.—REASONABLENESS.

Particular usages.—*See* Part III., *post*.

Usages of Stock Exchange.—*See* STOCK EXCHANGE.

350. Essential to validity.—A custom of a particular country has very little effect against foreigners, unless it is reasonable & just.—*COGNAC* (1832), 2 Hag. Adm. 377.

Annotations:—*Held*. The Glenmanna (1860), Lush. 115. *Mentd.* The Heart of Oak (1841), 1 Wm. Rob. 204; The Grapeshot (1870), 22 L. T. 376.

351. —.]—(1) A custom or usage of trade must, to be binding, be reasonable, & is not so if it is such as honest & right-minded men would deem unfair & unrighteous.

(2) *Semle*: a usage in the undertaking business, that undertakers should in each funeral charge the entire original cost of certain articles of funeral feature used, although they might be used at other funerals, is unreasonable & so unfair & improper that reasonable, honest & right-minded men would not adopt it.—*PAXTON v. COURTNEY* (1860), 2 F. & F. 131, N. P.

Annotation:—*As to* (1) *Apld.* Produce Brokers Co. v. Olympia Oil & Cake Co., [1916] 2 K. B. 296.

352. —.]—HARRISON v. UNIVERSAL MARINE INSURANCE CO., No. 326, *ante*.

353. —.]—PLAICE v. ALLCOCK, No. 593, *post*.

354. — To bind party ignorant of usage.]—ROBINSON v. MOLLETT, No. 270, *ante*.

355. — —.]—In an action for negligence in not making a binding contract for the sale of shares, *deft.* relied upon a custom of the Bristol Stock Exchange to sell shares without complying with 30 & 31 Vict. c. 29:—*Held*: such a custom was unreasonable & illegal, & was not binding on *pltf.*, &, therefore, *deft.* was liable for the amount which *pltf.* would have received for the shares if the contract of sale had been binding.

Customs must be lawful in order to be binding; that is, they must be customs which can be incorporated into contracts without violating the law. *Deft.* could not, by disregarding the Act of Parliament, profess to make a contract, & then say, "This is not a contract, & the custom justifies me in disregarding the Act" (LORD COLERIDGE, C.J.).

If the custom sought to be enforced is not legal & reasonable, the person who does not know of its existence is not bound by it; he cannot be assumed to take upon himself an illegal custom (BRETT, L.J.).—*NEILSON v. JAMES* (1882), 9 Q. B. D. 546; 51 L. J. Q. B. 369; 46 L. T. 791, C. A.

Annotation:—*Folld.* Perry v. Barnett (1885), 15 Q. B. D. 388.

356. — —.]—The proposition that a person who directs another to deal upon a particular market is to be treated as if he knew the rules of that market, has been adopted in the law to some extent, but certainly not to this extent, that however unreasonable or illegal they may be, he is still to be treated as if he knew them (BRETT, M.R.).

The *cts.* have always taken upon themselves to consider whether a custom is or not within the bounds of reason, & if the custom is reasonable the *cts.* have said they will not recognise it as binding on people who do not know it & who have not consented to act upon it (BRETT, M.R.).—*PERRY v. BARNETT* (1885), 15 Q. B. D. 388; 54 L. J. Q. B. 466; 53 L. T. 585; 1 T. L. R. 580, C. A.

357. — —.]—A person who employs a broker to sell shares on the Stock Exchange authorises such broker to make a contract of sale in accordance with the rules & regulations there in force, & undertakes to indemnify the broker against any liability incurred by him under those rules, unless the rules relied on by the broker are either illegal or unreasonable & not known by the principal.

It may be that *deft.* did not know all the rules, but he knew that the Stock Exchange was a market, & he knew, or ought to have known, the rule by which *pltf.*s must make the contract in their own names, & in so doing make themselves personally liable as principals. *Deft.* must, therefore, by implication, be taken to have authorised *pltf.*s. to make themselves liable, according to the rules of the Stock Exchange, to all the consequences resulting from those rules, unless any rule could be held by the *ct.* to be illegal, or unreasonable & not known in fact by him. If the rule were illegal it could not bind *deft.*, & if it were unreasonable, although it might make the broker, it would not make *deft.* liable if he did not know of it (LORD ESHER, M.R.).—*HARKER v. EDWARDS* (1887), 57 L. J. Q. B. 147; 4 T. L. R. 92, C. A.

Annotation:—*Folld.* Smith v. Reynolds (1892), 66 L. T. 808.

PART II. SECT. 3, SUB-SECT. 3.

350.1. Essential to validity.—A custom which allows a broker to deviate from his instructions is unreasonable, & the *cts.* will not enforce it.—*ARLAPA NAYAK v. NARSI KISHAYJI & Co.*

(1871), 8 Bom. A. C. 19.—**IND.**

1. Test of reasonableness.—A trade custom that delivery of goods from particular mills need not be made until a reasonable time, to enable the vendor to obtain the goods from

those mills has elapsed from the receipt of the purchaser's specification, is not unreasonable.—*ROSS BROTHERS, LTD. v. SHAW & Co.*, [1917] 2 I. R. 367.—**IR.**

358. ———.]—**REYNOLDS v. SMITH** (1893), 9 T. L. R. 494, H. L.; *affg.* S. C. *sub nom.* **SMITH v. REYNOLDS** (1892), 60 L. T. 808, C. A.

359. ———.]—A bill of lading, incorporating conditions of a charterparty, provided: "Time for discharging at destination shall be according to the custom of the port for steamers at the port of discharge, demurrage, if incurred, to be paid by consignees at the rate of fourpence sterling per gross register ton per day." An alleged custom was set up to the effect that the consignee could not be required to take delivery at a faster rate than about 500 tons per day at the port of Bristol for River Plate grain cargoes. A vessel discharged a grain cargo under the above bill of lading at Avonmouth Dock, Bristol. The alleged custom had been a matter of dispute for years. The facilities of discharge as regards ships & the three docks in the port of Bristol had increased since the origin of the alleged custom. The rate of discharge in fact was often in excess of 500 tons per day:—*Held*: (1) no such custom now existed at Bristol for grain steamers generally or for River Plate grain steamers; (2) the charterparty must be read as "custom, if any, at the port of discharge"; (3) when a custom relates directly to the obligations of parties under certain circumstances it must, in order to be valid & to be binding on parties who do not know of the existence of the custom as a fact, be reasonable; (4) the custom was quite inapplicable to the state of things at present existing & that there was no such settled & established practice in the port as to satisfy the words of the charterparty; (5) if the custom applied to the altered circumstances, it was unreasonable; (6) contracting out of a custom might become so general as to destroy the custom; (7) when a custom becomes the exception & not the rule, there is no longer a custom.—**ROPER & CO. v. STOATE, HOSGOOD & CO.** (1905), 92 L. T. 328; 21 T. L. R. 245; 49 Sol. Jo. 262; 10 Asp. M. L. C. 32; 10 Com. Cas. 73.

Annotations:—*Generally*, *Mentd.* **Akt. Hekla v. Bryson, Jameson** (1908), 100 L. T. 155; **Baird v. Price, Walker** (1916), 115 L. T. 227.

360. ———.]—**DUNBAR v. CARDIFF PHILHARMONIC MUSIC-HALL CO.** (1893), 9 T. L. R. 461.

361. ———.]—**DEVONALD v. ROSSER & SONS**, No. 303, *ante*.

362. ———.]—A custom must be reasonable, & it is absolutely unreasonable to say that parties who sign their names to a document containing the terms of the contract between them should be permitted to say that a clause in that document does not form part of the contract because there is a custom by which it can be disregarded (**SCRUTTON, L.J.**).—**LEOPOLD WALFORD (LONDON) v. AFFRÉTEURS RÉUNIS SOCIÉTÉ ANONYME**, [1918] 2 K. B. 498; 119 L. T. 608; *sub nom.* **WALFORD (L.) (LONDON), LTD. v. AFFRÉTEURS RÉUNIS SOCIÉTÉ ANONYME**, 87 L. J. K. B. 1215; *affd. sub nom.* **AFFRÉTEURS RÉUNIS SOCIÉTÉ ANONYME v. LEOPOLD WALFORD (LONDON), LTD.**, [1919] A. C. 801, H. L.

Annotation:—*Mentd.* **French v. Leeston Shipping Co.** (1921), 37 T. L. R. 453.

363. ———.]—By a charterparty made in London deft. engaged to ship on board pltf.'s vessel at Bombay a full cargo at a certain price per ton, cotton to be calculated at fifty cubic feet per ton, & other goods according to the scale of tonnage of the East India Co. In an action of *assumpsit* for the freight:—*Held*: (1) it was competent to deft. to give evidence of a custom at

Bombay to calculate the freight upon a measurement of the bales of cotton immediately after they had been submitted to hydraulic or other pressure, so as to reduce them to the smallest practicable bulk; (2) it was competent to pltf., in order to show the unreasonableness of the alleged custom, to give evidence in reply, that the cotton had increased in bulk 15 per cent. upon the screw measurement by the time it was put on board the vessel.—**BOTTOMLEY v. FORBES** (1838), 5 Bing. N. C. 121; 1 Arn. 431; 6 Scott, 866; 8 L. J. C. P. 85; 2 Jur. 1016; 132 E. R. 1051.

Annotations:—*As to* (1) *Foll.* **Buckle v. Knoop** (1867), L. R. 2 Exch. 125. *Generally*, *Refd.* **Grissell v. Bristowe** (1868), L. R. 3 C. P. 112. *Mentd.* **Robertson v. Jackson** (1845), 2 C. B. 412; **Kirchner v. Venus** (1859), 12 Moo. P. C. C. 361.

364. Question of law.—The reasonableness or unreasonableness of a custom is a question of law for the ct. & not a question of fact for the jury (**LINDLEY, J.**).—**BRADBURN v. FOLEY** (1878), 3 C. P. D. 129; 47 L. J. Q. B. 331; 38 L. T. 421; 42 J. P. 344; 26 W. R. 423.

Annotations:—*Refd.* **Devonald v. Rosser**, [1906] 2 K. B. 728. *Mentd.* **Mansel v. Norton** (1883), 22 Ch. D. 769; **Priestley v. Stone** (1888), 4 T. L. R. 730.

365. ———.]—**PERRY v. BARNETT**, No. 356, *ante*. See, also, **AGRICULTURE**, Vol. II., p. 12, No. 48.

366. Test of reasonableness—Prejudicial to trade.—Deft. proved a custom for public warehousekeepers in London to have a general lien on all goods from time to time housed in their warehouses, for & in the name of the merchants or other persons by whom such public warehousekeepers are employed, for all money or any balance thereof due from such merchants or other persons to such warehousekeepers for expenses incurred by them about goods consigned from abroad. On motion to enter judgment *non obstante veredicto*:—*Held*: the custom was bad.

It appears to us that such a custom is at once unreasonable & unjust, & therefore bad in law. It is a custom which is obviously prejudicial in a direct manner, & in a very high degree, to foreign trade (**TINDAL, J.**).—**LEUCKHART v. COOPER** (1836), 3 Bing. N. C. 99; 2 Hodg. 150; 3 Scott, 521; 6 L. J. C. P. 131; 132 E. R. 347.

Annotations:—*Refd.* **Dresser v. Bosanquet** (1862), 32 L. J. Q. B. 57. *Mentd.* **Jaulerey v. Britton** (1837), 3 Hodg. 93; **Kaltenbach v. Lewis** (1883), 24 Ch. D. 54; *Re Catford, Ex p. Carr v. Ford & Canning* (1894), 13 W. R. 159.

367. ——— **Long continuance.**—**THE HARRIOT** (1842), 1 Wm. Rob. 439; 1 Notes of Cases, 613; 6 L. T. 194.

368. ——— **Opinion of honest & right-minded men.**—**PAXTON v. COURTNEY**, No. 351, *ante*.

369. ———.]—A trade custom is not reasonable unless it be fair & proper, & such as reasonable, honest & fair-minded men would adopt.

Before the ct. can say that a custom, not sought to be introduced against an ignorant purchaser, but known to both parties to the contract, is unreasonable, it has to say that that custom outrages justice & common sense.—**PRODUCE BROKERS CO., LTD. v. OLYMPIA OIL & CAKE CO., LTD.**, [1916] 2 K. B. 296; *sub nom.* **OLYMPIA OIL & CAKE CO. v. PRODUCE BROKERS CO.**, 85 L. J. K. B. 1695; 114 L. T. 944; 13 Asp. M. L. C. 393, D. C.; *affd. sub nom.* **PRODUCE BROKERS CO., LTD. v. OLYMPIA OIL & CAKE CO., LTD.**, [1917] 1 K. B. 320, C. A.

Annotations:—*Mentd.* **Olympia Oil & Cake Co. v. Macandrew, Moreland** (1918), 16 L. G. R. 745; **Westacott v. Hahn**, [1918] 1 K. B. 495; **Manbre Saccharine Co. v. Corn Products Co.**, [1919] 1 K. B. 198; **Clark v. Cox, McEuen**, [1921] 1 K. B. 139.

370. ——— **General convenience of all parties**

368 i. ——— **Adoption by honest fair-minded men.**—A trade usage rule must

be reasonable, & such as any honest fair-minded man would adopt.—

MEYERTHAL v. BAXTER, [1916] O. P. D. 122.—S. AF.

Sect. 3.—Characteristics: Sub-sects. 3 & 4. Sect. 4:
Sub-sect. 1.]

engaged in branch of trade.]—A general usage founded on the general convenience of all parties engaged in a particular department of business can never be said to be unreasonable (COCKBURN, C.J.).—GRISSELL v. BRISTOWE (1868), L. R. 4 C. P. 36; 38 L. J. C. P. 10; 19 L. T. 390; 17 W. R. 123, Ex. Ch.

Annotations:—Consd. *Duncan v. Hill* (1871), L. R. 6 Exch. 255; *Marted v. Paine* (1871), L. R. 6 Exch. 132. *Reid*. *Hodgkinson v. Kelly* (1868), L. R. 6 Eq. 496; *Langton v. Waite* (1868), L. R. 6 Eq. 165; *Coles v. Bristowe* (1869), 4 Ch. App. 3; *Bowring v. Shepherd* (1871), 40 L. J. Q. B. 129; *Merry v. Nickalls* (1872), 7 Ch. App. 733. *Mentd*. *Dickenson v. Jardine* (1868), L. R. 3 C. P. 639; *Sheppard v. Murphy* (1868), 16 W. R. 948; *Torrington v. Lowe* (1868), 19 L. T. 316; *Davis v. Haycock* (1869), L. R. 4 Exch. 373; *Street v. Morgan* (1869), 21 L. T. 432; *Allen v. Graves* (1870), L. R. 5 Q. B. 478; *Dont v. Nickalls* (1873), 29 L. T. 536.

371. — Unduly favourable to one party—Unknown to other party.]—ROBINSON v. MOLLETT, No. 270, *ante*.

372. — Preference given to one class of trade.]—SEA S.S. CO., LTD. v. PRICE, WALKER & CO., LTD., No. 416, *post*.

373. Custom to treat part of contract as not being within contract—Unreasonable.]—LEOPOLD WALFORD (LONDON) v. AFFRETEURS REUNIS SOCIETE ANONYME, No. 362, *ante*.

See, also, AGENCY, Vol. I., pp. 572, 575, Nos. 2148, 2171.

SUB-SECT. 4.—LEGALITY.

Particular usages.]—*See* Part III., *post*.

Usages of Stock Exchange.]—*See* STOCK EXCHANGE.

374. Cannot contravene general law.]—POTTER v. PEARSON (1702), 2 Ld. Raym. 759; Holt, K. B. 33; 1 Salk. 129; 92 E. R. 7.

Annotations:—*Mentd*. *Brown v. Marsh* (1721), Glib. Ch. 154; *Smith v. Abbot* (1741), 2 Stra. 1152; *Walmsley v. Child* (1749), 1 Ves. Sen. 341.

375. —.]—The usage of a particular district cannot vary the general law.—*R. v. SALTREN* (1784), Cald. Mag. Cas. 444.

376. —.]—All ancient customs & prescriptions are to be considered with reference to the rules of the common law. If found to be repugnant to those rules & contrary to law on any ground, they have always been held to be invalid; & an Act of Parliament, confirming in general terms, the ancient usages & customs of a city must be considered to confirm those only which have not such repugnance & contrariety (LORD TENTERDEN, C.J.).—*R. v. LONDON CORPN.* (1829), 9 B. & C. 1; 4 Man. & Ry. K. B. 36; 1 L. J. M. C. 10; 109 E. R. 1.

Annotation:—*Reid*. *Scales v. Key* (1840), 11 Ad. & El. 819.

377. —.]—TAYLER v. GREAT INDIAN PENINSULA RY. CO., No. 466, *post*.

PART II. SECT. 3, SUB-SECT. 4.

374 i. Cannot contravene general law.]—A usage contrary to a settled principle of law is not admissible.—*HARDY & BAKER v. FAIRBANKS & MCNAB* (1847), James, 432.—CAN.

374 ii. —.]—A usage of clergyman of different dioceses to occasionally assist one another & preach without the bishop's license, is of no avail against his inhibition.—*DOWN (BP.) v. MILLER* (1861), 11 I. Ch. R. App. 1.—IR.

374 iii. —.]—*Down, CONNOR & DROMORE (BP.) v. POTTER* (1861), 13 Ir. Jur. 197.—IR.

374 iv. —.]—A local custom in a burgh as to increasing the height of

party walls, being contrary to the general principles of law, not admitted.—*SANDERS v. DUDGEON* (1832), 4 Sc. Jur. 234.—SCOT.

374 v. —.]—*FREEMAN v. STANDARD BANK OF SOUTH AFRICA, LTD.*, [1905] T. H. 26.—S. AF.

E. — Or Orders in Council.]—Deft. ordered from pltf. jam designated respectively "Strawberry & Apple," "Raspberry & Apple," & "Assorted & Apple." Pltf. delivered the jam in tins labelled, "Apple & Strawberry," "Apple & Raspberry," & "Apple & Assorted." Deft. refused to take delivery, & pltf. sued for the price:—*Held*: effect could not be given to evidence of usage because it was in

378. —.]—The superior cts. have at all times investigated the customs under which justice has been administered by local jurisdictions, & unless they are found to be consonant to reason & in harmony with the principles of law, they have always been rejected as illegal (POLLOCK, C.B.).—*COX v. LONDON CORPN.* (1862), 1 H. & C. 338; 32 L. J. Ex. 64; 6 L. T. 497; 27 J. P. 248; 8 Jur. N. S. 542; 10 W. R. 694; 158 E. R. 916; *affd.* (1863), 2 H. & C. 401, Ex. Ch.; *sub nom.* *LONDON CORPN. v. COX* (1867), L. R. 2 H. L. 239, H. L.

Annotations:—*Apld.* *Atwood v. Sellar* (1879), 4 Q. B. D. 342. *Mentd.* *Webster v. Webster* (1862), 8 Jur. N. S. 1047; *Morris v. Lantour, Cox, etc.* (1864), 3 New Rep. 475; *Frith v. Guppy* (1866), L. R. 2 C. P. 32; *Shea v. United Sick & Burial Soc. of St. Patrick* (1867), 16 W. R. 84; *Jacobs v. Brett* (1875), 44 L. J. Ch. 377; *Oram v. Brearey* (1877), 2 Ex. D. 346; *Appleford v. Juddins* (1878), 47 L. J. Q. B. 615; *London City Corp. v. London Joint-Stock Bank* (1881), 50 L. J. Q. B. 594; *St. Magnus-the-Martyr, etc., Parochial Church Council v. London Diocese Chancellor*, [1923] P. 38.

379. —.]—MEYER v. DRESSER, No. 461, *post*.

380. —.]—If a custom prevailing in a ct., which, though an inferior ct., is still a ct. of law, if inconsistent with law cannot prevail, surely the same rule must apply to a practice of average adjuster. When a practice of this kind is brought to the test of legal decision & is found to be erroneous & inconsistent with law, it cannot be permitted to override the law & acquire the force of law (COCKBURN, C.J.).—*ATWOOD v. SELLAR & CO.* (1879), 4 Q. B. D. 342; 27 W. R. 726; *sub nom.* *ATTWOOD v. SELLAR*, 48 L. J. Q. B. 465; 41 L. T. 83; 4 Asp. M. L. C. 153; *affd.* (1880), 5 Q. B. D. 286.

Annotations:—*Reid*. *Pirie v. Middle Dock Co.* (1881), 44 L. T. 426. *Mentd.* *Whitcross Wire Co. v. Savill* (1882), 8 Q. B. D. 653; *Svensen v. Wallace* (1885), 10 App. Cas. 404; *Assicurazioni Generali & Schenker v. S.S. Bessie Morris Co. & Browne* (1892), 61 L. J. Q. B. 754; *Anglo-Argentine Live Stock & Produce Agency v. Temperley Shipping Co.*, [1899] 2 Q. B. 403; *S.S. Balmoral Co. v. Marten*, [1901] 2 K. B. 896; *S.S. Carlsbrook Co. v. London & Provincial Marine & General Insce.* (1901), 50 W. R. 42; *The Leitrim*, [1902] P. 256; *Hamel v. Peninsular & Oriental Steam Navigation Co.*, [1908] 2 K. B. 298; *Chelwell v. Royal Commission on Sugar Supply*, [1922] 1 K. B. 12.

381. — Unless expressly imported into contract.]—Pltf. shipped bark on board defts.' general ship, under a bill of lading, by which average, if any, was to be adjusted according to British custom. When the ship was about to sail a fire broke out in the forehold, & a hole was cut in the side of the ship, & her fore compartment being thereby filled with water, the fire was extinguished. If this course had not been adopted the cargo on board would in all probability have been destroyed, & the ship seriously damaged. Pltf.'s bark was destroyed by the water poured into the ship. In an action for general average contribution in respect of the destruction of pltf.'s bark, it was found, in addition to the above facts, that it is

direct conflict with Orders in Council passed pursuant to Meat & Canned Foods Act, 1907, & because it was not honest & fair dealing, in so far, at least, as the consuming public was concerned; & deft. was justified in refusing the goods.—*WENTWORTH ORCHARD CO., LTD. v. MERCHANTS CONSOLIDATED, LTD.*, [1922] 1 W. W. R. 291.—CAN.

h. — Usages having immoral tendency.]—Among Mahomedan Kanchans, practices relating to their holding & inheritance of property, having an immoral tendency are not recognisable as customs, or enforceable as law.—*GHASITI v. UMRAO JAN, GHASITI v. JAGGU* (1893), 1 L. R. 21 Calc. 149, L. R. 20 Ind. App. 193.—IND.

the practice of British average adjusters to treat a loss so caused as not a general average loss:—*Held*: whether or not the loss was, according to the general law of England, the subject of general average contribution, *pltf.*, by the terms of the bill of lading, had made the admitted practice of British average adjusters part of the contract, & he was bound by it, even if different from British law.—*STEWART v. WEST INDIA & PACIFIC S.S. CO.* (1873), L. R. 8 Q. B. 362; 42 L. J. Q. B. 191; 28 L. T. 742; 21 W. R. 953; 2 Asp. M. L. C. 32, Ex. Ch.

Annotations:—*Apld.* Hendricks Australasian Insee. (1874), L. R. 9 C. P. 460. *Consd.* Pirie v. Middle Dock Co. (1881), 44 L. T. 426. *Refd.* Atwood v. Sellar (1880), 5 Q. B. D. 286; Whitecross Wire Co. v. Savill (1882), 8 Q. B. D. 653.

382. —.]—*GOODWIN v. ROBERTS*, No. 31, *ante*.

383. —.]—*Seemle*: a usage which would confer a general authority upon a partner in a trading firm to accept for the firm bills drawn in blank would be bad as being against the law.—*HOGARTH v. LATHAM & CO.* (1878), 3 Q. B. D. 643; 47 L. J. Q. B. 339; 39 L. T. 75; 26 W. R. 388, C. A.

Annotations:—*Mentd.* Baxendale v. Bennett (1879), 40 L. T. 23; London & South Western Bank v. Wentworth (1880), 5 Ex. D. 96; France v. Clark (1884), 26 Ch. D. 257; Oakley v. Boulton, Maynard (1888), 5 T. L. R. 60; Faulks v. Atkins (1893), 10 T. L. R. 178; Watkin v. Lamb (1901), 85 L. T. 483; Herdman v. Wheeler, [1902] 1 K. B. 361.

384. —.]—*Decided cases*.—A usage, though not immemorial, for farm tenants in a particular locality to cultivate their farms in a special manner, may be read into the contract between such a tenant & his landlord, if not repugnant to anything in the contract or contrary to the law as fixed by statute or decided cases (*KAY, L.J.*).—*DASHWOOD v. MAGNIAC*, [1891] 3 Ch. 306; 60 L. J. Ch. 809; 65 L. T. 811, C. A.

Annotations:—*Mentd.* *Re* Chaytor, [1900] 2 Ch. 804; *Pardoe v. Pardoe* (1900), 82 L. T. 547; *Chaytor v. Trotter* (1902), 87 L. T. 33; *Re Trevor-Batye's Settlement*, Bull v. Trevor-Batye, [1912] 2 Ch. 339; *Re Hall, Hall v. Hall*, [1916] 2 Ch. 488; *Lloyd-Jones v. Clark-Lloyd*, [1919] 1 Ch. 424.

385. —.]—*SEA S.S. CO., LTD. v. PRICE, WALKER & CO., LTD.*, No. 416, *post*.

386. *Cannot contravene statute*.—No custom can be good which is against an Act of Parliament (*COOK, C.J.*).—*GREENWAY & BARKER'S CASE* (1612), Godb. 260; 78 E. R. 151.

387. —.]—*R. v. HOGG*, No. 561, *post*.

388. —.]—*Except in case of necessity*.—*THE SYLPH* (1854), 2 Spinks, 75; 164 E. R. 315.

389. —.]—No local custom can prevail to justify a deviation from 17 & 18 Vict. c. 104, ss. 297 & 298.—*THE HAND OF PROVIDENCE* (1856), Sw. 107; *sub nom.* *THE MEDORA v. THE HAND OF PROVIDENCE*, 5 L. T. 462.

390. —.]—17 & 18 Vict. c. 104, s. 297, is not to be controlled by any custom resting on mere convenience of public officers, as custom-house officers, in the discharge of their duties.—*THE SEINE* (1859), Sw. 411; 5 Jur. N. S. 298.

Annotation:—*Mentd.* *Grill v. General Iron Screw Colliery Co.* (1868), L. R. 3 C. P. 476.

391. —.]—*NEILSON v. JAMES*, No. 355, *ante*.

392. —.]—*DASHWOOD v. MAGNIAC*, No. 384, *ante*.

393. —.]—*Pltf.*, a butcher, bought the carcass of a pig from *defts.*, meat salesmen in the Central Meat Market, London. He exposed it for sale in his shop in ignorance of the fact that it was tuberculous & unfit for human consumption, & it was seized by a sanitary inspector, adjudged as

unfit for human food by a magistrate, & thereupon destroyed. Proceedings were then taken against *pltf.*, who was fined £20 & costs under Public Health (London) Act, 1891 (c. 76), s. 47 (2), for exposing the carcass for sale on his premises. He then brought this action claiming damages, relying on the implied condition contained in Sale of Goods Act, 1893 (c. 71), s. 14 (1), that the carcass should be reasonably fit for the purpose for which he bought it, namely, for resale for human food. *Defts.* contended that by a custom of the market, of which there was evidence, the condition or warranty implied by law was excluded. The judge refused to leave the question of custom to the jury, & directed them that custom could not override the law. The jury found that the carcass was unfit for human food, that *pltf.* had impliedly made known to *defts.* the purpose for which it was required, & that he did so in such a way as to show that he relied on *defts.*' skill & judgment, & awarded him £236 damages, for which judgment was given. On appeal:—*Held*: in view of sect. 55 of the Sale of Goods Act, 1893, the judge had misdirected the jury, & that the case must be re-tried.—*COINTAT v. MYHAM & SON* (1914), 84 L. J. K. B. 2253; 110 L. T. 749; 78 J. P. 193; 30 T. L. R. 282; 12 L. G. R. 274, C. A.

Annotations:—*Mentd.* Leslie v. Reliable Advertising & Addressing Agency, [1915] 1 K. B. 652; Turpin v. Victoria Palace, [1918] 2 K. B. 539; Proops v. Chaplin (1920), 37 T. L. R. 112; Weld-Blundell v. Stephens, [1920] A. C. 956.

394. *Test of illegality—Grounded on fraud*.—Equity will not recognise a custom of merchants which is grounded on a fraud.—*BORRE v. VANDE* (1663), Nels. 87; Freem. Ch. 174; 1 Cas. in Ch. 30; 21 E. R. 796.

395. —.]—The practice of salting is immoral in the extreme, however it may be sanctioned by the usages of the trade, & such will be treated as fraudulent by the ct. (*TURNER, L.J.*).—*Re JOHNSON, Ex p. JOHNSON* (1861), 30 L. J. Bcy. 38; 5 L. T. 228, L. JJ.

396. —.]—*Subservient to fraud*.—Where a public functionary had received gratuities & presents from foreign agents on the amount of their commission, he was ordered to refund the whole, notwithstanding that the practice was also proved to be the practice of the trade, the custom being contrary to reason & equity & subservient to fraud.—*A.-G. v. LINDEGREN* (1819), 6 Price, 287; 146 E. R. 811.

397. —.]—If an agent conducts business in carrying out negotiations between his principal & a person whose interests are adverse to his principal, he cannot receive a commission from the person with whom he is negotiating without the knowledge of his principal, & any custom wide enough to cover such a case will not be upheld by the ct.—*BARTRAM & SONS v. LLOYD* (1903), 88 L. T. 286; 19 T. L. R. 293; *on appeal* (1904), 90 L. T. 357, C. A.

Usage to disregard Banking Cos. (Shares) Act, 1867 (c. 29) (Leeman's Act).—*See STOCK EXCHANGE*.

SECT. 4.—PROOF.

SUB-SECT. 1.—IN GENERAL.

398. *Existence of usage a question of fact—Determinable by jury*.—*Pltf.* relied upon evidence

398 i. *Cannot contravene statute*.—No custom can be admitted to override the provisions of the Limitation Act.—

MOHANLAL JECHAND v. AMRATLAL BECHARDAS (1878), 1 L. R. 3 Bom. 174.—IND.

PART II. SECT. 4, SUB-SECT. 1.
398 i. *Existence of usage a question of fact—Determinable by jury—Duty*

Sect. 4.—Proof: Sub-sect. 1.]

of usage, & it was proved to be the usual course under such circumstances, but the judge held that deft. could not be liable, whatever the usage was, & declined to leave any questions to the jury:—*Held*: this was not a pure question of law, & the judge ought to have left it to the jury.—*KIRBY v. WILLIAMSON* (1852), 19 L. T. O. S. 203.

399. ———.]—Pltf., through his broker, sold to deft., a stock jobber, a number of shares in a bank. On the same day the jobber gave to pltf.'s broker a ticket with the name of E. upon it, as the intended purchaser, & which name had passed to him from another jobber in the usual manner according to the course of business on the Stock Exchange. Pltf. executed a transfer to E., whose name was registered as a shareholder. The bank being wound up it was discovered that at the time E.'s name was passed to pltf. as the transferee of the shares he was an infant, & by order of the Ct. of Ch. pltf.'s name was placed upon the list of contributories in his stead. To an action brought by pltf. against deft. to indemnify him for the amount of calls paid, in consequence of being placed on the list of contributories, deft. pleaded that he was discharged from his liability by the usages of the Stock Exchange. The jury found that it was not part of the usage of the Stock Exchange that, if there be several intermediate sales between the first seller & the last buyer, & the first seller receives the price of the shares & transfers them to the last buyer, the intermediate buyers are irresponsible when the name of the transferee which was passed was that of a person legally incapable of being registered:—*Held*: the judge was right in leaving the jury to say what was the usage of the Stock Exchange, for it is not so universal an usage as to be binding upon all persons dealing there.—*DENT v. NICKALLS* (1873), 29 L. T. 536; 22 W. R. 218; *affd.* (1874), 30 L. T. 644, Ex. Ch.

Annotation:—*Mentd.* *Kellock v. Enthoven* (1874), 43 L. J. Q. B. 90.

400. ———.]—*After hearing witnesses—Affidavits alone insufficient.*—*Re JENSEN, Ex p. CALLOW* (1880), 4 Morr. 1, D. C.

401. ———.]—*Determinable by county court judge—Decision not subject to review—Issue previously declined by appellant.*—*Re MATTHEWS, Ex p. POWELL*, No. 428, *post*.

402. ———.]—*MOULT v. HALLIDAY*, No. 202, *ante*.

403. ———.]—*NELSON v. DAHL*, No. 710, *post*.

Award of arbitrator as to existence of custom—Submission of any dispute arising under contract.—*See ARBITRATION*, Vol. II., pp. 474–475, Nos. 1185–1187.

Meaning of mercantile terms—Question for

of judge.—When a question as to the existence of a trade usage or custom is left to the jury it is the duty of the judge to explain to the jury what the law requires to establish such a usage or custom.—*RODNEYSHIRE (PRESIDENT) v. VIBERT*, [1915] V. L. R. 388.—*AUS.*

398 ii. ———.]—Where pltf. claimed freight on goods from St. J. to T., from which port he was to bring back a cargo of fish at one shilling per quintal, the defence set up was the usage & custom of the trade to carry such goods free; the ct. left it to the jury to say whether there was such custom or usage as would exempt deft. from payment of freight.—*KEATING v. McBRIDE* (1857), 4 Nfld. L. R. 164.—*NFLD.*

398 iii. ———.]—Where in an

action for the price of a number of porches of stone, which represented the complement which would have been required to complete the rear wall of a house, the ct. left it to the jury to say whether there was a usage of trade which justified the contractor in charging for the full entire contents of the wall as if there had been no openings.—*KELLY v. HARVEY & FOX* (1861), 4 Nfld. L. R. 537.—*NFLD.*

404 i. Necessity for strict proof.—The evidence of a usage must be clear, cogent & irresistible.—*BURKE v. BLAKE* (1875), 6 P. R. 260.—*CAN.*

404 ii. ———.]—Usage is proved by the oral evidence of persons who become cognisant of its existence by reason of their occupation in the particular trade or business & the evidence establishing custom or usage must be

jury—Meaning of contract determinable by court.]

—*See Sect. 6, sub-sect. 1, post.*

Reasonableness—Question of law.—*See Sect. 3, sub-sect. 3, ante.*

404. Necessity for strict proof.—*THE FAIRY* (1850), 6 L. T. 195.

405. ———.]—*To take case out of general rule.*—To take a case out of the general law of principal & agent upon the ground of local usage, such usage must be distinctly proved.—*Re A TRUST DEED, Ex p. WELSFORD* (1865), 12 L. T. 507.

406. ———.]—*NELSON v. DAHL*, No. 710, *post*.

407. ———.]—*If not sufficiently notorious.*—*MOULT v. HALLIDAY*, No. 202, *ante*.

Notoriety as an essential characteristic of usage.

—*See Sect. 3, sub-sect. 1, ante.*

Judicial notice of usages.—*See Sub-sect. 2, post.*

408. Onus of proof—On party seeking to establish usage.—Persons who claim the right of working a mine by virtue of a custom must clearly show that such a custom does exist.—*HARRISON v. AMES* (1850), 15 L. T. O. S. 158; *reversd.* on other grounds, 15 L. T. O. S. 321, L. C.

409. ———.]—A witness cannot be asked what the effect of a supposed custom is until the existence of that custom has been strictly proved.—*GIBSON v. CRICK* (1862), 1 H. & C. 142; 31 L. J. Ex. 304; 6 L. T. 392; 10 W. R. 525; 158 E. R. 835.

410. What must be proved—Actual instances—Not mere evidence of opinion.—An usage of trade must be proved by instances, & cannot be supported by evidence of opinion merely.—*CUNNINGHAM v. FONBLANQUE* (1833), 6 C. & P. 44, N. P.

411. ———.]—The difficulty in dealing with evidence as to usage is that juries have to distinguish between a man's opinion & his actual experience. The best test to apply in such cases is to ask a witness whether he can give, or knows of, an instance of any dispute of this kind in which the usage he contends for was recognised (*MATHEW, J.*)—*KNIGHT v. COTESWORTH* (1883), Cab. & El. 48.

412. ———.]—*Within personal knowledge of witness.*—*HALL v. BENSON*, No. 267, *ante*.

413. ———.]—*LEWIS v. MARSHALL*, No. 479, *post*.

414. ———.]—You may cross-examine a witness who had proved a custom in chief, by inquiring into the instances in which he will assert the custom to have been pursued; but a custom cannot be proved by a man who knows nothing of it, but merely speaks to a number of instances in which such & such a course has been pursued (*POLLOCK, C.B.*)—*STURGE v. HALDIMANT* (1848), 11 L. T. O. S. 28.

415. ———.]—*Showing given course of busi-*

clear, convincing & consistent.—*WITTENBATER v. GALSTAU* (1917), 1 L. R. 44 Calc. 917.—*IND.*

410 i. What must be proved—Actual instances—Not mere evidence of opinion.—Usage must be proved by instances, & not by the opinion of witnesses.—*HENNESSY v. NEW YORK MUTUAL MARINE INSURANCE CO.* (1863), 5 N. S. R. (1 Old.) 259.—*CAN.*

410 ii. ———.]—A custom in a particular trade is not established by mere evidence of the popular opinion of the members of that trade.—*Re SPOTTEN & Co.* (1877), 11 I. R. Eq. 412.—*IR.*

410 iii. ———.]—A trade usage rule must be established by a great number of particular instances.—*MEYERTHAL v. BAXTER*, [1916] O. P. D. 122.—*S. AF.*

ness—& general established understanding.]—**MACKENZIE v. DUNLOP**, No. 675, *post*.

416. — General agreement—Acted upon.]—

(1) In order to establish a mercantile usage it is necessary not only to show that a large number of influential people at the place have agreed that it would be a good thing to have no liability to discharge more than at an average rate of 90 standards per working day, but also that the agreement was acted on, & because, unless it is acted on, no one will challenge it (**KENNEDY, J.**).

A custom cannot be established merely by three or four important classes of persons in a community of a port agreeing that it is desirable. It must be enforced (**KENNEDY, J.**).

(2) It appears to me that a custom cannot be treated as good which sets at defiance the law (**KENNEDY, J.**).

(3) A custom which gives a preference to steamers merely because they come from Baltic ports, as against vessels carrying practically the same goods from the other side of the Atlantic, although the steamers are exactly the same in size & in facilities for discharge with all the advantages of modern timber-carrying ships, would not be a reasonable custom (**KENNEDY, J.**).—**SEA S.S. CO., LTD. v. PRICE, WALKER & CO., LTD.** (1903), 8 Com. Cas. 202.

Annotations.—*Generally*, **Mentd.** **Ropner v. Stoate, Hosegood** (1905), 92 L. T. 328; **Baird v. Price, Walker** (1916), 115 L. T. 227.

417. — Settled & established practice.]—**ROPNER & CO. v. STOATE, HOSEGOOD & CO.**, No. 359, *ante*.

418. Admissibility of evidence—Traditional evidence—Public & private rights.]—**WITHNELL v. GARTHAM**, No. 574, *post*.

419. — Of persons in the trade.]—Evidence of the general opinion of merchants may be given to prove the custom of merchants.—**CAMDEN v. COWLEY** (1763), 1 Wm. Bl. 417; 96 E. R. 237.

Annotations.—**Mentd.** **Miller v. Warre** (1824), 1 C. & P. 237; **Waters v. Waters** (1848), 2 De G. & Sm. 591; **Marten v. Vestey**, [1920] A. C. 307.

420. — — — — —.]—**RAINY v. VERNON**, No. 323, *ante*.

421. — — — — —.]—Evidence from persons in the trade is admissible to inform the Ct. of its nature, & of what is customary in it.—**HAYNES v. DOMAN**, [1899] 2 Ch. 13; 68 L. J. Ch. 419; 80 L. T. 569; 15 T. L. R. 354; 43 Sol. Jo. 553, C. A.

Annotations.—**Consd.** **Mason v. Provident Clothing & Supply Co.**, [1913] A. C. 724. **Refd.** **Lamson Pneumatic Tire Co. v. Phillips** (1904), 91 L. T. 363; **North-Western Salt Co. v. Electrolytic Alkali Co.** (1912), 107 L. T. 439; **McEllistrim v. Ballymacelligott Co-op. Agricultural & Dairy Soc.**, [1919] A. C. 548. **Mentd.** **Hood & Moore's**

k. Admissibility of evidence—Traditional evidence—Whether opinion of witness.]—A witness may state his opinion as to the existence of a family custom & give as the grounds thereof information derived from deceased persons. But it must be independent opinion based on hearsay, & not on mere repetition of hearsay.—**GARURUDHWAJA PARSHAD SINGH v. SAPARANDHWAJA PARSHAD SINGH** (1900), L. R. 27 Ind. App. 238.—**IND.**

419 i. — *Whether of persons in the trade.*]—When a party bound himself to guarantee another for four per cent. for commission & guarantee.—**Held**: evidence of mercantile men was inadmissible to prove that in practice the words comprehended an obligation for his faithful conduct.—**CALDER v. AITCHISON & CO.** (1831), 5 Wils. & S. 410.—**SCOT.**

l. — *To prove existence of usage—Former judgment.*]—A co-owner of village lands sued in 1861 to have them divided among the villagers according to a custom that at the

expiration of every twelve years the lands should be re-distributed by lot among the co-owners & to have two of the shares delivered to him as one of the co-owners. In 1851 another co-owner had, in a suit to which only some of the present defts. were parties, obtained a decree for the periodical allotment of the lands; & in 1853 such decree, which clearly recognised the existence & validity of the custom, was affirmed on appeal.—**Held**: though the decree of 1851 was only a judgment *inter partes*, it was, as against such of the present defts. as were not parties to the former suit, cogent evidence of the existence & validity of the custom.—**VENKATASWAMI NAYAKHAN v. SUBBARAU, SANKARA SUBBAIYAN v. SUBBARAU** (1863), 2 Mad. 1.—**IND.**

423 l. — *To prove existence of trade usage—Whether that similar usage prevalent elsewhere.*]—Comparatively slight proof of the practice of trade in Scotland will be sufficient to establish a rule of trade which is recognised & in full force in England.—

Stores v. Jones (1899), 81 L. T. 169; **Morris v. Ryle** (1910), 103 L. T. 545; **Eastes v. Russ**, [1914] 1 Ch. 408; **Millers v. Steedman** (1915), 84 L. J. K. B. 2057; **Morris v. Saxelby**, [1915] 2 Ch. 57; **Forster v. Suggett** (1918), 35 T. L. R. 87; **Attwood v. Lamont**, [1920] 3 K. B. 571; **Dewes v. Fitch**, [1920] 2 Ch. 159; **Hepworth Manufacturing Co. v. Ryott**, [1920] 1 Ch. 1; **Spence v. Mercantile Bank of India** (1921), 37 T. L. R. 390.

422. — *To prove how branch of trade conducted—Manner which same branch carried on in another place.*]—To prove the manner of conducting a particular branch of trade at one place, evidence may be given to show the manner in which the same branch is carried on at another place.—**NOBLE v. KENNOWAY** (1780), 2 Doug. K. B. 510; 99 E. R. 326.

Annotations.—**Refd.** **Fleet v. Murton** (1871), L. R. 7 Q. B. 126. **Mentd.** **Ougler v. Jennings** (1800), 1 Camp. 505, n.; **Zwinger v. Samuda** (1817), 7 Taunt. 265; **Pearson v. Commercial Union Assce.** (1876), 45 L. J. Q. B. 761.

423. — *To prove existence of trade usage—Not that similar usage prevalent elsewhere.*]—

In an action against a broker at Southampton, seeking to make him responsible for the value of scrip sold by him, on account of *pltf.*, to an unnamed purchaser, evidence having been offered, on the part of *pltf.*, on the examination in chief, of the custom of business at Southampton, & on cross-examination, *deft.*'s counsel having shown that, from there being only two brokers at Southampton, of whom *deft.* was one, this evidence was of no importance.—**Held**: on re-examination counsel for *pltf.* would not be permitted to ask the witness as to the custom in London or elsewhere, such evidence not being admissible.—**JONES v. CLARK** (1847), 8 L. T. O. S. 517.

424. — — — — —.]—*Similar usage prevalent in neighbouring town—Interchange of trade between both towns.*]—**PLAICE v. ALLCOCK**, No. 593, *post*.

425. — — — — —.]—*Similar usage in analogous trade.*]—*Pltfs.*, F. & D., sued *defts.*, M. & W., who were fruit brokers in the City of London, employed by them, for not accepting a cargo of Chesme raisins, agreed to be sold by the following note: "Messrs. F. & D. We have this day sold for your account to our principal, to arrive per steamer from Trieste, fifty to seventy tons of Chesme raisins. F. & D. to draw on M. & W. for £500 (if required), on handing equal value. M. & W., brokers"—**Held**: (1) evidence was admissible of a custom in the fruit trade of London rendering brokers who sign such a contract for an undisclosed principal personally liable thereon, notwithstanding that they might subsequently declare the name of their principal; (2) evidence of a similar custom in an analogous trade of the same city, *viz.* the colonial trade, might likewise be received.—**FLEET**

STRONG v. PHILIPS & CO. (1878), 5 R. (Ct. of Sess.) 770; 15 Sc. L. R. 443.—**SCOT.**

424 l. — — — — —.]—*Similar usage prevalent in neighbouring village.*]—In a suit by the landlords to avoid the sale of an occupancy holding in their *mowzah* & eject the purchaser thereof, one of the questions was as to the existence of a custom or usage under which the *raiyat* was entitled to sell such a holding.—**Held**: a judgment of the High Ct. as to the transferability of similar tenures in an adjoining village of the same *pergunnah* is admissible as evidence of such usage.—**DALGLISH v. GUZUFFER HASSAIN** (1896), 1 L. R. 23 Cal. 427.—**IND.**

m. — *Unbroken user for nineteen years.*]—The office of manager of a Hindu temple was vested by inheritance in eight male descendants of the last holder by his two wives, four by each. One member of each branch held office for one year in alternate succession until 1881-82, when the four members

Sect. 4.—Proof: Sub-sects. 1 & 2. Sects. 5 & 6: Sub-sect. 1.]

v. MURTON (1871), L. R. 7 Q. B. 126; 41 L. J. Q. B. 49; 26 L. T. 181; 20 W. R. 97.

Annotations:—As to (1) *Appld.* Hutchinson v. Tatham (1873), L. R. 8 C. P. 482. *Distd.* Miller, Gibb v. Smith & Tyrer, [1917] 2 K. B. 141. *Refd.* Mollett v. Robinson (1872), L. R. 7 C. P. 84; Southwell v. Bowditch (1876), 1 C. P. D. 374; Pike v. Ongley (1887), 56 L. J. Q. B. 373; Gabriel v. Churchill & Sim, [1914] 1 K. B. 449. *Generally, Mentd.* Sutton v. Grey, [1894] 1 Q. B. 285; Thompson v. L. C. C., [1899] 1 Q. B. 840.

426. — To prove non-existence of trade usage—Not evidence of interested party.]—A packer is entitled to a general lien on the goods of his customer which are in his hands.

In the present case if a single affidavit of the custom had been produced that would have been sufficient evidence, if any evidence is required at all. If the existence of this lien is ever seriously to be contested & it is sought to prove that by the present usage of trade packers have not a general lien, it must be done in quite a different way from merely bringing the customer himself to say that he never heard of the general lien (MELLISH, L.J.).—*Re WITT, Ex p. SHUBROOK* (1876), 2 Ch. D. 489; 45 L. J. Bcy. 118; 34 L. T. 785; 24 W. R. 891, C. A.

Annotation:—*Mentd.* *Re Catford, Ex p. Carr v. Ford* (1894), 71 L. T. 584.

427. Mode of proof—Evidence as on a question of fact—Or reported cases.]—*Re MATTHEWS, Ex p. POWELL*, No. 428, *post*.

SUB-SECT. 2.—JUDICIAL NOTICE.

See, generally, EVIDENCE.

428. General rule.]—(1) Where a custom of holding certain goods on hire is relied on to take the goods out of the order & disposition of a bkpt., the custom must be one which the ordinary creditors of the bkpt. may be reasonably presumed to have known.

(2) Such a custom may be proved either by reported cases, or by evidence of the custom as on a question of fact.

(3) The ct. will not overrule the decision of the ct. below in favour of the existence of a custom of trade, though the evidence establishing it may be slight, if the person interested in disputing the custom declines an issue to try it.

(4) There is no doubt that a mercantile custom may be so frequently proved in cts. of common law that the cts. will take judicial notice of it, & it becomes part of the law merchant, & we see no reason why the same rule ought not to prevail in the Ct. of Bkpcy. It seems a useless expense to require parties to prove by a large number of witnesses a custom which has been proved over & over again (MELLISH, L.J.).—*Re MATTHEWS, Ex p. POWELL* (1875), 1 Ch. D. 501; 45 L. J. Bcy. 100; 34 L. T. 224; 24 W. R. 378, C. A.

Annotations:—As to (1) *Consd.* *Crawcour v. Salter* (1881), 18 Ch. D. 30. *Refd.* *Re Blanchard, Ex p. Hattersley* (1878), 8 Ch. D. 601. *As to (2) *Consd.* *Crawcour v. Salter* (1881), 18 Ch. D. 30. *Refd.* *Moult v. Halliday* (1897), 46 W. R. 318; *Re Tabor, Ex p. Cork*, [1920] 1 K. B. 808. *As to (3) *Refd.* *Re Blanchard, Ex p. Hattersley* (1878), 8 Ch. D. 601; *Crawcour v. Salter* (1881), 18 Ch. D. 30; *Moult v. Halliday* (1897), 46 W. R. 318; *Re Tabor, Ex p. Cork*, [1920] 1 K. B. 808. *As to (4) *Consd.* *Crawcour v. Salter* (1881), 18 Ch. D. 30. *Refd.* *Moult v. Halliday* (1897), 46 W. R. 318.***

of the junior branch, including the appellant, relinquished their claim in favour of the resp., a member of the senior branch. In a suit by resp.

against applt. in effect to assert his term of office under this family arrangement:—*Held*: an unbroken usage for nineteen years was, as against the

429. —.]—The custom has been so often proved that the cts. will take judicial notice of it (BRETT, M.R.).—*Re PARKER, Ex p. TURQUAND* (1885), 14 Q. B. D. 636; 54 L. J. Q. B. 242; 53 L. T. 579; 33 W. R. 437; 1 T. L. R. 284, C. A.

Annotations:—*Refd.* *Moult v. Halliday* (1897), 46 W. R. 318; *Re James, Ex p. Swansea Mercantile Bank* (1907), 24 T. L. R. 15; *Chappell v. Harrison* (1910), 103 L. T. 594; *Re Tabor, Ex p. Cork*, [1920] 1 K. B. 808; *French v. Gething, Gething Claimant* (1921), 91 L. J. K. B. 276.

430. —.]—*MOULT v. HALLIDAY*, No. 202, *ante*.

431. —.]—If a usage has been clearly found & laid down as the custom in a particular trade or market, so that persons dealing in that trade or market contract on the basis of the custom, then the law supports that custom in subsequent cases.—*LEVITT v. HAMBLETT*, [1901] 2 K. B. 53; 70 L. J. K. B. 520; 84 L. T. 638; 17 T. L. R. 307; 6 Com. Cas. 79, C. A.

Annotations:—*Mentd.* *Scott & Horton v. Godfrey*, [1901] 2 K. B. 726; *Lomas v. Graves*, [1904] 2 K. B. 557; *Ponsolle v. Webber* (1907), 98 L. T. 375.

432. —.]—The county ct. judge was asked to take judicial notice of that custom & to act upon it. The judge, who has been a county ct. judge for many years & who must have had great experience of these cases, which almost necessarily, owing to the smallness of the sums claimed, are brought in the county ct., said that he had in previous cases taken judicial notice of the custom, & he would take judicial notice of it in this case. I cannot say that the judge was wrong in so doing. A time must come when a county ct. judge, having had the question of the existence of this custom before him in other cases, is entitled to say that he will take judicial notice of it, & will not require it to be proved by evidence in each case (BRAY, J.).—*GEORGE v. DAVIES*, [1911] 2 K. B. 445; 80 L. J. K. B. 924; 104 L. T. 648; 27 T. L. R. 415; 55 Sol. Jo. 481.

Customs of merchants.]—*See* Sect. 2, *ante*.

For usages judicially noticed as establishing reputed ownership in bankruptcy, *see* BANKRUPTCY & INSOLVENCY, Vol. V., pp. 803–808, Nos. 6859–6901.

For usages judicially noticed in relation to inns & innkeepers, *see* INNS & INNKEEPERS.

For usages judicially noticed in relation to colonial & foreign bearer bonds, *see* COMPANIES.

See BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS, Vol. VI., pp. 444–450, Nos. 2853–2857, 2863–2882.

For usages judicially noticed in relation to termination of service, *see* MASTER & SERVANT.

For other usages judicially noticed, *see* Part III., *post*.

For usages judicially noticed as part of the law merchant, *see* Part III., *post*.

Judicial notice of customs.]—*See* Part I., Sect. 9, sub-sect. 2, *ante*.

Judicial notice of customs of London.]—*See* METROPOLIS.

SECT. 5.—PERSONS BOUND BY USAGES.

Persons with knowledge of usage.]—*See* Sect. 3, sub-sect. 1, B. (a), *ante*.

When knowledge presumed.]—*See* Sect. 3, sub-sect. 1, B. (b), *ante*.

applt., conclusive evidence thereof.—*RAMANATHAN CHETTI v. MURUGAPPA CHETTI* (1906), 1 L. R. 29 Mad. 283; L. R. 33 Ind. App. 139.—*IND.*

SECT. 6.—EFFECT OF USAGE UPON CONTRACTS.

SUB-SECT. 1.—IN GENERAL.

433. Meaning of mercantile terms—Question for jury—Meaning of contract for court to determine.]—*Assumpsit* for the non-delivery of barley. It was proved at the trial that deft. wrote to pltf. offering them a certain quantity of "good" barley, upon certain terms: to which pltf. answered, after quoting deft.'s letter, as follows: "Of which offer we accept, expecting you will give us 'fine' barley & full weight." Defts. in reply, stated that their letter contained no such expression as "fine" barley, & declined to ship the same. Evidence was given at the trial that the terms "good" & "fine" were terms well known in the trade; & the jury found that there was a distinction in the trade between "good" & "fine" barley:—*Held*: although it was a question for the jury what was the meaning of those terms in a mercantile sense, yet they having found what that meaning was, it was for the ct. to determine the meaning of the contract & there was not a sufficient acceptance.—*HUTCHISON v. BOWKER* (1839), 5 M. & W. 535; 9 L. J. Ex. 24; 151 E. R. 227.

434. ———.]—The construction of a contract, & the meaning of particular words used in it, is for the judge, except in cases where there is evidence that a particular word was used in a sense peculiar to a particular trade or business, or that its meaning depends on the usage of a particular place.—*SIMPSON v. MARGITSON* (1847), 11 Q. B. 23; 17 L. J. Q. B. 81; 12 Jur. 155; 116 E. R. 383.

*Annotations:—**Reid. Marsh v. Higgins* (1850), 9 C. B. 551; *Hutton v. Brown* (1881), 45 L. T. 343; *Bruner v. Moore*, [1904] 1 Ch. 305; *Yangtze Insee. Assocn. v. Indemnity Mutual Marine Assocn.*, [1908] 2 K. B. 504.

435. ———.]—Deft. contracted for the purchase of a large quantity of Danubian maize "fair average quality of the season & port of shipment when shipped. To be shipped from Danube, etc., by three or more first-class vessels. For shipment in June &/or July, 1869 (old style), seller's option," etc.

In fulfilment of the contract on the part of the seller two cargoes of maize were tendered to deft., the bills of lading for which were dated respectively June 4 & 6, 1869. The loading of these two cargoes was commenced respectively on May 12 & 16, & completed on June 4 & 6; somewhat more than the half of each cargo having been put on board in May. There was evidence that grain shipped in May was more likely to damage by heating than grain shipped in June. It was left to the jury to say whether in their opinion the cargoes in question were "June shipments" in the ordinary business sense of the term; & they found that they were:—*Held*: the question was one for the jury.—*ALEXANDER v.*

VANDERZEE (1872), L. R. 7 C. P. 530; 20 W. R. 871, Ex. Ch.

*Annotations:—**Consd. Bowes v. Shand* (1877), 2 App. Cas. 455. *Reid. Ashforth v. Redford* (1873), L. R. 9 C. P. 20; *Sutro v. Helbut, Symons* (1916), 86 L. J. K. B. 330.

436. ———.]—If a mercantile document is insensible, when read according to the ordinary sense of the words used therein, it is a question for the jury whether the language thereof has not acquired a definite meaning by mercantile usage.

Pltf. at Manchester sold to defts. certain cotton goods; the invoice was dated May 1, & at the foot of it were written the words, "Terms—Net cash, to be paid within six to eight weeks from date hereof." The goods not having been paid for, pltf. issued a writ to recover the price thereof on June 18, scarcely seven weeks from May 1. At the trial the judge left to the jury the question whether the credit had expired on June 18, according to mercantile usage. The jury having found that the action was not brought too soon:—*Held*: the direction to the jury was proper & pltf. was entitled to the verdict.—*ASHFORTH v. REDFORD* (1873), L. R. 9 C. P. 20; *sub nom. ASHWORTH v. REDFORD*, 43 L. J. C. P. 57.

437. Contracts construed with reference to.]—The contracts of parties must be interpreted by their intention & the subject-matter, regard being had to what is customary.—*OTES v. THORNHILL* (1662), 1 Lev. 93; 83 E. R. 314.

438. Basis & part of every contract—Known rule & habit of dealing in particular trade.]—*HARRISON v. AMES*, No. 268, *ante*.

439. ——— Unless expressly or impliedly excluded.]—The question is the existence of the custom.

If it exists, it applies to all agreements, written or unwritten, which either do not exclude it by express words, or, by the nature of the stipulations contained in them, rebut the presumption of law that the parties intended to be bound by the custom also (LORD DENMAN, C.J.).—*WILKINS v. WOOD* (1848), 17 L. J. Q. B. 319; 11 L. T. O. S. 291; 12 Jur. 583.

440. May control contract—Cannot change intrinsic character.]—Although a usage may control the mode of performing a contract, it cannot change its intrinsic character.—*MOLLETT v. ROBINSON* (1870), L. R. 5 C. P. 646; 39 L. J. C. P. 290; 23 L. T. 185; 18 W. R. 1160; *affd.* (1872), L. R. 7 C. P. 84, Ex. Ch.; *reversd.* on other grounds, *sub nom. ROBINSON v. MOLLETT* (1875), L. R. 7 H. L. 802, H. L.

*Annotations:—**Consd. Tetley v. Shand* (1871), 25 L. T. 658; *Scott & Horton v. Godfrey*, [1901] 2 K. B. 726. *Reid. Re Simpson, Ex p. Morgan* (1876), 34 L. T. 329; *Re Rogers, Ex p. Rogers* (1880), 15 Ch. D. 207; *Perry v. Barnett* (1885), 15 Q. B. D. 388; *Sachs v. Spielmann* (1889), 5 T. L. R. 487; *May & Hart v. Angeli* (1898), 14 T. L. R. 551; *Anderson v. Board*, [1900] 2 Q. B. 260; *Beckhuson & Gibbs v. Hamblet*, [1900] 2 Q. B. 18; *Johnson v. Kearley*, [1908] 2 K. B. 514. *Mentd. Armstrong v. Stokes* (1872), L. R. 7 Q. B. 598; *R. v. Christian* (1873), 43 L. J. M. C. 1; *Hollins v. Fowler* (1875), L. R. 7 H. L. 757; *Levitt v. Hamblet*, [1901] 2 K. B. 53; *Matveleff v. Crossfield* (1903), 51 W. R. 365.

PART II. SECT. 6, SUB-SECT. 1.

433.1. Meaning of mercantile terms—Question for jury—Meaning of contract for court to determine.]—The construction of a mercantile contract is for the ct., unless it contains words of a technical or conventional use in the trade to which the contract relates.—*NORDBEIMER v. ROBINSON* (1878), 2 A. R. 305.—*CAN.*

n. May control contract—As to time.]—Where a contract for sale & delivery "as required" of goods is silent as to time, the law will imply that the specification requiring delivery must be made within a reasonable time after the contract; also, that the

contract must be completed within a reasonable time after specification, & such reasonable time for delivery may be explained & controlled by a trade custom or usage.—*ROSS BROTHERS, LTD. v. SHAW & Co.*, [1917] 2 I. R. 367.—*IR.*

o. ———.]—A trade usage or course of dealing, not inconsistent with the expressed conditions of a written contract for the sale of goods, may have the force of annexing to the contract, during its currency or within a reasonable time after the expiry thereof, incidents regarding which the contract is silent, & evidence of such trade usage or course of dealing is

admissible. The exercise of the incidental rights thereby created does not react so as to vary the essential conditions of the contract; & where time is of the essence of the contract the fact that a trade usage or course of dealing has enabled the buyer to request & obtain delivery of portions of the goods at varying dates prior to the date conditioned for delivery, does not relieve the seller from the duty of tendering the balance of the goods on the due date, or within a reasonable time thereafter, if he wishes to put the buyer in default.—*IMPERIAL GRAIN & MILLING CO., LTD. v. SLOHINSKY BROTHERS & SONS*, [1922] 3 W. W. R. 221.—*CAN.*

Sect. 6.—Effect of usage upon contracts: Sub-sects. 1 & 2, A.]

441. Construed by usage of place where contract made.]—(1) Where the same broker is employed on behalf both of the vendor & purchaser & by the terms of the contract the name of the ship in which the goods are to be loaded is to be declared, & by a custom of the place where the contract was made such declaration, if made to the broker, is considered as notice to the principal, & the broker neglected to communicate such notice to the purchaser:—*Held*: the declaration made to the broker by the vendor was good & sufficient, although he had never communicated it to the purchaser.

(2) The construction & terms of a contract must be determined by the custom of the place where the contract is made.—*GRAVES v. LEGG* (1857), 2 H. & N. 210; 26 L. J. Ex. 316; 5 W. R. 597; 157 E. R. 88; *sub nom.* *GRAVES v. LEGG*, 29 L. T. O. S. 145; 3 Jur. N. S. 519, Ex. Ch.; *affg.* *S. C. sub nom.* *GRAVES v. LEGG* (1856), 11 Exch. 642.

Annotations:—As to (1) Refd. Sweeting v. Pearce (1861), 9 W. R. 343. *Generally, Mentd.* Holt v. Cozens (1856), 18 C. B. 673; Crookewit v. Fletcher (1857), 1 H. & N. 893; Gilkes v. Leonino (1858), 4 Jur. N. S. 537; Newson v. Smythies (1858), 28 L. J. Ex. 97; Roberts v. Brett (1859), 6 C. B. N. S. 611; Seeger v. Duthie (1860), 7 Jur. N. S. 239; White v. Beeton (1861), 30 L. J. Ex. 373; Behn v. Burness (1863), 3 B. & S. 751; Pust v. Dowle (1864), 5 B. & S. 20; Carter v. Scargill (1875), L. R. 10 Q. B. 564; Bettini v. Gye (1876), 1 Q. B. D. 183; Oppenheim v. Fraser (1876), 34 L. T. 524; River Wear Comrs. v. Adamson (1877), 2 App. Cas. 743; Kidston v. Moreau Ironworks Co. (1902), 86 L. T. 556; Butterley Co. v. New Hucknall Colliery Co., [1909] 1 Ch. 37; Leiston Gas Co. v. Leiston-cum-Sizewell U. D. C., [1916] 2 K. B. 428; Metropolitan Water Board v. Dick Kerr, [1917] 2 K. B. 1.

442. Usage must be pleaded.—To affect construction of contract.]—Where the instrument was alleged to convey a meaning in the understanding of mercantile men that it did not necessarily import:—*Held*: *pltf.* ought to set out alleged meaning in his declaration.—*GWILLIM v. DANIELL* (1835), 2 Cr. M. & R. 61; 1 Gale, 143; 5 Tyr. 644; 4 L. J. Ex. 174; 150 E. R. 26.

Annotations:—Refd. Leeming v. Snaith (1851), 16 Q. B. 275. *Mentd.* McConnell v. Murphy (1873), L. R. 5 P. C. 203; Morris v. Levison (1876), 1 C. P. D. 155.

443. Admissibility to show reasonableness of agreement.]—In an administration action a horse-dealer brought a claim against the estate of testator for charges connected with the purchase & sale of horses for testator. *Extrix* disputed the amount charged, & alleged that the horse-dealer

had sold several horses, as agent for testator, on commission, & asked for discovery of entries in the horse-dealer's books relating to the sales. The horse-dealer alleged that he had never sold horses on commission as agent for testator, but on the terms that he should pay testator a fixed sum for each horse & sell it again on his own account for what he pleased, retaining the difference, if any, by way of profit, & that this was the custom of all horse-dealers of good standing:—*Held*: evidence of the course of dealing of other horse-dealers was admissible to show that the alleged agreement with testator was not an unreasonable one.—*Re LEIGH'S ESTATE, ROWCLIFFE v. LEIGH* (1877), 6 Ch. D. 256; 37 L. T. 557; 25 W. R. 783.

Annotation:—Mentd. Dickson v. Harrison (1878), 47 L. J. Ch. 686.

Award of arbitrator as to existence of usage.—Submission of "Any dispute arising on this contract."—See *ARBITRATION*, Vol. II., pp. 474–475, Nos. 1185–1187.

SUB-SECT. 2.—ADMISSIBILITY OF EVIDENCE OF USAGE GENERALLY.

A. To Annex Terms.

Particular usages.]—See Part III., *post*.

Where usage contradictory, inconsistent or repugnant.]—See Sub-sect. 2, C., *post*.

444. General rule.]—The custom of a particular place may rectify what otherwise would be imprudence or folly. The custom does not alter or contradict the agreement in the lease, it only superadds a right which is consequential to the taking (LORD MANSFIELD, C.J.).—*WIGGLESWORTH v. DALLISON* (1779), 1 Doug. K. B. 201; 99 E. R. 132.

Annotations:—Consd. Hughes & Hamilton v. Gordon (1819), 1 Bl. 287; Produce Brokers Co. v. Olympia Oil & Cake Co., [1916] 1 A. C. 314. *Refd.* Webb v. Plummer (1819), 2 B. & Ald. 746; Knight v. Bennett (1826), 3 Bing. 364; Hutton v. Warren (1836), 1 M. & W. 466; Spartali v. Bencke (1850), 10 C. B. 212; Sweeting v. Pearce (1859), 6 Jur. N. S. 753; Myers v. Sari (1860), 3 E. & E. 306; Miller v. Titherington (1861), 9 W. R. 437; Vint v. Constable (1871), 25 L. T. 324; Abbott v. Bates (1875), 33 L. T. 491; Dashwood v. Magniac, [1891] 3 Ch. 306; *Re Sutro & Hellbut, Symons*, [1917] 2 K. B. 348. *Mentd.* St. Germain v. Willan (1823), 2 B. & C. 216; Wilkins v. Wood (1848), 17 L. J. Q. B. 319; Brown v. Byrne (1854), 23 L. T. O. S. 154; Clarke v. Westrope (1856), 18 C. B. 765; Josling v. Kingsford (1863), 13 C. B. N. S. 447.

445. — Grounds of admissibility.]—It has long been settled that, in commercial transactions,

441 i. Construed by usage of place where contract made.]—By agreement in writing *pltf.*, a corp. having its head office in T., agreed to sell goods on certain terms to *defts.*, a firm of commission merchants in W. The contract was drawn & executed by *pltf.* in T., & was afterwards executed by *defts.* in W.:—*Held*: it was a T. contract & no usage adopted by the trade in W. would be admissible to explain, vary or contradict any of its terms.—*SANITARY PACKING CO., LTD. v. NICHOLSON & BAIN* (1916), 33 W. L. R. 594; 9 W. W. R. 1420.—*CAN.*

p. Not admissible.—Unless contract ambiguous.]—The construction of a contract cannot be affected by the introduction of evidence of local mercantile usage unless the terms of the contract are doubtful & ambiguous.—*DUFRESNE v. FEE* (1904), 35 S. C. R. 274.—*CAN.*

q. —.—A declaration for the non-delivery of a cargo of Indian corn, averred a bargain & sale of such Indian corn, as per sample, at the rate of £12 15s. per ton, & alleged as a breach the non-delivery of the corn.

At the trial, this question was put to a witness, "whether or not, according to the custom of the corn trade, a sale by sample of corn afloat, omitting an express warranty of order or condition, is more than a warranty of the quality of the corn as distinguished from its condition":—*Held*: this was not a legal question, & was properly objected to, & properly not allowed by the judge to be put, because the words, "as per sample," in the contract, are unambiguous, & no usage of trade can be admitted to vary or contradict the plain terms of a contract.—*MALCOMSON v. MORTON* (1847), 11 I. L. R. 230.—*IR.*

r. — Unless usage general.]—Evidence of mercantile usage will not be allowed to add to or affect the construction of a contract for sale of goods unless such custom is general.—*TRENT VALLEY WOOLLEN MANUFACTURING CO. v. OELRICHS & CO.* (1894), 23 S. C. R. 682.—*CAN.*

s. — Unless known to party.—And contract made with reference to usage.]—Evidence of usage in Canada will not affect the construction of a contract for sale of goods in New York

by parties domiciled there, unless the latter are shown to be cognisant of it, & can be presumed to have made their contract with reference to it.—*TRENT VALLEY WOOLLEN MANUFACTURING CO. v. OELRICHS & CO.* (1894), 23 S. C. R. 682.—*CAN.*

PART II. SECT. 6, SUB-SECT. 2.—A.

1. General rule.]—To incorporate mercantile usages with the terms of a contract or to prove that they form the basis of it, they must be such as attach universally to the subject-matter of the contract in the neighbourhood or place where it was made.—*BURKE v. BLAKE* (1875), 6 P. R. 260.—*CAN.*

a. —.]—In order that the practice on a particular estate may be imported as a term of the contract into a contract in respect of land in that estate, it must be shown that the practice was known to the person whom it is sought to bind by it, & that he assented to its being a term of the contract; & when the person sought to be bound by the practice is an assignee for value of rights under that contract, it must also be shown that he & all prior assignees (if any) for value

extrinsic evidence of custom & usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established & prevailed; & this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages (PARKE, B.).—HUTTON v. WARREN (1836), 1 M. & W. 466; 2 Gale, 71; Tyr. & Gr. 646; 5 L. J. Ex. 234; 150 E. R. 517.

Annotations:—**Consd.** Brown v. Byrne (1851), 3 E. & B. 703; Myers v. Sarl (1860), 3 E. & B. 396; *Re* Constable & Cranswick (1899), 80 L. T. 164. **Refd.** Johnston v. Osborne (1840), 11 Ad. & El. 549; Syers v. Jonas (1848), 2 Exch. 111; Wilkins v. Wood (1848), 12 Jur. 583; Spartali v. Benecke (1850), 10 C. B. 212; Gibson v. Small (1853), 4 H. L. Cas. 353; Cuthbert v. Cumming (1855), 10 Exch. 809; Lundy v. Reilly (1857), 30 L. T. O. S. 223; Vint v. Constable (1871), 25 L. T. 324; Biddell v. Clemens Horst Co. [1911] 1 K. B. 934; Produce Brokers Co. v. Olympia Oil & Cake Co., [1916] 1 A. C. 314; *Re* Sutro & Heilbut, Symons, [1917] 2 K. B. 348. **Mentd.** Johnson v. Blenkinsopp (1841), 5 Jur. 870; Arden v. Sullivan (1850), 19 L. J. Q. B. 268; Westacott v. Hahn, [1917] 1 K. B. 605.

446. —.]—SYERS v. JONAS, No. 713, *post*.

447. —.]—SPARTALI v. BENECKE, No. 526, *post*.

448. — **Usage not inconsistent.**]—PARKER v. IBBETSON, No. 725, *post*.

Inadmissibility of usage if inconsistent with contract, *see* Sub-sect. 2, C., *post*.

449. —.]—ARBON v. FUSSELL, No. 669, *post*.

450. —.]—ALLAN v. SUNDIUS, No. 535, *post*.

451. —.]—The question arises whether evidence is admissible to add a term not expressed in the contract. It is the general rule that evidence is admissible for the purpose of explaining the terms of a contract with reference to the usage of a particular trade, & of showing that a term which, *prima facie*, would have one meaning, may have in such trade another well-understood meaning (BOVILL, C.J.).—HUTCHINSON v. TATHAM (1873), L. R. 8 C. P. 482; 42 L. J. C. P. 260; 29 L. T. 103; 22 W. R. 18.

Annotations:—**Consd.** Pike v. Ougley (1887), 18 Q. B. 178. **Mentd.** Southwell v. Bowditch (1876), 45 L. J. Q. B. 374; Miller, Gibb v. Smith & Tyrer, [1917] 2 K. B. 141.

452. —.]—GULF LINE, LTD. v. LAYCOCK & CO., No. 487, *post*.

453. —.]—CROUCH v. CREDIT FONCIER OF ENGLAND, No. 464, *post*.

454. **To complete contract.**]—According to the usage of the Newfoundland trade, when ships arrive on the coast they are either employed for some time in fishing (called banking) or they make an intermediate voyage in the American seas, before beginning to take in their homeward cargo, during which they are protected by a separate policy. Therefore, in effecting a policy "lost or not lost at & from Newfoundland to a port in Europe," although the ship is to be employed in banking,

it is not necessary to disclose the fact to the underwriters, as their risk only commences from the time when the banking or intermediate voyage ends, & they are bound to know the nature & circumstances of the branch of trade to which the policy relates.—VALLANCE v. DEWAR (1808), 1 Camp. 503, N. P.

Annotations:—**Refd.** Mount v. Larkins (1831), 8 Bing. 108; Palmer v. Marshall (1831), 8 Bing. 79. **Mentd.** De Wolf v. Archangel Maritime Bank & Insce. (1874), L. R. 9 Q. B. 451.

455. —.]—Pltf. proposed by letter to enter into deft.'s service as salesman; the term of service was to be for one year, & a list of customers was to be drawn up. Deft. replied by letter stating that the terms of pltf.'s letter required further definition, but requesting him to come on an appointed day. Pltf. entered upon deft.'s service, but was dismissed before the expiration of the year with a month's notice. Pltf. having sued for a wrongful dismissal, at the trial, evidence was tendered of a custom to dismiss salesmen at a month's notice, & such evidence was rejected, on the ground that the letters contained a complete contract in writing:—**Held**: the evidence was admissible, as the contract in the letters was incomplete.—APPLEBY v. JOHNSON (1874), L. R. 9 C. P. 158; *sub nom.* JOHNSON v. APPLEBY, 43 L. J. C. P. 146; 30 L. T. 261; 22 W. R. 515.

456. — **Usage tacitly incorporated.**]—HUTTON v. WARREN, No. 445, *ante*.

457. —.]—R. v. STOKE UPON TRENT (INHABITANTS), No. 602, *post*.

458. —.]—Although the care & skill which is bestowed in the training of racehorses would give a lien to the trainer for his charge, yet, inasmuch as by the usage, the trainer is bound to send the horses to run any race which the owner pleases, & as the jockey is appointed by the owner, there is no such right of continuing possession as is sufficient to support a claim of lien.

If there is a constant usage in a given line of business, persons in that business contracting together must be presumed to contract according to that usage, & looking at the evidence, by the usage the owner may direct to what races the horse is to be taken, & they are given into his possession for the purpose of running the race (KRLE, J.).—FORTH v. SIMPSON (1849), 13 Q. B. 680; 18 L. J. Q. B. 263; 13 L. T. G. S. 187; 13 Jur. 1024; 116 E. R. 1423.

Annotations:—**Mentd.** Lord's Trustee v. G. E. Ry., [1908] 2 K. B. 54; Hatton v. Car Maintenance Co. (1914), 30 T. L. R. 275.

459. —.]—BROWN v. BYRNE, No. 545, *post*.

460. —.]—By the custom of trade, when timber is sold in bond at a sale by auction in London, the buyer contracts to buy at a price including the duty payable, & he may, by giving notice on the following day so to do, elect to take the timber in bond, & if he does so, he is then only bound to pay the price less the duty. Evidence of that custom is admissible.

knew that the practice was a term of the original contract—MANA VIKRAMA v. RAMA PATTER (1897), 1 L. R. 20 Mad. 275.—**IND.**

b. —.]—When a contract is made for loading or discharging a ship at a particular port, the contract must be construed with reference to the conditions of that port, whether the contracting parties were or were not aware of them.—ARDAN S.S. CO., LTD. v. WEIR & Co. (1904), 6 F. (Ct. of Sess.) 294.—**SCOT.**

456 i. **To complete contract—Usage tacitly incorporated.**]—Evidence of usage of trade applicable to the contract which the parties making it knew, or

may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the instrument itself is silent.—JOY LALL & Co. v. MON-MOTHA NATH MULLIK (1916), 20 C. W. N. 365.—**IND.**

456 ii. —.]—Pltfs. signed a bought note, which contained no reference to a sale by sample:—**Held**: evidence was admissible to show that, according to the general usage of the trade at B., & generally in the district, sales were taken to be by sample, whether they purported on the face of the bought & sold note to be so or not.—O'NEILL v. BELL (1866), 1 R. 2 C. L.

68.—**IR.**

456 iii. —.]—A custom not being inconsistent with a written contract, is therefore incorporated therein.—WHITCOMBE & TOMBS v. TAYLOR (1907), 27 N. Z. L. R. 237.—**N.Z.**

456 iv. —.]—Evidence of a trade usage applicable to a specific contract, & which the parties knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract, respecting which the written instrument is silent.—MCLEOD & Co. v. DUNELL, EDDEN & Co. (1868), 1 Buch. A. C. 182.—**S. AF.**

Sect. 6.—Effect of usage upon contracts: Sub-sect. 2, A. & B. (a).]

The custom must be considered as incorporated into the contract & as if it was part of the written terms of it (COCKBURN, C.J.).—CLARK v. SMALLFIELD (1861), 4 L. T. 405.

461. ————.]—A universal usage which is not according to law cannot be set up to control the law (ERLE, C.J.).

Many contracts are construed by the course of business in the particular trade or in the particular place where they are made. But that is not at all analogous to a universal usage pervading the whole world. In the cases where such local usages are imported into the contract, it is because they tacitly form part of it, like those contracts in which we find the words " & other usual terms." They then form part of the contract itself. The contract expresses what is peculiar to the bargain between the parties, & the usage supplies the rest (ERLE, C.J.).—MEYER v. DRESSER (1864), 16 C. B. N. S. 446; 33 L. J. C. P. 289; 10 L. T. 612; 2 Mar. L. C. 27; 143 E. R. 1280; *sub nom.* MAYER v. DRESSER, 12 W. R. 983.

Annotations:—*Reftd.* Grissell v. Bristowe (1868), L. R. 3 C. P. 112; Produce Brokers Co. v. Olympia Oil & Cake Co., [1916] 1 A. C. 314. *Mentd.* The Norway (1864), Brown. & Lush. 377; Maspons y Hermano v. Mildred (1882), 9 Q. B. D. 530.

462. ————.]—Unless excluded by terms of contract.]—The custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural, & others, which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable (PARKE, B.).—GIBSON v. SMALL (1853), 4 H. L. Cas. 353; 21 L. T. O. S. 240; 17 Jur. 1131; 1 C. L. R. 363; 10 E. R. 499, H. L.; *affg.* S. C. *sub nom.* SMALL v. GIBSON (1849), 16 Q. B. 128, Ex. Ch.

Annotations:—*Consd.* Biddell v. Horst Co., [1911] 1 K. B. 934. *Mentd.* Jenkins v. Hyecock (1853), 8 Moo. P. C. B. 351; Couch v. Steel (1854), 3 E. & B. 402; Fawcus v. Sarafeld (1856), 6 E. & B. 192; Michael v. Tredwin (1856), 17 C. B. 551; Knill v. Hooper (1857), 2 H. & N. 277; Thompson v. Hopper (1858), K. B. & E. 1038; Burgess v. Wickham (1863), 3 B. & S. 669; Clapham v. Langton (1864), 5 B. & S. 729; Standhead v. Mid. Ry. (1867), L. R. 2 Q. B. 412; Stanton v. Richardson (1872), L. R. 7 C. P. 421; Daniels v. Harris (1874), 23 W. R. 86; Kopitoff v. Wilson (1876), 1 Q. B. D. 377; Dudgeon v. Pembroke (1877), 2 App. Cas. 284; Steel v. State Line S.S. Co. (1877), 3 App. Cas. 72; The West Cock, [1911] P. 208.

463. ————.]—METZNER v. BOLTON, No. 584, *post*.

464. ————.]—Incidents which the parties are competent by express stipulation to introduce into their contracts may be annexed by custom, however recent, provided that it be general, on the ground that they are tacitly incorporated in the contract. If the wording of an instrument is such as to exclude this tacit incorporation no usage can annex the incident. But where the incident is of such a nature that the parties are not themselves competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage. It may be so annexed by the ancient law merchant, which forms part of the law & of which the cts. take judicial notice. Nor, if the ancient law merchant annexes the incident, can any modern usage take it away (BLACKBURN, J.).—CROUCH v. CREDIT FONCIER OF ENGLAND (1873), L. R. 8 Q. B. 374; 42 L. J. Q. B. 183; 29 L. T. 259; 21 W. R. 946.

Annotations:—*Reftd.* Goodwin v. Roberts (1876), 1 App. Cas. 476; Dashwood v. Magniac, [1891] 3 Ch. 306; Bechuana-land Exploration Co. v. London Trading Bank, [1898] 2 Q. B. 658. *Mentd.* Tyvycross v. Dreyfus (1877), 5 Ch. D. 605; London & County Banking Co. v. London & River Plate

Bank (1887), 20 Q. B. D. 232; Mortgage Insee. Corp'n. v. L. R. Comrs. (1888), 21 Q. B. D. 352; National Bank v. Slike (1890), 63 L. T. 787; Simmons v. London Joint Stock Bank (1890), 39 W. R. 449, 450, 452; Venables v. Baring, [1892] 3 Ch. 527; Webb, Hale v. Alexandria Water Co. (1905), 21 T. L. R. 572; Jones v. Coventry, [1909] 2 K. B. 1029.

465. ————.]—MOULT v. HALLIDAY, No. 202, *ante*.

Degree of notoriety essential—To validity of usages.]—*See* Sect. 3, sub-sect. 1, *ante*.

466. Not where usage contrary to policy of the ———.]—The ct. will refuse to recognise an alleged custom of accepting transfers in blank as being contrary to the policy of the law, & in contravention of a settled rule of law.—TAYLER v. GREAT INDIAN PENINSULA RY. CO. (1859), 4 De G. & J. 559; 28 L. J. Ch. 709; 33 L. T. O. S. 361; 5 Jur. N. S. 1087; 7 W. R. 637; 45 E. R. 217, L. J.J.

Annotations:—*Consd.* France v. Clark (1884), 26 Ch. D. 257. *Mentd.* *Re* North British Australasian Co. & Joint Stock Co.'s Acts, 1856 & 1857, *Ex p.* Swan (1859), 7 C. B. N. S. 400; Swan v. North British Australasian Co. (1863), 2 H. & C. 175; Hawkins v. Maltby (1867), 3 Ch. App. 188; Hunter v. Walters, Curling v. Walters, Darnell v. Hunter (1870), L. R. 11 Eq. 292; Soc. Générale de Paris v. Walker (1885), 11 App. Cas. 20; *Re* Queensland Land & Coal Co., Davis v. Martin (1894), 71 L. T. 115.

467. Only if both parties cognisant of usage.]—When evidence of usage of a particular place is admitted to add to or in any manner affect the construction of a written contract, it is admitted only on the ground that both parties were cognisant of the usage, & it being shown that only one of the parties knew of the custom, such evidence will be rejected.—KIRCHNER v. VENUS (1859), 12 Moo. P. C. C. 361; 33 L. T. O. S. 81; 5 Jur. N. S. 395; 7 W. R. 455; 14 E. R. 948, P. C.

Annotations:—*Consd.* Gibson v. Hillstrom (1869), 21 L. T. 302. *Reftd.* Sweeting v. Pearce (1859), 6 Jur. N. S. 753; Buckle v. Knoop (1867), L. R. 2 Exch. 125. *Mentd.* Pearson v. Goschen (1864), 17 C. B. N. S. 352; The Felix (1868), L. R. 2 A. & E. 273; Gray v. Carr (1871), L. R. 6 Q. B. 522; McLean & Hope v. Fleming (1871), L. R. 2 Sc. & Div. 128; Allison v. Bristol Marine Insee. (1876), 1 App. Cas. 209; Fisher v. Smith (1878), 4 App. Cas. 1; Great Indian Peninsula Ry. v. Turnbull (1885), 53 L. T. 325; Smith, Hill v. Pyman, Bell, [1891] 1 Q. B. 742; The Canada (1897), 13 T. L. R. 238; Weir v. Girvin, [1900] 1 Q. B. 45; Rederiakt. Superior v. Dewar & Webb (1909), 14 Com. Cas. 320.

468. ———.]—A trade usage cannot be annexed to a contract of service, unless the servant was aware of it on entering the employment.—MEEK v. PORT OF LONDON AUTHORITY, [1918] 1 Ch. 415; 87 L. J. Ch. 286; 119 L. T. 196; 82 J. P. 225; 34 T. L. R. 249; 16 L. G. R. 289; *affd.* on other grounds, [1918] 2 Ch. 96, C. A.

469. To qualify contract.]—HOWCROFT v. LAYCOCK, No. 556, *post*.

Usages relating to landlord & tenant.]—*See* AGRICULTURE, Vol. II., p. 11, Nos. 37 *et seq.*, & LANDLORD & TENANT.

Usages of Stock Exchange.]—*See* STOCK EXCHANGE.

Usages in relation to insurance.]—*See* INSURANCE.

Usages in connection with sale of land.]—*See* SALE OF LAND.

Usages relating to master & servant.]—*See* MASTER & SERVANT.

Usages relating to building trade.]—*See* BUILDING CONTRACTS, ENGINEERS & ARCHITECTS, Vol. VII., pp. 332–334, 341, 444, 445, 448–450, Nos. 7, 14, 16, 47, 449, 450, 455, 456, 458, 461, 472, 474, 475, 479, 482, 485.

B. To Explain Terms.

(a) In General.

Particular usages.]—*See* Part III., *post*.

470. Admissibility a question of law.]—LEWIS v. MARSHALL, No. 479, *post*.

471. Grounds of admissibility.]—MYERS v. SARL, No. 503, post.

472. Evidence admissible to explain.]—On mercantile contracts relating to insurances, etc., cts. of law examine & hear witnesses, of what is the usage & understanding of merchants conversant therein; for they have a style peculiar to themselves, which is short, yet is understood by them, & must be the rule of construction (LORD HARDWICKE, C.).—**BAKER v. PAINE** (1750), 1 Ves. Sen. 456; 27 E. R. 1140, L. C.

Annotation:—Mentd. Rich v. Jackson (1794), 4 Bro. C. C. 614.

473. —.]—In all mercantile contracts & adventures, parol evidence of usage is allowed.—**BLUNT v. CUMYNS** (1751), 2 Ves. Sen. 331; 28 E. R. 213, L. C.

474. —.]—Where a holding is general from Michaelmas, the custom of the country as to whether that shall be deemed Old or New Michaelmas Day, is admissible evidence.—**FURLEY d. CANTERBURY CORPN. v. WOOD** (1794), 1 Esp. 198, N. P.

Annotations:—Apprvd. & Foldd. Doe d. Hall v. Benson (1821), 4 B. & Ald. 588. *Refd.* Den d. Peters v. Hopkinson (1823), 3 Dow. & Ry. K. B. 507.

475. —.]—DOE d. HALL v. BENSON (1821), 4 B. & Ald. 588; 106 E. R. 1051.

Annotations:—Refd. Den d. Peters v. Hopkinson (1823), 3 Dow. & Ry. K. B. 507; Spartali v. Benecke (1850), 10 C. B. 212.

476. —.]—Although parol evidence cannot be received to vary the terms of a contract, yet it has always been received to show in what sense mercantile terms are used (VAUGHAN, J.).—**POWELL v. HORTON** (1836), 2 Bing. N. C. 608; 2 Hodg. 12; 3 Scott, 110; 5 L. J. C. P. 204; 132 E. R. 257.

477. —.]—BOTTOMLEY v. FORBES, No. 363, ante.

478. —.]—Deft., a corn merchant in Ireland, sent written instructions to pltf., a corn factor & *del credere* agent of deft. in London, to sell oats of a certain quality at a certain price on his (deft.'s) account. Pltf. sold them, as described by deft., in his own name. The oats proved to be of inferior quality, & pltf. was obliged to pay to the vendee the difference in value. In an action to recover the difference, it was objected by deft. that pltf. had no right to sell in his own name & thereby to incur liability:—*Held:* evidence was admissible for pltf. to show that, by the custom of the London corn trade, a factor was warranted by such instructions in selling in his own name.—**JOHNSTON v. USBORNE** (1841), 11 Ad. & El. 549; 3 Per. & Dav. 236; 113 E. R. 524.

479. —.]—(1) Evidence of general usage in the trade to which a contract refers is admissible to interpret the contract. But to vary the ordinary meaning of plain words, such evidence must be clear & irresistible.

Where, therefore, two witnesses stated, that the usual practice of the trade to Sydney was to consider steerage passengers as cargo, & their passage-money as freight, but stated no instance of such construction in their own knowledge, & added, that the guarantee in question was an unusual one:—*Held:* this evidence was insufficient to prove a general usage of trade, so as to vary the *prima facie* meaning of the contract.

(2) Whether such evidence when offered is admissible is a question for the judge alone.—**LEWIS v. MARSHALL** (1844), 7 Man. & G. 729; 8 Scott, N. R. 477; 13 L. J. C. P. 193; 3 L. T. O. S. 261; 8 Jur. 848; 135 E. R. 293.

Annotations:—As to (1) Refd. Spartali v. Benecke (1850), 10 C. B. 212; Kirehner v. Venus (1859), 12 Moo. P. C. C. 361. *As to (2) Refd.* Hutchinson v. Tatham (1873), 42 L. J. C. P. 260.

480. —.]—HALL v. JANSON, No. 527, post.

481. —.]—CUTHBERT v. CUMMING, No. 700, post.

482. —.]—When the terms of a contract are plain, usage can little affect the construction to be placed upon it; but when it is ambiguous, the usage for a long time may influence the judgment of the ct., by showing how it was understood by the original parties to it.—**BOLDERO v. EAST INDIA CO.** (1858), 26 Beav. 316; 28 L. J. Ch. 24; 32 L. T. O. S. 214; 4 Jur. N. S. 1124; 7 W. R. 1; 53 E. R. 920; *affd.* on other grounds (1860), 1 De G. F. & J. 313, L. C.; (1865), 11 Il. L. Cas. 405, H. L.

Annotation:—Mentd. Secretary of State for India v. Underwood (1870), L. R. 4 H. L. 580.

483. —.]—HUTCHINSON v. TATHAM, No. 451, ante.

484. —.]—SCHWEIBER (ASSIGNEE OF DEBRICKS) v. HORSLEY (1865), 11 Jur. N. S. 675.

485. —.]—Evidence of the custom of the trade, of course would, according to the well-known rule of law, which admits parol evidence, not to contradict a document, but to explain the words used in it, supply, as it were, the mercantile dictionary in which you are to find the mercantile meaning of the words which are used (LORD CAIRNS, C.).—**BOWES v. SHAND** (1877), 2 App. Cas. 455; 46 L. J. Q. B. 561; 36 L. T. 857; 25 W. R. 730; 5 Asp. M. L. C. 461, H. L.; *reversg.* S. C. *sub nom.* SHAND v. BOWES, 2 Q. B. D. 112, C. A.

Annotations:—Refd. *Re* Sutro & Hellbut, Symons, [1917] 2 K. B. 348. *Mentd.* West Ham Union Grdn. v. St. Matthew, Bethnal Green, [1896] A. C. 477; *Re* Goodbody & Balfour & Williamson (1899), 5 Com. Cas. 59; Nelson v. Nelson Line Liverpool (No. 3), *Re* Nelson & Nelson Line Liverpool (1907), 77 L. J. K. B. 97; *Re* General Trading Co. & Van Stokks Commissiehandel (1911), 16 Com. Cas. 95; The Annie Johnson, The Kronprinsessan Margareta, [1918] 2 P. 154; Manbre Saccharine Co. v. Corn Products Co., [1919] 1 K. B. 198; Fisher, Rooves v. Armour, [1920] 2 K. B. 329; Hartley v. Hymans, [1920] 3 K. B. 475; Aron (Incorporated) v. Comptoir Wegmont, [1921] 3 K. B. 435; Diamond Alkali Export Corp. v. Bourgeois, [1921] 3 K. B. 443; Taylor v. Bank of Athens, Pinnock v. Bank of Athens (1922), 91 L. J. K. B. 776.

486. —.]—COTTON v. SOUNES (1902), 18 T. L. R. 456.

Annotation:—Refd. Clayton-Greene v. De Courville (1920), 36 T. L. R. 790.

487. —.]—By custom you may add by inference to the terms of a contract, or you may show a customary meaning of a term of the contract; but you must not by an allegation of custom contradict the express contract contained in the terms of the particular document, which governs the rights of the parties (KENNEDY, J.).—**GULF LINE, LTD. v. LAYCOCK & Co.** (1901), 18 T. L. R. 14; 7 Com. Cas. 1.

488. —.]—Meaning of contract—To define places & mode of performance.]—The rule as to whether evidence of a custom is admitted to vary a written contract is perhaps easier to state than to apply, because in a sense any admission of

PART II. SECT. 6, SUB-SECT. 2.—B. (a).

4721. Evidence admissible to explain.]—A cargo was ordered by merchants at A. from merchants at B., & a dispute having arisen as to the mode of measuring (which is different in the two places):—*Held:* competent to

ask merchants engaged in the trade with B. to read the letter ordering the goods & say whether they would understand from it that the port of delivery was B. or A.—**SCHURMANST & SON v. STEPHEN & SONS** (1833), 11 Sh. (Ct. of Sess.) 779.—**SCOT.**

c. — Must conform to rules

*governing evidence.]—*Evidence as to practice & custom is inadmissible, when it does not profess to conform to the rule governing evidence explanatory of the meaning of doubtful words, nor to that relating to custom.—**MILLS v. CONTINENTAL BAG & PAPER CO.** (1919), 44 O. L. R. 71.—**CAN.**

Sect. 6.—Effect of usage upon contracts: Sub-sect. 2, B. (a) & (b).]

custom varies a written contract. The contract construed without the custom will be different from what it is if construed with the custom, & in that sense every admission of custom varies the written contract (SCRUTTON, L.J.).

It is quite clear that, although the meaning of the written contract is varied, you may use the custom, first of all, in the case where you are using it as a dictionary to explain what words in the contract mean. Thus, where the contract says twelve, you may show that by custom twelve means thirteen, as in the case of a baker's dozen; & where the contract says one hundred, you may prove by custom that one hundred means the long hundred or one hundred & twenty; & where the contract provides for payment at thirty days or three months, as in the case of an ordinary bill of exchange or promissory note, you may find that thirty days means thirty-three days, or that three months means three months & three days. You may also use the custom to define places. Thus, "alongside" without a custom may mean a certain area, & "alongside" with a custom may mean a much larger area. Again, you may use custom to define method of performance. The method of performance without the custom might be limited to certain means, & the method of performance with the custom might be much wider (SCRUTTON, L.J.).—PRODUCE BROKERS CO., LTD. v. OLYMPIA OIL & CAKE CO., LTD. No. 690, *post*.

489. — Latent & patent ambiguities.—In modern & ancient instruments.]—WATCHAM v. A. G. OF EAST AFRICA PROTECTORATE, No. 557, *post*.

Not where usage contradictory, inconsistent or repugnant.]—See Sect. 6, sub-sect. 2, C., *post*.

490. Not where terms clear & express.]—With regard to the evidence of the usage of the trade, the language of the agreement between the parties being clear & unequivocal, evidence as to the general usage of the trade could not be of any avail.—READING v. MENHAM (1832), 1 Mood. & R. 234, N. P.

491. —.]—Where house agents were employed to sell houses upon the terms that their commission should be payable upon the treaty being concluded:—Held: the terms of the contract were unambiguous, & no parol evidence of custom could be received.

It is impossible that any parol evidence could be admitted, because plff.'s card contains the terms of the contract & they are quite clear & express (PATTESON, J.).—COTTON v. SWANN (1848), 11 L. T. O. S. 63.

492. —.]—BOLDERO v. EAST INDIA CO., No. 482, *ante*.

492a. — Printed & written clause in charter-party—Not inconsistent.]—THE NIFA, [1892] P. 411; 62 L. J. P. 12; 69 L. T. 56; 7 Asp. M. L. C. 324; 1 R. 540, D. C.

Annotations:—Consol. Akt. Helios v. Ekman (1897), 76 L. T. 537; Paigrove, Brown v. Turid S.S., [1922] 1 A. C. 397. Reld. Brenda S.S. Co. v. Green (1900), 69 L. J. Q. B. 445.

493. Only if both parties cognisant of usage.]—KIRCHNER v. VENUS, No. 407, *ante*.

494. — & usage not variable.]—ABBOTT v. BATES, No. 744, *post*.

490 i. Not where terms clear & express.]—Custom cannot affect the express terms of a written contract.—INDUR CHANDRA DUGAR v. LACHMI BIBI (1871), 7 B. L. R. 682; 15 W. R. 501.—IND.

490 ii. —.]—Averments of custom of trade cannot be admitted to proba-

tion in order to construe a written contract clearly expressed.—TANCRED, ARROL & Co. v. STEEL CO. OF SCOTLAND (1890), 17 R. (Ct. of Sess.) 31.—SCOT.

490 iii. —.]—MACLELLAN v. PEATIE'S TRUSTEES (1903), 5 F. (Ct. of Sess.) 1031.—SCOT.

Characteristics of usages.]—See Sect. 5, *ante*.

495. Only if usage relates to matter incident to contract.]—Evidence of custom is admissible to explain a contract only where it relates to a matter incident to the contract.—PHILLIPPS v. BRIARD (1856), 1 H. & N. 21; 25 L. J. Ex. 233; 4 W. R. 486; 156 E. R. 1101.

496. Only if usage in fact established.]—ABBOTT v. BATES, No. 744, *post*.

497. —.]—The law merchant may govern the construction of a written commercial document, but there must be evidence in fact of the commercial usage before there can be admission or adoption.—BIDDELL BROTHERS v. E. CLEMENS HORST CO., [1911] 1 K. B. 934; 80 L. J. K. B. 584; 104 L. T. 577; 27 T. L. R. 331; 55 Sol. Jo. 383; 12 Asp. M. L. C. 1, C. A.; *reversd.* on other grounds, *sub nom.* E. CLEMENS HORST CO. v. BIDDELL BROTHERS, [1912] A. C. 18, H. L.

Annotations:—Mentd. Landauer v. Craven & Speeding, [1912] 2 K. B. 94; Orient Co. v. Brekke & Howlid, [1913] 1 K. B. 531; Groom v. Barber, [1915] 1 K. B. 316; Happe v. Manasseh (1915), 84 L. J. K. B. 1895; Karberg v. Blythe, Green, Jourdain, Schneider v. Burgett & Newsam (1915), 85 L. J. K. B. 665; The Miramichi, [1915] P. 71; Sharpe v. Nosawa, [1917] 2 K. B. 814; Upjohn v. Hitchens, Upjohn v. Ford, [1918] 1 K. B. 171; Manbre Saccharine Co. v. Corn Products Co., [1919] 1 K. B. 198; Johnson v. Taylor, [1920] A. C. 144; Aron (Incorporated) v. Comptoir Wegimont, [1921] 3 K. B. 435; Diamond Alkali Export Corp'n. v. Bourgeois, [1921] 3 K. B. 443; Hansson v. Hamel & Horley, [1922] 2 A. C. 36; Ballantine v. Cramp & Bosman (1923), 129 L. T. 502.

498. Not to define specific article of trade—"Foreign refined rape oil."—NICHOL v. GODTS, No. 687, *post*.

Usages relating to landlord & tenant.]—See AGRICULTURE, Vol. II., p. 11, Nos. 37 *et seq*.

Usages of Stock Exchange.]—See STOCK EXCHANGE.

Usages in relation to insurance.]—See INSURANCE.

(b) To attach special Mercantile or Professional Interpretation.

Usages of Stock Exchange.]—See STOCK EXCHANGE.

Usages relating to landlord & tenant.]—See AGRICULTURE, Vol. II., p. 11, No. 37 *et seq*; LANDLORD & TENANT.

Usages in relation to insurance.]—See INSURANCE.

Particular usages.]—See Part III., *post*.

499. General rule.]—The case turns upon the meaning of the word "privilege." This is a mercantile term, & I must learn its meaning from mercantile men. Then if indifferent witnesses may be called on to explain what is understood by privilege, may we not hear the construction put upon the word by the parties themselves before the agreement was entered into? (GIBBS, C.J.).—BIRCH v. DEPEYSTER (1816), 4 Camp. 385; 1 Stark. 210, N. P.

Annotations:—Mentd. Luckie v. Bushby (1853), 13 C. B. 864; Crampton v. Walker (1860), 3 E. & E. 321.

500. —.]—If a word has acquired a particular meaning in a certain trade, that meaning will be applied to it in construing a written contract respecting that trade; but, that the word has acquired that particular meaning must be distinctly proved.

The important point here is as to the meaning of the word bale, one party contending that it means a compressed bale, the other party that it

493 i. Only if both parties cognisant of usage.]—Where a custom is purely local, it cannot be taken to control or explain the words of a written instrument unless it was known to both parties.—HOLMAN v. PERUVIAN NITRATE CO. (1878), 5 R. (Ct. of Sess.) 657.—SCOT.

means a bag (ABBOTT, C.J.).—TAYLOR v. BRIGGS (1827), 2 C. & P. 525, N. P.

501. —.]—Where terms are used which are known & understood by a particular class of persons, in a certain special & peculiar sense, evidence to that effect is admissible for the purpose of applying the instrument to its proper subject-matter, & although this principle has been more frequently applied to mercantile instruments than to others, it is not confined to them (PARKE, J.).—SMITH v. WILSON (1832), 3 B. & Ad. 728; 1 L. J. K. B. 194; 110 E. R. 266.

Annotations.—*Apld.* Myers v. Sari (1860), 3 E. & E. 306. *Refd.* Bold v. Rayner (1838), 2 Gale, 44; Clayton v. Gregson (1836), 5 Ad. & El. 302; Spicer v. Cooper (1841), 1 Q. B. 424; Shore v. Wilson (1842), 9 Cl. & Fin. 355; Simpson v. Margitson (1847), 11 Q. B. 23; Sparta v. Benecke (1850), 10 C. B. 212; Humfrey v. Dale (1858), 5 Jur. N. S. 191; Bruner v. Moore, [1904] 1 Ch. 305. *Mentd.* Partridge v. Bank of England (1846), 10 Jur. 1031.

502. —.]—Wherever the words used have, by usage or local custom, a peculiar meaning, that meaning may be shown by parol evidence (ALDERSON, B.).—GRANT v. MADDOX (1846), 15 M. & W. 737; 16 L. J. Ex. 227; 7 L. T. O. S. 187.

Annotations.—*Refd.* Simpson v. Margitson (1847), 11 Q. B. 23; Sotilichos v. Kemp (1848), 18 L. J. Ex. 36; Myers v. Sari (1860), 3 E. & E. 306; Abbott v. Bates (1875), 45 L. J. Q. B. 117; Bruner v. Moore, [1904] 1 Ch. 305; Clayton-Greene v. De Courville (1920), 30 T. L. R. 790. *Mentd.* Harner v. Cornelius (1858), 4 Jur. N. S. 1110.

503. —.]—(1) Although parol evidence is not admissible to contradict a contract the terms of which have but one ordinary meaning & acceptation, yet if the parties have used terms which bear not only an ordinary meaning, but also one peculiar to the department of trade or business to which the contract relates, it is obvious that due effect would not be given to the intention, if the terms were interpreted according to their ordinary & not according to their peculiar signification. Therefore, whenever such a question has come before the cts., it has always been held that where the terms of the contract under consideration have, besides their ordinary & popular sense, also a peculiar & scientific meaning, the parties who have drawn up the contract with reference to some particular department of trade or business, must have intended to use the words in the peculiar sense. This is but an application of the well-known rule that the interpretation of contracts must be governed by the intention of the parties; & from the nature of the case, the peculiar meaning of the terms used can be discovered only by means of parol evidence (COCKBURN, J.).

(2) The cts. have long allowed mercantile instruments to be expounded according to the usage & custom of merchants, who have a style & language peculiar to themselves of which usage & custom are the legitimate interpreters (COCKBURN, J.).—MYERS v. SARI (1860), 3 E. & E. 306; 30 L. J. Q. B. 9; 7 Jur. N. S. 97; 9 W. R. 96; 121 E. R. 457.

Annotations.—*Refd.* Miller v. Tetherington (1861), 6 H. & N. 278; *Re* Suto & Heilbut, Symons, [1917] 2 K. B. 348; British & Foreign Marine Insce. v. Gaunt, [1921] 2 A. C. 41.

504. — Whether usage must be known at place where contract made.—By a contract in writing, made at S., between A., who resided at S., & B., who resided in London, B. sold to A. a cargo of St. Gilles Marais wheat f.o.b. at a French port.

The grain was unknown at S., but is known elsewhere, in the trade, to contain a mixture of barley. The judge, at the trial, rejected evidence to prove this, unless it could also be proved that this fact was well known at S.:—*Held*: the ruling was wrong.—RYDER v. WOODLEY (1862), 10 W. R. 294.

505. —.]—PRODUCE BROKERS CO., LTD. v. OLYMPIA OIL & CAKE CO., LTD., No. 690, *post*.

506. Although terms bear *prima facie* a natural import.—The same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, that it is to be construed according to its sense & meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary & popular sense, unless they have generally in respect to the subject-matter as by known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words (LORD ELLENBOROUGH, C.J.).—ROBERTSON v. FRENCH (1803), 4 East, 130; 102 E. R. 779.

Annotations.—*Consd.* Carr v. Montefiore (1864), 5 B. & S. 408. *Refd.* Lang v. Anderson (1824), 3 B. & C. 495; Hunter v. Leathley (1830), 10 B. & C. 858; Hart v. Standard Marine Insce. (1889), 22 Q. B. D. 499; G. W. Ry. v. Carpalla United China Clay Co., [1909] 1 Ch. 218; Cave v. Horsell, [1912] 3 K. B. 533; Sanday v. British & Foreign Marine Insce., [1915] 2 K. B. 781. *Mentd.* *Ex p.* Yallop (1808), 15 Ves. 60; Spitta v. Woodman (1810), 2 Taunt. 416; Horneyer v. Lushington (1812), 15 East, 46; Pirie v. Anderson (1812), 4 Taunt. 652; Gladstone v. Clay (1813), 1 M. & S. 418; Park v. Hammond (1816), 6 Taunt. 495; Prouting v. Hammond (1819), 8 Taunt. 688; Rickman v. Carstairs (1833), 5 B. & Ad. 651; Alsager v. St. Katherine's Dock Co. (1845), 14 M. & W. 794; Gunn v. Tyrie (1864), 4 B. & S. 680; Glynn v. Margeson, [1893] A. C. 351; Saqui & Lawrence v. Stearns (1910), 103 L. T. 583; *Re* Suto & Heilbut, Symons, [1917] 2 K. B. 348.

507. —.]—Deft., a merchant at P., established H. as his general agent in London in 1832, authorising him to make contracts in his own name; that authority was, however, revoked shortly before the making of the contract in question with plffs. The contract was effected through W., a broker, in the terms previously sanctioned by deft., & was contained in two notes; the bought note was in these terms: "Bought for T. & C. 1,000 casks of tallow—W., Broker"; & was delivered to plffs., the buyers; the sold note was in these terms: "Sold for H. to my principals 1,000 casks of yellow candle tallow—W., Broker"; & was delivered to H., the agent for the seller, deft. In an action for not delivering the tallow, the jury found that H. intended to make the sale on his own account, but that the broker thought he was making the sale for deft., & intended to deal with deft.:—*Held*: evidence of a custom in the trade, that a party to such a contract might, when the principal was disclosed, reject him & elect to hold the broker responsible, was not admissible; though parol evidence was admissible to show in what character a party had made a contract, or in what name a party was carrying on his trade.

When parties have agreed to reduce their contract to writing, common sense seems to require that they should be held bound by that writing. Customs of trade are supposed to form a virtual exception to this rule; but the cases only go so far as to admit parol evidence to explain terms used in a sense different from their ordinary meaning (LORD DENMAN, C.J.).—TRUEMAN v. LODER (1840), 11 Ad. & El. 589; 3 Per. & Dav.

PART II. SECT. 6. SUB-SECT. 2.— B. (b).

d. Although terms bear *prima facie* a natural import—"Insufficiency of

package."—Evidence of mercantile usage or custom is admissible to show that the words "insufficiency of package" should not be taken in their ordinary sense, but as meaning

insufficient according to a special custom of the china trade.—PENINSULAR & ORIENTAL STEAM NAVIGATION CO. v. MANICKJI NARAINJI PADSHA (1867), 4 Bom. O. C. 169.—IND.

Sect. 6.—Effect of usage upon contracts: Sub-sect. 2, B. (b) & C.]

267; 9 L. J. Q. B. 165; 4 Jur. 934; 113 E. R. 539.

Annotations:—*Consd.* *Calder v. Dobell* (1871), L. R. 6 C. P. 486. *Refd.* *Humfrey v. Dale* (1858), 5 Jur. N. S. 191. *Mentd.* *Beckham v. Drake* (1841), 9 M. & W. 79; *Furze v. Sharwood* (1841), 2 Q. B. 388; *Royal Exchange Insee. v. Moore* (1863), 11 W. R. 592; *Re Oriental Bank Corpn. Ex p. Guillemin* (1884), 28 Ch. D. 634; *Durant v. Roberts & Keighley, Maxsted*, [1900] 1 Q. B. 629; *Willis, Faber v. Joyce* (1911), 104 L. T. 576.

508. ——We must apply the ordinary rules of construction to this instrument. One of these rules is that words are to be construed according to their strict & primary acceptation, & subject always to the observation, that the meaning of a particular word may be shown by parol evidence to be different in some particular place, trade or business from its proper & ordinary acceptation (*POLLOCK, C.B.*).—*MALLAN v. MAY* (1844), 13 M. & W. 511; 14 L. J. Ex. 48; 4 L. T. O. S. 174; 9 Jur. 19; 153 E. R. 213.

Annotations:—*Consd.* *Cave v. Horsell*, [1912] 3 K. B. 533. *Refd.* *Simpson v. Margitson* (1847), 11 Q. B. 23; *Bruner v. Moore*, [1904] 1 Ch. 305. *Mentd.* *Horwood v. Griffith* (1853), 2 W. R. 71; *Wallace v. A.-G.* (1864), 33 Beav. 384.

509. ——On clear & irresistible evidence.]—*LEWIS v. MARSHALL*, No. 479, *ante*.

510. ——By the terms of a charterparty the charterers agreed to unload the vessel at a certain rate *per diem*, & payment for any detention beyond that time was "to reckon from the time of the vessel being ready to unload, & in turn to deliver." At the port to which the vessel was bound certain regulations of the French Govt. were in force, by which vessels arriving to discharge their cargo might have to wait a certain number of days before their turn to deliver arrived. In an action brought upon this charterparty for demurrage:—*Held*: evidence was receivable to show what was the general understood meaning of the words "in turn to deliver" amongst shipowners & merchants entering into charterparties, with respect to the commerce & business under investigation.—*ROBERTSON v. JACKSON* (1845), 2 C. B. 412; 15 L. J. C. P. 28; 6 L. T. O. S. 250; 10 Jur. 98; 135 E. R. 1006.

Annotations:—*Consd.* *Lawson v. Burness* (1862), 1 H. & C. 396. *Refd.* *Simpson v. Margitson* (1847), 11 Q. B. 23; *Liedemann v. Schultz* (1853), 14 C. B. 38; *Bruner v. Moore*, [1904] 1 Ch. 305. *Mentd.* *Lloyd v. Guilbert* (1865), L. R. 1 Q. B. 115; *Tapscott v. Balfour* (1872), L. R. 8 C. P. 46.

511. ——*SPARTALI v. BENECKE*, No. 526, *post*.

512. ——*BROWN v. BYRNE*, No. 545, *post*.

513. ——No ambiguity.]—*MYERS v. SARL*, No. 503, *ante*.

514. ——The only occasion on which words receive a meaning different from their natural import is where, by usage, they have acquired a particular meaning in a certain trade, or where a well-known established custom controls or is embodied in a particular expression (*POLLOCK, C.B.*).—*KEARON v. PEARSON* (1861), 7 H. & N. 386; 31 L. J. Ex. 1; 10 W. R. 12; 158 E. R. 523.

Annotations:—*Mentd.* *Cave v. Mills* (1862), 10 W. R. 471; *Ford v. Cotesworth* (1868), L. R. 4 Q. B. 127; *Jackson v. Union Marine Insee.* (1873), L. R. 8 C. P. 572; *Ashroft v. Crow Orchard Colliery Co.* (1874), L. R. 9 Q. B. 540;

Postlethwaite v. Freeland (1880), 5 App. Cas. 599; *Kay v. Field* (1882), 8 Q. B. D. 594; *Grant v. Coverdale, Todd* (1884), 9 App. Cas. 470; *Nickoll & Knight v. Ashton, Edridge*, [1901] 2 K. B. 126; *Harrowing v. Dupré* (1902), 18 T. L. R. 594; *Jones v. Green*, [1904] 2 K. B. 275.

515. ——Where in a mercantile contract words are used capable of more than one interpretation, they must be interpreted according to the meaning which mercantile men of knowledge & experience would fix upon them (*KELLY, C.B.*).—*BUCKLE v. KNOOP*, No. 337, *ante*.

516. ——*HUTCHINSON v. TATHAM*, No. 451, *ante*.

517. ——A policy of insurance upon a ship contained the following clause: "Warranted no iron, or ore, or phosphate cargo exceeding net registered tonnage across the Atlantic." In an action upon the policy, defts. contended that they were relieved from liability as the ship at the time of the loss was carrying a cargo of steel blooms, exceeding in weight the tonnage of the ship across the Atlantic:—*Held*: the word "iron" being capable of including steel in its meaning, the onus lay upon pltf. to show that the commercial meaning of the word "iron," when used in the particular warranty amongst persons engaged in the business of insurance, did not include steel, & evidence to show that the use of the word "iron" in other commercial documents would not be understood by mean of business to include steel was insufficient.—*HART v. STANDARD MARINE INSURANCE CO.* (1889), 22 Q. B. D. 499; 58 L. J. Q. B. 284; 60 L. T. 649; 37 W. R. 366; 5 T. L. R. 229; 6 Asp. M. L. C. 368, C. A.

Annotation:—*Refd.* *Sanday v. British & Foreign Marine Insee.*, [1915] 2 K. B. 781.

518. ——Where, between persons engaged in a trade, a contract is made, & a custom is alleged to exist in the trade which affects the contract, the matter stands thus: Having regard to the fact that the persons who are speaking in the contract are proved (if the custom is proved) to mean by their language something which in the absence of evidence they *prima facie* would not mean, then the construction of the contract necessarily involves, in my opinion, the consideration of the custom (*BUCKLEY, L.J.*).—*Re NORTH WESTERN RUBBER CO., LTD., & HÜTTENBACH & CO.*, [1908] 2 K. B. 907; 78 L. J. K. B. 51; 99 L. T. 680, C. A.

Annotations:—*Overd.* *Produce Brokers Co. v. Olympia Oil & Cake Co.*, [1916] 1 A. C. 314. *Refd.* *Produce Brokers Co. v. Olympia Oil & Cake Co.*, [1917] 1 K. B. 320. *Mentd.* *Miller, Gibb v. Smith & Tyrer*, [1917] 2 K. B. 141.

519. ——If, according to the custom of a trade or the usage of the market, a word has acquired a secondary meaning, evidence may be given to prove it (*COZENS-HARDY, M.R.*).—*LOVELL & CHRISTMAS, LTD. v. WALL* (1911), 104 L. T. 85; 27 T. L. R. 236, C. A.

Annotation:—*Mentd.* *Slack v. Hancock* (1912), 107 L. T. 14.

520. ——In non-mercantile instrument.]—*SMITH v. WILSON*, No. 501, *ante*.

521. Not where such interpretation meant to be included.—By necessary implication.—Or express words.]—*MYERS v. SARL*, No. 503, *ante*.

522. What evidence admissible.—Not dictionary of English language.]—A general dictionary of the English language is not authority to show, on a trial, the meaning of a word which is relied on as

e. What evidence admissible.]—Where a party has agreed to erect a "cutting shop" but refuses to erect a steam engine & stack as accessories thereof, evidence of the usage of trade is admissible as to the application of steam to glass-cutting, & the understanding of what is comprehended under the term "cutting shop."

WATSON v. KIDSTON (1839), 1 Durl. (Ct. of Sess.) 1254.—*SCOT.*

f. ——Not to alter ordinary meaning of word.]—In an action for work done by pltf. in excavating for building operations, it appeared that during the progress of the work deft. finding the sand being excavated suitable for the building which he

proposed to erect, directed pltf. not to remove any more. Accordingly pltf. left some sand unremoved and *in situ*. Pltf. now alleged that by an alleged custom in H. he was entitled to be paid as though he had removed all the material down to the bottom:—*Held*: excavating must have its ordinary meaning of hollowing out; the

deriving a peculiar meaning from mercantile usage.—*HOUGHTON v. GILBART* (1836), 7 C. & P. 701, N. P.
Annotation.—*Reid. Krenger v. Blanck* (1870), L. R. 5 Exch. 179.

C. Where Usage Contradictory or Inconsistent with Contract.

Particular usages.—*See Sect. 7, post.*

523. Not admissible to contradict.—*PARKINSON v. COLLIER* (1797), 2 Park's Marine Insurance, 8th ed. 653.

524. —.—On a warranty of prime singed bacon evidence is not admissible of a practice in the bacon trade to receive bacon to a certain degree tainted as prime singed bacon, nor of a practice to exclude the purchaser from all remedy, if he does not discover & point out the defect by an early date.—*YATES v. PYM* (1816), 6 Taunt. 446; 128 E. R. 1107; *previous proceedings, sub nom. YEATS v. PIM* (1815), Holt, N. P. 95, N. P.

Annotations.—*Reid. Parker v. Palmer* (1821), 4 B. & Ald. 387; *Powell v. Horton* (1836), 2 Bing. N. C. 668; *Brown v. Byrne* (1854), 18 Jur. 700; *Humfrey v. Dale* (1857), 7 E. & B. 266; *Lucas v. Bristow* (1858), 27 L. J. Q. B. 364. *Mentd. Budd v. Fairmanner* (1831), 1 L. J. C. P. 16; *Maxwell v. Deare* (1854), 23 L. T. O. S. 1.

525. —.—Usage may be admissible to explain what is doubtful, but it is never admissible to contradict what is plain (LORD LYNTHURST, C.B.).—*BLACKETT v. ROYAL EXCHANGE ASSURANCE* (1832), 2 Cr. & J. 244; 2 Tyr. 266; 1 L. J. Ex. 101*; 149 E. R. 106.

Annotations.—*Consd. Miller v. Tetherington* (1861), 6 H. & N. 278. *Reid. Hall v. Janson* (1855), 4 E. & B. 500; *Humfrey v. Dale* (1857), 7 E. & B. 266. *Mentd. Stewart v. Steele* (1842), 5 Scott, N. R. 927; *Stewart v. Merchants Marine Insce.* (1885), 16 Q. B. D. 619; *Myers v. Sarl* (1860), 3 E. & B. 306; *Lidgett v. Secretan* (1871), L. R. 6 C. P. 616; *British & Foreign Marine Insce. v. Gaunt*, [1921] 2 A. C. 41.

526. — Expressly or by implication.—A contract for the sale of thirty bales of goats' wool at a certain price per lb., contained the following stipulation: "Customary allowance for tare & draft, & to be paid for by cash in one month, less 5 per cent. discount."—*Held*: (1) the vendee was entitled to have the goods delivered to him immediately, or within a reasonable time, but was not bound to pay for them until the expiration of the month; (2) there being no ambiguity in the language of the contract, evidence was not admissible, to show, that, by the usage of the particular trade, vendors selling under such contracts, were not bound to deliver the goods without payment.

In mercantile contracts, evidence is admissible to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a peculiar sense, & different from the sense which they ordinarily import; secondly, that evidence of usage is admissible for the purpose of annexing incidents

to the contract in matters upon which the contract is silent; but both these rules are subject to the limitation or qualification, that the peculiar sense or meaning which it is proposed by the evidence to attach to the words of the contract, must not vary or contradict, either expressly or by implication, the terms of the written instrument (WILDE, C.J.).—*SPARTALI v. BENECKE* (1850), 10 C. B. 212; 19 L. J. C. P. 293; 15 L. T. O. S. 183; 138 E. R. 87.

Annotations.—*Consd. Godts v. Rose* (1855), 17 C. B. 229; *Myers v. Sarl* (1860), 3 E. & B. 306; *Field v. Leelan* (1861), 6 H. & N. 617. *Reid. Humfrey v. Dale* (1858), 5 Jur. N. S. 191; *Kirchner v. Venus* (1859), 12 Moo. P. C. C. 361.

527. —.—Usage may be relied upon to show the sense in which an expression found in a written contract is used in a particular trade; & a usage, consistent with a written contract, may be introduced into it, as both parties, being aware of it, may be supposed to intend that it shall form part of their bargain. But to let in verbal evidence of a usage for the purpose of contradicting & nullifying an express written contract would be contrary to all principle, & has been forbidden as often as the attempt has been made (LORD CAMPBELL, C.J.).—*HALL v. JANSON* (1855), 4 E. & B. 500; 21 L. J. Q. B. 97; 24 L. T. O. S. 289; 1 Jur. N. S. 571; 3 C. L. R. 737; 119 E. R. 183.

Annotations.—*Mentd. Allison v. Bristol Marine Insce.* (1876), 1 App. Cas. 209; *Atwood v. Sellar* (1880), 5 Q. B. D. 286; *Svensden v. Wallace* (1884), 13 Q. B. D. 69; *Hamel v. Peninsular & Oriental Steam Navigation Co.*, [1908] 2 K. B. 298.

528. —.—*CUTHBERT v. CUMMING*, No. 700, *post*.

529. —.—In an action against the drawer on a bill drawn & indorsed in England, & payable abroad, & dishonoured by the acceptor's non-payment:—*Held*: evidence was not admissible to prove a usage among merchants here to entitle the holder, at his option, to demand from the drawer the amount of the re-exchange, or the sum which he gave him for the purchase of the bill, this being a usage which in terms contradicts the written instrument.—*SUSE v. POMPE* (1860), 8 C. B. N. S. 538; 30 L. J. C. P. 75; 3 L. T. 17; 7 Jur. N. S. 166; 9 W. R. 15; 141 E. R. 1276.

Annotations.—*Consd. Willans v. Ayers* (1877), 3 App. Cas. 133. *Mentd. Re Commercial Bank of South Australia* (1887), 36 Ch. D. 522; *Manners v. Pearson*, [1898] 1 Ch. 581; *Re Francko & Rasch* (1918), 87 L. J. Ch. 273; *Di Ferdinando v. Simon, Smith* (1920), 36 T. L. R. 797.

530. —.—*ARBON v. FUSSELL*, No. 669, *post*.

531. —.—*ABBOTT v. BATES*, No. 744, *post*.

532. —.—*BOWES v. SHAND*, No. 485, *ante*.

533. —.—*GULF LINE, LTD. v. LAYCOCK & Co.*, No. 487, *ante*.

534. —.—*PRODUCE BROKERS CO., LTD. v. OLYMPIA OIL & CAKE CO., LTD.*, No. 690, *post*.

535. Not admissible where usage inconsistent with contract.—If any custom was to be annexed to the actual contract, & there were a repugnancy

evidence as to custom & usage was quite insufficient to justify the interpretation of the contract otherwise; the measurement must be of the material actually moved.—*KENNEDY v. HARTMANN* (1908), 12 O. W. R. 795.—CAN.

PART II. SECT. 6, SUB-SECT. 2.—C.

523 i. Not admissible to contradict.—A usage cannot be set up to contradict the plain words of a contract.—*TROOP v. UNION INSURANCE CO.* (1893), 32 N. B. R. 135.—CAN.

523 ii. —.—In an action brought to recover the amount of a cargo of goods sold per sample, a written contract between the parties was relied on. At the trial, evidence of the custom of the trade in London, according to which the allowance,

in case the cargo proved inferior to sample, made by any one of the firm of selling brokers, was conclusive & binding, was given in support of the contract:—*Held*: such evidence was admissible, as not being contradictory to the written document.—*PAGE v. MYERS* (1861), 13 Ir. Jur. 364.—IR.

535 i. Not admissible where usage inconsistent with contract.—Presumption of a trade usage will not be made where there is a written term of the contract which is inconsistent with it to such an extent as impliedly to exclude it.—*SUMMERS v. COMMONWEALTH* (1918), 25 C. L. R. 144.—AUS.

535 ii. —.—A custom or usage is inadmissible, when its effect is inconsistent with an express covenant.—*HAYES v. NESBITT* (1875), 25 C. P. 101.—CAN.

535 iii. —.—Defts. entered into contracts with plffs. for the sale & delivery of piece goods of specified descriptions.

Certain bales of piece goods were inferior in quality, were not otherwise in accordance with the contract & were rejected by plffs. The dispute was referred to arbn.

The arbitrators found that there was a difference in finish, quality, width, & in some cases of design & colour & they decided that plffs. were entitled to an allowance, but must take delivery of 84 bales with the allowance. Plffs., however, refused to take delivery of the bales with any allowance on the ground that they were not bound to do so under their contract.

Plffs. filed a suit asking for delivery of certain other bales; defts. counter-claimed in respect of the bales of which

Sect. 6.—Effect of usage upon contracts: Sub-sect. 2, C.]

between them, the custom could not be annexed (BRAMWELL, B.).—*ALLAN v. SUNDIUS* (1862), 1 H. & C. 123; 31 L. J. Ex. 307; 6 L. T. 359; 10 W. R. 648; 1 Mar. L. C. 222.

536. —.]—*TRAVERS v. MASON* (1896), 60 J. P. 724; 45 W. R. 77.

537. —.]—A custom in the wood trade in the Port of London which imposes an obligation on a shipowner to discharge a cargo of long lengths of timber into lighters, is not inconsistent with a clause in a charterparty under which the cargo is to be taken from alongside the ship at merchant's risk & expense.

If the custom contradicts the express terms of the charterparty, then it is a bad custom so far as it is sought to apply to a charterparty in such terms. But, if the custom is consistent with the terms of the charterparty, so that the two may fairly stand together, then the custom must be taken to be incorporated into the written contract (LORD ESHER, M.R.).—*AKTISELKAB HELIOS v. EKMAN & Co.*, [1897] 2 Q. B. 83; 66 L. J. Q. B. 538; 76 L. T. 537; 8 Asp. M. L. C. 244; 2 Com. Cas. 163, C. A.

Annotations.—*Distd.* *Brenda S.S. Co. v. Green* (1900), 82 L. T. 68. *Consd.* *Glasgow Navigation Co. v. Howard* (1910), 102 L. T. 172. *Distd.* *Palgrave, Brown v. S.S. Turid*, [1922] 1 A. C. 397. *Mentd.* *Langham S.S. Co. v. Gallagher* (1911), 12 Asp. M. L. C. 109.

538. —.]—By a contract dated Mar. 27, 1916, applts. agreed to sell to resps. 25 tons of plantation rubber, c.i.f., "to be shipped during the months of Mar./Apr. 1916, by vessel or vessels from the East to New York direct and/or indirect, with liberty to call and/or tranship at other ports." The sellers made a declaration under the contract of fifteen tons as having been shipped *per steamship via Seattle*, under a through bill of lading, which stated that the goods were shipped at Singapore for New York *via Seattle* (a port on the Pacific coast of the United States, whence they would be sent by rail to New York). The buyers objected to this declaration as irregular, upon the ground that the rubber was to be conveyed by sea to New York. The dispute was referred to arbn., & the arbitrators found that after the outbreak of war great difficulty was experienced in obtaining space for shipments from the East, & in consequence, in Oct. 1915, shipments to the eastern States of the United States, which had before gone the whole distance to New York by water, began to be made by steamer to a port on the western seaboard of the United States, whence they were transmitted by rail to destination; that at the date of the contract this route from the East by sea & rail from the Pacific seaboard was well known to those engaged in the trade as one of the usual routes for rubber sold on contracts in the form of the one in question; that there was, at the date of the contract, such a course of business established as would make it within the contemplation of the parties that the rubber might come by this route:—*Held*: the contract provided for a sea carriage from

the port of loading to New York, & the usage found by the arbitrators was inconsistent with the terms of the contract, & therefore was not applicable thereto.—*Re SUTRO (L.) & Co. & HEILBUT, SYMONS & Co.*, [1917] 2 K. B. 348; 86 L. J. K. B. 1226; 116 L. T. 545; 33 T. L. R. 359; 14 Asp. M. L. C. 31; 23 Com. Cas. 21, C. A.

539. —.]—*VICKERY'S PATENTS, LTD. v. HILL*, No. 681, *post*.

540. —.]—A contract for the sale of lumber was in the following form: "Contract by which our principals sell through the agency of S. & T., Ltd. (defts.), wood brokers, Liverpool, & Messrs. M. & G. & Co. (pltf.s.), of Liverpool, buy the wood goods specified below, etc." Then followed clauses in which reference was made to the "seller" & the "buyer," & there was an arbn. clause by which the parties agreed to submit all disputes arising out of the contract to arbn. in England, & in case any action was brought it was to be brought in England & determined according to English law. The contract was signed "By authority of our principals, S. & T., Ltd., C. T., managing director, as agents." The contract was made by defts. on behalf of foreign principals, who had given defts. authority to make the contract on their behalf so as to pledge their credit, but whose names were not disclosed to pltf.s. In an action to recover damages for breach of the contract pltf.s. sought to make defts. personally liable thereon under a general custom of merchants that when an agent contracts on behalf of a foreign principal he undertakes the liability of principal:—*Held*: the custom did not apply where it was inconsistent with the contract.—*MILLER, GIBB & Co. v. SMITH & TYRER, LTD.*, [1917] 2 K. B. 141; 86 L. J. K. B. 1259; 116 L. T. 753; 33 T. L. R. 295; 22 Com. Cas. 320, C. A.

Annotations.—*Refd.* *Universal Steam Navigation Co. v. McKelvie*, [1923] A. C. 492. *Mentd.* *Mercer v. Wright, Graham* (1917), 33 T. L. R. 343.

541. —.]—By an indenture of lease executed in Oct. 1905, certain farm lands & premises were demised by the predecessors in title of H. to W. for a term of 21 years from Sept. 29, 1905. There was inserted in the indenture among the tenant's covenants a covenant by the tenant that he would from time to time during the term at his own cost when & as often as necessary well & substantially repair the said premises, "being allowed all necessary materials for this purpose to be previously approved in writing by the lessor & carting such materials free of cost a distance not exceeding five miles from the farm." The lease contained certain powers of determining the tenancy with a view to selling or letting the premises. The premises having fallen out of repair, W. executed such repairs as were necessary, though he had not been called upon by H. to do so, & H. did not supply any of the materials required for such repairs. W. claimed damages against H. for failure to comply with the requirement as to the supply of materials as set out in the covenant, & alternatively, that H. was, by the custom of the country, bound to allow W. to have the materials necessary for such repairs as were executed:—

pltf.s. failed to take delivery, & pleaded a custom of the trade that the buyer could not reject for difference in quality provided the same was not excessive or unreasonable, & could not be met by an allowance in the price:—*Held*: the custom was inconsistent with the stipulation in the contract that a certain quality of goods should be delivered in return for payment of a certain fixed price.—*RUSSON v. ROWE v. BOMBAY UNITED SPINNING & WEAVING CO.* (1916), 1 L. R. 41 Bom. 518.—*IND.*

535 iv. —.]—In an action brought to recover the amount of a cargo of goods sold per sample, a written contract between the parties was relied on. At the trial evidence of the custom of the trade in London, according to which the allowance in case the cargo proved inferior to sample, made by any one of the firm of selling brokers was conclusive & binding was given in support of the contract:—*Held*: such evidence was admissible as not being inconsistent with the written document.—*PAGE v. MYERS*

(1861), 13 Ir. Jur. 364.—*IR.*

535 v. —.]—Where the power of a manager is fixed by contract, no general evidence to show the practice as to the nomination of inferior servants by a manager is competent.—*GYE & Co. v. HALLAM* (1832), 10 Sh. (Ct. of Sess.) 512.—*SCOT.*

535 vi. —.]—Usage must be consistent with the terms of a written contract.—*HOGARTH & SONS v. LEITH COTTON SEED OIL CO.*, [1909] S. C. 955.—*SCOT.*

Held: evidence of the alleged custom was not admissible, as it was inconsistent with the terms of the lease which dealt with the matter.—*WESTACOTT v. HAHN*, [1918] 1 K. B. 495; 87 L. J. K. B. 555; 118 L. T. 615; 34 T. L. R. 257; 62 Sol. Jo. 348, C. A.

542. —.]—A time charterparty provided by a clause that "a commission of three per cent. on the estimated gross amount of hire is due to" the brokers "on signing this charter (ship lost or not lost)." The ship was requisitioned by the French Govt., & no hire was earned under the charterparty. The shipowners claimed to set up a custom by which commission was not payable unless hire was earned under the charterparty:—*Held*: the custom was inconsistent with the clause of the charterparty, & could not be set up as an answer to the brokers claim to commission.—*AFFRÉTEURS RÉUNIS SOCIÉTÉ ANONYME v. LEOPOLD WALFORD (LONDON), LTD.*, [1919] A. C. 801; 88 L. J. K. B. 861; 121 L. T. 393; 35 T. L. R. 542; 14 Asp. M. L. C. 451; 24 Com. Cas. 268, H. L.; *affg.* S. C. *sub nom.* LEOPOLD WALFORD (LONDON) v. AFFRÉTEURS RÉUNIS SOCIÉTÉ ANONYME, [1918] 2 K. B. 498, C. A.

Annotation:—*Mentd.* French v. Leeston Shipping Co. (1921), 37 T. L. R. 453.

543. —.]—Defts. chartered pltf's vessel to carry a cargo of timber to Y. Under the charterparty the vessel had to deliver the cargo at Y. "always afloat, cargo to be taken from alongside the steamer at charterers' risk & expense as customary." To lie "always afloat," the vessel could not come within about thirteen feet of the quay, & in such a case the custom of the port was to erect a wooden staging between the ship & the quay, & for stevedores employed by the shipbrokers to carry the cargo for the shipowners from the ship's rail over the staging & to put it down ten or twelve feet from the edge of the quay. The custom further was that the whole of the work was carried out at the expense of the shipowners. Pltfs. objected that the custom was inconsistent with the provision in the charterparty that the charterers had to take the cargo from "alongside" at their expense, & brought an action in the county ct. to recover the difference between the cost of the whole of the work & the rate for delivery at the ship's rail:—*Held*: the custom was inconsistent with the charterparty & pltfs.

545 i. — Or repugnant to it.]—The terms of a document inconsistent with & repugnant to a usage must prevail against such usage.—*PARSONS v. HART* (1900), 30 S. C. R. 473.—*CAN.*

545 ii. —.]—In an action

Pltfs. sought to show a custom he trade at variance with the in the contract as to the date of shipment, & with that object applied for leave to take evidence on commission of persons familiar with the trade customs of such material filed

be obtained was immaterial & inad-
CO. v. SLOBINSKY BROTHERS & SONS, [1922] 1 W. W. R. 1246.—*CAN.*

545 iii. —.]—Deft. signed a contract to buy from pltfs. 25 bales grey dhories "June shipment, in four lots, with an interval of four weeks." These goods were not supplied as they could not be obtained at the price limited. Thereafter deft. gave pltfs. an order at an increased limit of price in the following terms: "Please telegraph your M. friends to purchase on my account 25 bales grey dhories at

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an all-round advance of 1d. per pair on original limits for Nov., Dec., Jan. shipments, in three monthly lots, about 8 bales to be shipped in each month." This order was accepted, & the goods were shipped as follows: "

handed to the same carriers Dec. 23, & one bale Dec. 24, & 11 bales were shipped Jan. 6, 1891. Deft. refused

three monthly lots, at intervals of four weeks. He also contended that the shipment Dec. 9, 1890, was a late shipment, & that he was not therefore bound to accept the goods under the contract. Pltfs. alleged that by the custom of B. in the case of contracts made with members of the Native Piece-goods Assoc., the date of the carriers' weight note was to be regarded as the date of shipment, & that, under such contract as the one in question, delivery to the ry. co or other inland carrier was equivalent to shipment:—*Held*: evidence of the alleged custom

were entitled to succeed.—*PALGRAVE, BROWN & SON, LTD. v. S.S. TURID*, [1922] 1 A. C. 397; 91 L. J. P. 81; 127 L. T. 42; 38 T. L. R. 423; 66 Sol. Jo. 349; 15 Asp. M. L. C. 538; 27 Com. Cas. 216, H. L.

Annotations:—*Apld.* Mowbray, Robinson v. Rosser (1922), 91 L. J. K. B. 524. *Reid.* Akt. Dampsskibsselskabet Primula v. Horsley (1923), 40 T. L. R. 11.

544. —.]—In an English contract, the word "shipment" means the loading of goods on to a ship, & it cannot be successfully contended that, by custom of the trade in the country of origin of the goods, it means loading into railway cars. Such a construction would be inconsistent with the terms expressed by the parties, & would not explain, but vary the contract.—*MOWBRAY, ROBINSON & CO. v. ROSSER* (1922), 91 L. J. K. B. 524; 126 L. T. 748; 38 T. L. R. 413; 66 Sol. Jo. 315, C. A.

545. — Or repugnant to it.]—Mercantile contracts are very commonly framed in a language peculiar to merchants; the intention of the parties, though perfectly well known to themselves, would often be defeated, if this language were strictly construed according to its ordinary import in the world at large; evidence, therefore, of mercantile custom & usage is admitted in order to expound it, & arrive at its true meaning. Again, in all contracts, as to the subject-matter of which a known usage prevails, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding; evidence, therefore, of such incidents is receivable. But in these cases a restriction is established, on the soundest principle, that the evidence received must not be of a particular which is repugnant to, or inconsistent with the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less; neither in the construction of a contract among merchants, tradesmen, or others will the evidence be excluded, because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the

or usage of trade was not admissible to explain or vary the natural ordinary meaning of the words in the contract. The parties contracted for a shipment on board of a ship or steamer, & to allow evidence of a usage that delivery to a ry. co. at an inland town should be regarded as equivalent to shipment on board a vessel at a seaport town, would be to allow evidence of a usage repugnant to the express terms of the contract.—*SMITH v. LUDHA GHILLA DA MODAR* (1892), 1 L. R. 17 Bom. 129.—*IND.*

545 iv. —.]—A written contract for the sale & delivery "as required" of goods, of which the vendor is not producer, & which are known to both parties to be the spin of particular mills where the purchaser has the choice of numerous varieties of the contract goods, incorporated a trade custom that delivery need not be made until a reasonable time to enable the vendor to obtain the goods from the particular mills has elapsed from the receipt of the purchaser's specification. Such custom is not repugnant to the written terms of such contract, being explanatory of what is the reasonable time for delivery.—*ROSS BROTHERS, LTD. v. SHAW & CO.*, [1917] 2 I. R. 367.—*IR.*

Sect. 6.—Effect of usage upon contracts: Sub-sect. 2, C.; sub-sect. 3. Sect. 7.]

contractors in a different sense from that (COLERIDGE, J.).—*BROWN v. BYRNE* (1854), 3 E. & B. 703; 23 L. J. Q. B. 313; 23 L. T. O. S. 154; 18 Jur. 700; 2 W. R. 471; 2 C. L. R. 1599; 118 E. R. 1304.

Annotations:—*Consol. Hall v. Janson* (1855), 4 E. & B. 500. *Appld. Lucas v. Bristow* (1858), E. B. & E. 907. *Refd. Hughes v. Humphreys* (1854), 1 Jur. N. S. 42; *Cuthbert v. Cumming* (1855), 10 Exch. 809; *Phillips v. Briard* (1856), 1 H. & N. 21; *Humphrey v. Dale* (1857), 7 E. & B. 266; *Kirchner v. Venus* (1859), 12 Moo. P. C. C. 361; *Sweeting v. Pearce* (1861), 9 C. B. N. S. 534; *Abbott v. Bates* (1875), 33 L. T. 491; *Robinson v. Mollett* (1875), 44 L. J. C. P. 362; *Johnson v. Raylton* (1881), 7 Q. B. D. 438. *Mentd. McKune v. Joynton* (1858), 5 C. B. N. S. 218.

546. ———.]—D. & Co., brokers employed by S. to purchase oil, dealt with T. & M., brokers, employed by pltf. to sell oil, without either brokers disclosing the names of their principals. D. & Co. delivered to T. & M. a note as follows: "Sold this day for T. & M. to our principal ten tons of oil," specifying the terms & price. The note was signed "D. & Co., brokers." D. & Co. did not disclose the name of their principal S. till after the lapse of an unreasonable time, when S. had become insolvent. In an action by pltf. against D. & Co. for not accepting the oil, pltf. proved a usage in the trade that when a broker purchased without disclosing the name of his principal he was liable to be looked to as principal:—*Held*: evidence of the usage was admissible as not contradicting the written instrument, but explaining its terms or adding a tacitly implied incident.—*DALE v. HUMFREY* (1858), E. B. & E. 1004; 6 W. R. 854; 120 E. R. 783; *sub nom. HUMFREY v. DALE & MORGAN*, 27 L. J. Q. B. 390; 31 L. T. O. S. 328; 5 Jur. N. S. 191, Ex. Ch.

Annotations:—*Fold. Fleet v. Murlon* (1871), L. R. 7 Q. B. 126; *Hutchinson v. Tatham* (1873), L. R. 8 C. P. 482. *Distd. Miller, Gibb v. Smith & Tyrer*, [1917] 2 K. B. 141; *Weetacott v. Bahn*, [1918] 1 K. B. 495. *Consol. Palgrave, Brown v. S.S. Turid*, [1922] 1 A. C. 397. *Refd. Myers v. Earl* (1860), 3 E. & E. 306; *Fleld v. Lelan* (1861), 6 H. & N. 617; *Robinson v. Mollett* (1875), 33 L. T. 544; *Pike v. Ongley* (1887), 18 Q. B. D. 708; *Re North Western Rubber Co. & Huttenbach*, [1908] 2 K. B. 907; *Produce Brokers Co. v. Olympia Oil & Cake Co.*, [1916] 1 A. C. 314; *Produce Brokers Co. v. Olympia Oil & Cake Co.*, [1917] 1 K. B. 320; *Re Suto & Hellbot*, Symons, [1917] 2 K. B. 348. *Mentd. Southwell v. Howditch* (1876), 1 C. P. D. 376.

547. Whether evidence contradictory—Limitation of general words—According to particular trade.]—Where general words are used, evidence which shows that in a particular trade they have a more limited meaning is not contradictory (WILDE, B.).—MILLER v. TETHERINGTON (1861), 6 H. & N. 278; 30 L. J. Ex. 217; 3 L. T. 893; 7 Jur. N. S. 214; 9 W. R. 437; 1 Mar. L. C. 39; 158 E. R. 114; *affd.* (1862), 7 H. & N. 954, Ex. Ch. **Annotations:—***Mentd. Stewart v. West India & Pacific S.S. Co.* (1873), L. R. 8 Q. B. 83; *British & Foreign Marine Insce. v. Gaunt*, [1921] 2 A. C. 41.

548. Not admissible to vary.]—A payment by the vendee of goods to the broker is good, if the name of the principal be not disclosed, although the vendee knows that the broker sells for some unknown principal. But a payment in such case would not be good, if it varied from the original terms of the contract. Evidence of a custom to that effect is not admissible.—CAMPBELL v. HASSEL (1816), 1 Stark. 233.

Annotation:—*Consol. Scott v. Irving* (1830), 1 B. & Ad. 605.

549. ———.]—MENZIES v. LIGHTFOOT, No. 598, *post*.

550. ——— In a material manner.]—If a written contract for the sale of goods specified no time for delivering them, in an action for not delivering them, it is not competent to give parol evidence that it was a condition of sale that the goods

should be taken away immediately, or that by the usage of trade where goods are sold to be delivered at a distant day, the time is always mentioned in the written contract.—*GREAVES v. ASHLIN* (1813), 3 Camp. 426, N. P.

Annotations:—*Fold. Ford v. Yates* (1841), 2 Man. & G. 549. *Refd. Startup v. Macdonald* (1841), 2 Man. & G. 395; *Spartali v. Benecke* (1850), 10 C. B. 212. *Mentd. Harnor v. Groves* (1855), 3 W. R. 168.

551. ——— By adding new condition.]—By charterparty deft. covenanted to pay freight for a cargo, at a certain rate per ton, freight measurement. To an action of covenant for non-payment of freight, he pleaded that by the usage of the particular trade an account must be produced to the freighter by the owner, before he could demand payment of the freight, & that no such account was delivered; & that it was the duty of pltf. to deliver a freight measurement, & that he had not done so:—*Held*: these pleas were bad, as the usage so pleaded would create a new condition, & vary the terms of the original contract.—*GIBBON v. YOUNG* (1818), 8 Taunt. 254; 2 Moore, C. P. 224; 129 E. R. 381.

552. ———.]—PETTITT v. MITCHELL (1842), 4 Man. & G. 819; 5 Scott, N. R. 721; 12 L. J. C. P. 9; 6 Jur. 1016; 134 E. R. 337.

Annotations:—*Refd. Isherwood v. Whitmore* (1842), 10 M. & W. 757. *Mentd. Isherwood v. Whitmore* (1843), 11 M. & W. 347.

553. ———.]—Resps. agreed to supply to applts. "the whole of the steel required by you," for certain works then in course of construction. The contract was made subject to certain general terms & conditions, which contained the clause "The estimated quantity of steel we understood to be 30,000 tons more or less":—*Held*: resps. were entitled to supply all the steel required in excess of the estimated quantity of 30,000 tons, & the contract was not qualified or affected by the clause stating that the estimated quantity was "30,000 tons more or less"; & evidence of an alleged custom in the Glasgow steel trade, as to the interpretation of contracts containing such a clause, was not admissible.

The principle is the same in both countries, you may translate the words of a contract, you cannot vary or alter it (LORD HALSBURY, C.).—*TANCRED, ARROL & Co. v. STEEL CO. OF SCOTLAND* (1890), 15 App. Cas. 125; 62 L. T. 738, H. L.

Annotations:—*Refd. Kensington Electric Lighting Co. v. Notting Hill Electric Lighting Co.* (1918), 82 J. P. 197. *Mentd. Caledonian Insce. v. Gilmour*, [1993] A. C. 85; *Bourne v. Keane*, [1919] A. C. 815.

Construction inconsistent with terms expressed.]—See No. 544, ante.

554. Not admissible to alter or control.]—CUTHBERT v. CUMMING, No. 700, *post*.

555. ———.]—HARRISON v. UNIVERSAL MARINE INSURANCE CO., No. 326, *ante*.

556. Not admissible to destroy.]—The custom of the trade may qualify a contract, but it cannot destroy it (DAY, J.).—HOWCROFT v. LAYCOCK (1898), 14 T. L. R. 460; 42 Sol. Jo. 572.

Annotations:—*Mentd. Wallis Son & Wells v. Pratt & Haynes*, [1910] 2 K. B. 1003; *Harrison v. Knowles & Foster*, [1917] 2 K. B. 606.

Intention to exclude.]—See Sect. 8, post.

SUB-SECT. 3.—PARTICULAR CONTRACTS.

See, generally, Part III., post.

Leases.]—See AGRICULTURE, Vol. II., pp. 10–40, Nos. 31–225; **LANDLORD & TENANT**.

Building contracts.]—See BUILDING CONTRACTS, Vol. VII., p. 447, No. 466.

Contracts by agents.—See AGENCY, Vol. I., pp. 635–637, Nos. 2576–2590.

Contracts between agent & principal.—See AGENCY, Vol. I., p. 490, No. 1668; p. 514, Nos. 1773, 1778, 1779; p. 527, No. 1866; p. 546, No. 1985.

Charterparties & bills of lading.—See SHIPPING.

Customs of the port.—See SHIPPING.

Insurance.—See INSURANCE.

Sale of Goods.—See SALE OF GOODS.

Shipping.—See SHIPPING.

Stock Exchange.—See STOCK EXCHANGE.

Other contracts.—See particular Titles, *passim*.

SECT. 7.—USAGE AS EVIDENCE IN CONSTRUCTION OF ACTS OF PARLIAMENT, CHARTERS AND OTHER INSTRUMENTS.

Usage as evidence in reference to charitable trusts, see CHARITIES, Vol. VIII., pp. 334, 335, Nos. 1205–1231.

Usage as evidence in construction of charters of corporations, see CORPORATIONS, Vol. XIII., pp. 294, 298, 309, 339, Nos. 253–260, 300, 414, 775.

Usage as evidence in construction of royal grants, see CONSTITUTIONAL LAW, Vol. XI., pp. 573–574, Nos. 732–744.

Usage as evidence in construction of contracts, see Part II., Sect. 6, *ante*.

557. General rule.—The principle that when an instrument contains an ambiguity evidence of user under it may be given in order to show the sense in which the parties used the language employed, applies to a modern as well as to an ancient instrument, & where the ambiguity is patent as well as where it is latent.—WATCHAM v. A.-G. OF EAST AFRICA PROTECTORATE, [1919] A. C. 533; 87 L. J. P. C. 150; 120 L. T. 258; 34 T. L. R. 481, P. C.

Annotation.—Mentd. Belton v. Bass, Ratcliffe & Gretton, [1922] 2 Ch. 449.

558.—Where parcels are described in old documents by words of a general nature or of doubtful import, evidence of usage is proper to be received to show what they comprehend.—WATER-PARK (LORD) v. FENNEL (1859), 7 H. L. Cas. 650; 33 L. T. O. S. 374; 23 J. P. 643; 5 Jur. N. S. 1135; 7 W. R. 634; 11 E. R. 259, H. L.

Annotations.—Consd. Watcham v. East Africa Protectorate, [1919] A. C. 533. Rejd. Van Dieman's Land Co. v. Table Cape Marine Board, [1906] A. C. 92. Mentd. Hastings Corp'n. v. Ivall (1874), L. R. 19 Eq. 558; Devonshire v. Pattinson (1887), 20 Q. B. D. 263; Fryor v. Petre, [1894] 2 Ch. 11.

559.—It is quite true that neither contrary practice nor disuse can repeal the positive enactment of a statute, but contemporaneous & continuous usage is of the greatest efficacy in law for determining the true construction of obscurely framed documents (LORD HATHERLEY, C.).—JEBBERT v. PURCHAS (1871), L. R. 3 P. C. 605; Moo. P. C. C. N. S. 468; Bro. Ecc. Rep. 162; 0 L. J. Eccl. 33; 35 J. P. 452; 19 W. R. 898; 7 E. R. 177, P. C.

Annotations.—Rejd. Lord Advocate v. Walker Trustees, [1912] A. C. 95; Bourne v. Keane, [1919] A. C. 815. Mentd. Boyd v. Philpotts (1874), L. R. 4 A. & E. 297;

Martin v. Mackonochie (1871), L. R. 4 A. & E. 279; Hudson v. Tooth (1877), 2 P. D. 125; Ridsdale v. Clifton (1877), 2 P. D. 276; Serjeant v. Dale (1870), 43 J. P. 220; Heywood v. Manchester Bp. (1884), 12 Q. B. D. 404; Read v. Lincoln Bp., [1892] A. C. 644; Re Robinson, Wright v. Tugwell, [1897] 1 Ch. 85; Gore-Booth v. Manchester Bp., [1920] 2 K. B. 412; Rhondda's Claim, [1922] 2 A. C. 339.

560.—Where the penning of a statute is dubious, long usage is a just medium to expound it by (*per cur.*).—SHEPPARD v. GOSNOLD (1672), VAUGH. 159; 124 E. R. 1018.

Annotations.—Rejd. A.-G. v. Chitty (1744), Park. 37; Buckinghamshire v. Drury (1762), Willm. 177; Re Aaron, Ex p. Lowe (1832), 1 L. J. Bcy. 54; Fernoy Poorage Claim (1856), 8 State Tr. N. S. 723. Mentd. R. v. Hornbee (1691), Creen. K. B. 331; Anon. (1697), 1 Ld. Raym. 388; Courtney v. Bower (1761), 1 Ld. Raym. 501; Camplin v. Bullman (1761), Park. 198; Mitchell v. Torup (1766), Park. 227; Legge v. Boyd (1845), 1 C. B. 92; Barrow v. Arnaud (1846), 6 L. T. O. S. 453.

561. Admissible to explain doubtful words—Acts of Parliament.—Local usages do not control or affect the construction of Acts of Parliament.

Where the words of an Act of Parliament are clear, usage can never be attended to, but in doubtful cases & where they are ambiguous, general & contemporary usage may be material to show the sense in which the public have received a public law (GROSE, J.).—R. v. HOGG (1787), 1 Term Rep. 721; Cald. Mag. Cas. 266; 1 Bott's Poor Law, 6th ed. 159; 99 E. R. 1341.

Annotations.—Rejd. Income Tax Special Purposes Comrs. v. Painsel, [1891] A. C. 531. Mentd. R. v. Brighton Gas Light Co. (1826), 5 B. & C. 466; Brown v. Granville (1833), 10 Bing. 69; R. v. Liverpool Exchange Proprietors (1834), 1 Ad. & El. 465; R. v. Haslam (1851), 17 Q. B. 220; Tyne Boiler Works Co. v. Longbenton Overseers (1886), 18 Q. B. D. 81; Kirby v. Hunslet Union (1905), [1904–1908], 1 Konst. Rat. App. 225.

562.—Not when defendants not parties to usage.—Usage or acquiescence in a particular construction of a statute, founded upon alleged circumstances & practice, to which the individual defenders were not parties, could not relevantly be admitted as evidence of such construction to be binding on those defenders.—EWING v. BURNS (1839), Macl. & Rob. 435; 9 E. R. 160, H. L.

563.—Contemporaneous usage to interpret ancient statute.—A club which is governed by rules prescribing the amount of the annual subscription, but not containing any provision for the amendment or alteration thereof, cannot by a resolution passed by a majority of the members present at a general meeting raise the amount of the subscription so as to bind existing members, & the ct. will interfere by injunction to restrain the expulsion of a dissentient member for refusing to pay the increased subscription.

No doubt, in the case of a very ancient statute, where the words are ambiguous, you may refer to the *contemporanea expositio* of usage as the interpreter of a doubtful law. Here nothing is so doubtful as to require a reference to usage for its interpretation, even if usage were admissible for the purpose of construction where everything is quite modern (JOYCE, J.).—HARRINGTON v. SENDALI, [1903] 1 Ch. 921; 72 L. J. Ch. 396; 88 L. T. 323; 19 T. L. R. 302; *sub nom.* HARRINGTON v. SENDALI, 51 W. R. 463; 47 Sol. Jo. 337.

Annotation.—Mentd. Morgan v. Driscoll (1922), 38 T. L. R. 251.

PART II. SECT. 7.

557 i. General rule.—One of the most settled rules of law for the construction of ambiguities in ancient instruments is, that you may resort to contemporaneous usage to ascertain the meaning of a deed.—A.-G. v. DRUMMOND (1842), 1 Dr. & War. 353, 368.—IR.

557 ii.—In the construction of ancient grants & deeds, evidence is

admissible as to the manner of which the thing granted has always been possessed & used, for so the parties thereto must be supposed to have intended. This principle does not apply unless there is an ambiguity. Consequently, while in a case of ambiguity the ct. will uphold that construction of a deed which justifies a long usage as to the application of trust funds, the ct. will not, where there is an ambiguity, accept an

erroneous interpretation though consistent with usage, so as to sanction a manifest breach of trust.—KULADA PHOSAD DEGHORIA v. KALI DAS NAIK (1914), 1 L. R. 42 Cal. 538.—IND.

561 i. Admissible to explain doubtful words—Acts of Parliament.—Proof of usage is allowed to explain an ambiguous clause in a private statute as to levying harbour dues.—GIRDWOOD & Co. v. CAMPBELL (1829), 7 Sh. (Ct. of Sess.) 840.—SCOT.

Sect. 7.—Usage as evidence in construction of Acts of Parliament, charters and other instruments.
Sect. 8.]

564. ——— **But not subsequent user.]**—No amount of subsequent user will control the plain meaning of an Act of Parliament; but where the meaning is not plain, a continuous user, extending over many years, may be called in aid to show what the true meaning is.—*DUBLIN CORPN. v. TRINITY COLLEGE* (1903), 88 L. T. 305, H. L.

565. ——— **Charters.]**—A.-G. v. SHREWSBURY TOWN (1726), Bunb. 215; 145 E. R. 652.

566. ——— **]**—The Crown, by charters, granted & confirmed to the master, pilots, & seamen of Newcastle upon Tyne, & their successors certain duties, called primage, from all persons being owners of any goods which should thereafter be brought in any ship from beyond the seas into the river Tyne, & every free merchant, & other inhabitant of Newcastle arriving with their ships within the river should pay the duties. Goods had been brought into the river from ports beyond the seas, in a ship of which deft. was not the owner. Deft., a merchant at Newcastle, as importer, there landed, entered, & warehoused them. The goods then belonged to merchants in London, for whom deft. had so landed, entered, & warehoused them gratuitously; the invariable usage had been to treat as "the owner," the importer.—*Held:* by the designation of "owners" in the charters, usage showed the importers were intended, & deft. having acted gratuitously for the London merchants (the owners) did not abridge his liability.—*NEWCASTLE (MASTER PILOTS) v. HAMMOND* (1849), 4 Exch. 285; 18 L. J. Ex. 417; 14 L. T. O. S. 223; 154 E. R. 1219.

Annotation:—Mentd. Ribble Navigation Co. v. Hargreaves (1856), 17 C. B. 385.

567. ——— **Not if charter of recent date.]**—*R. v. GROSVENOR* (1734), 7 Mod. Rep. 198; Kel. W. 280; Ridg. temp. H. 41; 87 E. R. 1187.

568. ——— **Contemporaneous usage.]**—Usage will be good or bad according to circumstances. Where the words of a charter are equivocal, & it stands indifferent how to interpret, contemporary usage will explain the words (*LORD MANSFIELD, C.J.*).—*R. v. JOHNS* (1772), Lofft, 76; 98 E. R. 541.

569. ——— **& continuing.]**—*Semble:* contemporaneous & continuing usage may be resorted to in aid of the construction of doubtful words in an old charter.—*R. v. OSBOURNE* (1803), 4 East, 327; 102 E. R. 856.

570. ——— **Long usage.]**—Where the words of a charter are doubtful, they may be explained by long usage.—*BLANKLEY v. WINSTANLEY* (1789), 3 Term Rep. 279; 100 E. R. 574.

Annotations:—Refd. *Rennell v. Lincoln Bp.* (1825), 3 Bing. 223. *Mentd.* *Arnold v. Gausson* (1853), 8 Exch. 463; *R. v. Beacontree JJ.*, *R. v. Wright* (1915), 84 L. J. K. B. 2230.

571. ——— **Ancient & modern usage.]**—Defts. were natives & merchants of Sunderland, which was a creek or member of the port of Newcastle-upon-Tyne. They brought their own goods by sea in their ships into Sunderland, & refused to pay the primage on such goods claimed by the corpn. of Newcastle-upon-Tyne, on the authority of a charter of James II., & the corpn. thereupon brought an action against them to recover it. On the trial the corpn. put in the charter, & also gave evidence of ancient & modern usage, that all persons, including those resident in Sunderland, who being owners of goods brought them into Sunderland in ships from beyond sea, had paid primage. Defts. objected that the

charter did not impose the liability to the payment of primage on Sunderland merchants bringing their goods by ship into Sunderland & that the evidence of usage was not admissible to aid in the interpretation of the charter:—*Held:* the corpn. were not precluded by the charter from claiming primage in respect of goods imported into Sunderland by Sunderland merchants; the charter was not incompatible with such claim, & evidence of usage was admissible in support of it.—*BRADLEY v. NEWCASTLE (PILOTS)* (1853), 2 E. & B. 427; 23 L. J. Q. B. 35; 18 Jur. 240; 1 W. R. 294; 118 E. R. 826; *sub nom.* *NEWCASTLE-UPON-TYNE (MASTER PILOTS & SEAMEN) v. BRADLEY*, 22 L. T. O. S. 291; 1 C. L. R. 479, Ex. Ch.; *affd.* *S. C. sub nom.* *NEWCASTLE UPON TYNE (MASTER PILOTS & SEAMEN) v. BRADLEY & POTTS* (1852), 2 E. & B. 428, n.

572. ——— **Not to contradict.]**—But suppose the words of the charter are doubtful, the usage in this case is of great force; not, that usage can overturn the clear words of a charter, but if they are doubtful, the usage under the charter will tend to explain the meaning of them (*LORD MANSFIELD, C.J.*).—*R. v. VARLO* (1775), 1 Cowp. 248; 98 E. R. 1068.

Annotations:—Refd. *R. v. Bellringer* (1792), 4 Term Rep. 810; *Watcham v. East Africa Protectorate*, [1919] A. C. 533.

573. ——— **]**—In ascertaining the meaning & effect of a charter, contemporaneous documents, proceedings in causes relating to it, & parol testimony may be resorted to in order to explain & give to the charter a construction, but not to contradict it.—*LUCTON SCHOOL (GOVERNORS) v. SCARLETT* (1827), 2 Y. & J. 330; 148 E. R. 945, Ex. Ch. in Eq.; *affd. sub nom.* *SCARLET v. FREE SCHOOL IN LUCTON (GOVERNORS)* (1836), 4 Cl. & Fin. 1, H. L.

574. ——— **Grant.]**—Where a right of election is given by an old deed to any number of persons, usage is admissible evidence as to its construction & meaning. In the case of the public right in proof of usage, traditional evidence as to it is admissible. *Aliter* in case of private rights.—*WITHNELL v. GARTHAM* (1795), 6 Term Rep. 388; 1 Esp. 321; 101 E. R. 610.

Annotations:—Mentd. *Grindley v. Barker* (1798), 1 Bos. & P. 229; *Blacket v. Blizard* (1829), 9 B. & C. 851; *Wilkinson v. Mallin* (1832), 2 Cr. & J. 636; *R. v. Mashter* (1837), 6 Ad. & El. 153; *Fell v. Charity Lands, Official Trustee*, [1898] 2 Ch. 44.

575. ——— **]**—A grant of wreck was made by Hen. II. to the proprietors of certain lands on the coast, & confirmed by Hen. VIII. The proprietors of those lands having, forty years ago, with a view to reclaim sea mud, run an embankment across a small bay, which was used to be left almost dry at low water, & having ever since asserted, without opposition, an exclusive right to the soil of the bay, though the bank was forced by tempest:—*Held:* such usage was evidence whence anterior usage might be presumed, which, coupled with the general terms of the grant, served to elucidate it, & to establish the right so asserted.—*CHAD v. TILSED* (1821), 2 Brod. & Bing. 403; 5 Moore, C. P. 185; 129 E. R. 1022.

Annotations:—Refd. *Healy v. Thorn* (1870), 18 W. R. 1004; *Watcham v. East Africa Protectorate*, [1919] A. C. 533.

576. ——— **Modern usage.]**—All ancient documents, where a question arises as to what passed by a particular grant, can be explained by modern usage (*PARKE, B.*).—*BEAUFORT (DUKE) v. SWANSEA CORPN.* (1849), 3 Exch. 413; 12 L. T. O. S. 453; 154 E. R. 905.

Annotations:—Apld. *Waterpark v. Fennell* (1859), 7 H. L. Cas. 651. *Consd.* *Hastings Corpn. v. Ivall* (1875), L. R. 19 Eq. 558; *Saltaah Corpn. v. Goodman* (1881), 7 Q. B. D.

106; *Devonshire v. Pattinson* (1887), 20 Q. B. D. 263; *Sutton Harbour Improvement Co. v. Plymouth Town Grdns.* (1890), 63 L. T. 772. *Reid. Re Alston's Estate* (1856), 28 L. T. O. S. 337; *A.-G. v. Hammer* (1858), 27 L. J. Ch. 837; *The Abonema, The Hillerod, The Florida, The Albania, The Adjutant*, [1919] P. 41. *Mentd. Penryn Corp'n. v. Holm* (1877), 37 L. T. 133; *Lord Advocate v. Young, N. B. Ry. v. Young* (1887), 12 App. Cas. 544.

577. — Contemporary usage.]—Contemporaneous usage may be resorted to for the purpose of explaining any uncertainty or ambiguity in ancient grants (COLTMAN, J.).—*DOE d. KINGLAKE v. BEVISS* (1849), 7 C. B. 456; 18 L. J. C. P. 128; 12 L. T. O. S. 452; 137 E. R. 181.

Annotations:—Distd. Hastings v. N. E. Ry., [1899] 1 Ch. 656. *Reid. Waterpark v. Fennell* (1859), 7 H. L. Cas. 651; *De La Warr v. Miles* (1881), 29 W. R. 809. *Mentd. Whaley v. Carlisle* (1867), 15 W. R. 1183; *Hudson & Humphrey v. Swiftsure (Owners), The Swiftsure* (1900), 82 L. T. 389; *Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K. B. 130.

578. — Contemporaneous usage—Not agreement for lease—Made 35 years ago.]—By an agreement under seal dated in 1854, & made between H., the owner in fee of land, & a railway co., while a bill—which subsequently became an Act—was before Parliament to enable the co. to construct certain railways intended to pass to a great extent over H.'s land, it was agreed that H. should, immediately after the passing of the bill, grant to the co., by lease in the form set out *verbatim* in the agreement, a "way-leave" over his land, with the right to make & use the railways thereon. No formal lease was ever executed, but the co. entered on H.'s land & constructed the railways. One of them, the "M. branch," partly crossed H.'s land, & coal was carried over it to Port B. For upwards of forty years from the date of the agreement rent was paid by the co. for coal carried over this branch so far only as it crossed H.'s land, the parties acting throughout on the assumption that under the agreement no rent was payable for coal not carried over H.'s land. In an action brought by H.'s successor in title to the land against the co. claiming that, according to the true construction of the agreement, rent was payable for coal passing over any part of the M. branch to Port B., whether it crossed his land or not:—*Held*: the agreement could not be regarded as an ancient document capable of being construed by the light of contemporaneous usage, but must be construed according to its literal meaning.—*HASTINGS (LORD) v. NORTH EASTERN RY. CO.*, [1899] 1 Ch. 656; 68 L. J. Ch. 315, C. A.; *affd. sub nom. NORTH EASTERN RY. CO. v. HASTINGS (LORD)*, [1900] A. C. 260, H. L.

Annotations:—Reid. Van Diemen's Land Co. v. Table Cape Marine Board, [1906] A. C. 92; *Watcham v. East Africa Protectorate*, [1919] A. C. 533. *Mentd. Brown v. Peto*, [1900] 2 Q. B. 653; *A.-G. v. Tamworth R. D. C.* (1901), 85 L. T. 190; *Eckersley v. Wigan Coal & Iron Co.* (1901), 102 L. T. 264; *Hong-Kong & China Gas Co. v. Glen* (1914), 110 L. T. 859.

579. — Trust deed—Contemporary usage.]—If an instrument be doubtful in its terms, it is to be interpreted by contemporaneous usage; & if there has been a long usage in the application of funds to purposes which may be warranted upon one construction of the instrument, but which may not be warranted upon another, the ct. will lean to that construction, provided it be doubtful which will best correspond with the mode in which the funds have been for so long a period applied; but no usage for a length of time will warrant the ct. in making a decree in contradiction to a clear & express trust.—*A.-G. v. ROCHESTER CORPN.* (1854), 5 De G. M. & G. 797; 23 L. T. O. S. 104; 43 E. R. 1079, L. J.

Annotations:—Reid. A.-G. v. Sidney Sussex College (1869), 4 Ch. App. 722. *Mentd. Re Campden Charities* (1881), 18 Ch. D. 310.

580. Where words not ambiguous—Rules of modern club—Usage inadmissible.]—*HARRINGTON v. SENDALL*, No. 563, *ante*.

SECT. 8.—EXCLUSION, MODIFICATION AND EXTINGUISHMENT OF USAGES.

Usage admissible in evidence to annex terms—Unless expressly or impliedly excluded in contract.]—*See Sect. 6, sub-sect. 2, A., ante.*

581. Exclusion of—Intention to exclude—Question of law.]—*PARKER v. IBBETSON*, No. 725, *post*.

582. — By express or implied terms in contract.]—Covenant to leave, at the end of a term, a water mill, with all fixtures, fastenings, & improvements, during the demise, fixed fastened or set up in or upon the premises, in good plight & condition, reasonable use & wear only excepted:—*Held*: to include a pair of new mill-stones set up by the lessee during the term, although the custom of the country authorised him to remove them. The evidence of the custom for tenants to remove stones of this kind, may account for the parties having resorted to such a covenant, to exclude any doubt on the question (*TINDAL, C.J.*).—*MARTYR v. BRADLEY* (1832), 9 Bing. 24; 2 Moo. & S. 25; 1 L. J. C. P. 147; 131 E. R. 523.

Annotation:—Mentd. Pole-Carew v. Western Counties & General Manure Co., [1920] 2 Ch. 97.

583. — —.]—*GIBSON v. SMALL*, No. 402, *ante*.

584. — —.]—It is quite certain, that general usages are tacitly annexed to all contracts relating to the business with reference to which they are made, unless the terms of such contract expressly or impliedly exclude them (*PARKE, B.*).—*METZNER v. BOLTON* (1854), 9 Exch. 518; 23 L. J. Ex. 130; 2 W. R. 302; 2 C. L. R. 685; 150 E. R. 221.

Annotations:—Consd. Produce Brokers Co. v. Olympia Oil & Cake Co., [1916] 1 A. C. 314. *Reid. Parker v. Ibbetson* (1858), 27 L. J. C. P. 236. *Mentd. Wheeler v. Bayldge* (1854), 9 Exch. 668; *Hanau v. Ehrlich*, [1911] 2 K. B. 1056.

585. — —.]—*CROUCH v. CRÉDIT FONCIER OF ENGLAND*, No. 404, *ante*.

586. — — Clause inconsistent with usage.]—If the lease contain no stipulations as to the mode of quitting, the off-going tenant is entitled to his 'way-going crop according to the custom of the country, even though the terms of the holding may be inconsistent with such a custom.

If any condition is found in the lease necessarily repugnant to or inconsistent with the custom, the latter is excluded, for it can only be called in aid where the former is silent upon the subject (*TINDAL, C.J.*).—*HOLDING v. PIGOTT* (1831), 7 Bing. 465; 5 Moo. & P. 427; 9 L. J. O. S. C. P. 125; 131 E. R. 180.

Annotation:—Consd. Muncey v. Dennis (1856), 1 H. & N. 216.

587. — — —.]—If upon the face of the written agreement there is some clause which expressly says "we exclude the unwritten customary incident," of course it is excluded; & if there is any written clause which is inconsistent with it to such an extent as impliedly to exclude it, then too the unwritten clause must yield to & is excluded by the written one (*LORD BLACKBURN*).—*TUCKER v. LINGER* (1883), 9 App. Cas. 508; 52 L. J. Ch. 941; 49 L. T. 373; 48 J. P. 4; 32 W. R. 40, H. L.

Annotations:—Consd. Re Constable & Cranswick (1899), 80 L. T. 164; *Produce Brokers Co. v. Olympia Oil & Cake Co.*, [1916] 1 A. C. 314. *Mentd. Jersey v. Neath Union Grdns.* (1888), 52 J. P. 582; *Dashwood v. Magniac*, [1891] 3 Ch. 306.

Sect. 8.—Exclusion, modification and extinguishment of usages. Part III. Sect. 1: Sub-sects. 1, 2, 3, 4 & 5.]

588. ———. ———.]—By a charterparty a cargo of timber was to be shipped at a Baltic port & delivered at the Surrey Commercial Docks, London. The charterparty contained a clause, "The cargo to be brought to & taken from alongside the steamer at charterers' risk & expense, any custom of the port notwithstanding":—*Held*: the exclusion of the custom of the port related to the whole clause, & the shipowners were therefore only bound to deliver over the ship's rail, & were not bound by any custom of the port of London requiring a shipowner to do work outside the ship.

This clause of the charterparty means in my judgment, that in considering the obligations of

the shipowner & the charterer as to loading & unloading the customs of the ports of loading or discharge respectively are to be disregarded. The matter would then be governed by the general law (*ROMER, L.J.*).—*BRENDA S.S. Co. v. GREEN*, [1900] 1 Q. B. 518; 69 L. J. Q. B. 445; 82 L. T. 66; 48 W. R. 321; 16 T. L. R. 226; 44 Sol. Jo. 277; 9 Asp. M. L. C. 55; 5 Com. Cas. 195, C. A.

589. ———. ———.]—By parol evidence—Usage not referred to in written contract.]—*FAWKES v. LAMB*, No. 721, *post*.

590. Modification of — By growth of new custom.]—*MOULT v. HALLIDAY*, No. 202, *ante*.

591. Extinguishment of — By habitual exclusion from contracts.]—*ROPNER & Co. v. STOATE, HOSEGOOD & Co.*, No. 359, *ante*.

Customs of the country.—See *AGRICULTURE*, Vol. II., pp. 10 *et seq.*; *LANDLORD & TENANT*.

Part III.—Particular Usages.

SECT. 1.—TRADE, COMMERCE AND INDUSTRY.

SUB-SECT. 1.—BLEACHERS AND CALICO PRINTERS.

592. Bleachers — To allow discount for prompt payment.]—Under an agreement to take off a discount above 5 per cent. for prompt payment, though according to the custom of the bleaching trade, creditor cannot upon failure charge more than 5 per cent.—*Ex p. AYNSWORTH* (1799), 4 Ves. 678; 31 E. R. 350, L. C.

Annotation:—*Reid. Re Harvey, Ex p. Pigou* (1818), 3 Madd. 136.

593. ———. Quarterly accounts — Option of cash payment—Or bill at three months.]—In order to prove that a particular usage exists in a trade carried on at A., evidence that the usage prevails at B. where the same trade is carried on is admissible, provided B. is in the vicinity of A., & there is an interchange of the trade in question between the two places. In order to prove a usage in a particular trade it must be shown that the usage is certain & reasonable, & so universally acquiesced in, that everybody engaged in the trade knows it or might know it if he took the pains to enquire. A general lien established in the bleaching trade at Nottingham, viz. that by the usage of the bleaching trade at Nottingham, accounts are made out quarterly, containing the charges made for the goods bleached during the previous three months; at the option of the bleacher this amount is either payable in cash at once in which case discount at the rate of five per cent. is allowed, or else the bleacher draws a bill at three months upon debtor for the full amount; & that bleachers may retain all goods sent to be bleached until they are paid all previous quarterly accounts, in case either no bills have been given for such account, or if given they have arrived at maturity & been dishonoured.—*PLAICE v. ALLCOCK* (1866), 4 F. & F. 1074.

—Lien for general balance.]—See *LIEN*.

594. Calico printers — Bound to take goods damaged in printing—Unless owner elects to take.]—Where, by the custom of the trade, a calico printer is bound to take goods damaged in the printing, the mere circumstance of their being

damaged confers no such property in them on him as to authorise him to sell them, unless the owner has elected that he should take them.—*LACLOUGH v. TOWLE* (1800), 3 Esp. 114, N. P.

Annotation:—*Mentd. Wilson v. Anderton* (1830), 1 B. & Ad. 450.

—Lien for general balance.]—See *LIEN*.
Calico packers.]—See No. 692, *post*.

SUB-SECT. 2.—BREWERS, DISTILLERS AND PUBLICANS.

See, generally, INTOXICATING LIQUORS.

595. For property in warehoused malt not to pass till re-measured.]—A warehouseman who, on receiving an order from the seller of malt to hold it on account of the purchaser, gives a written acknowledgement that he so holds it, cannot set up as a defence for not delivering it to the purchaser, that by the usage of trade the property in malt sold is not transferred till it is re-measured, & that before the malt in question was re-measured, the seller became bkpt.—*STONARD v. DUNKIN* (1809), 2 Camp. 344, N. P.

Annotations:—*Mentd. Hawes v. Watson* (1824), 2 B. & C. 540; *Gosling v. Bifnie* (1831), 7 Bing. 339; *Holl v. Griffin* (1833), 10 Bing. 246; *Woodley v. Coventry* (1863), 2 New Rep. 35; *Biddle v. Bond* (1865), 6 B. & S. 225; *Knights v. Wiffen* (1870), L. R. 5 Q. B. 660; *Henderson v. Williams*, [1895] 1 Q. B. 521.

596. Whether brewer entitled to have prior charge on public house—For money advanced to purchase lease—Publican uncertified bankrupt.]—Brewers advanced money to enable a publican to pay the consideration for the purchase of the lease of a public house. As soon as the lease was executed, they took a deposit of equitable mtge., accompanied by a memorandum of deposit, whereby the publican, after reciting the deposit to have been made by himself, stated its purpose, & that he undertook to execute a legal mtge., by way of underlease, when required. The publican turned out to have been at the time an uncertified bkpt. On a bill filed by the brewers, stating it to be the custom for these advances to be made, upon the understanding that the lease

PART II. SECT. 8.

g. Extinguishment of—By statute.—The object of all the weights & measures Acts for the last half century was to abolish all local customs & make them illegal.—*COLLINS v. DENNY &*

SONS (1897), 31 Ir. L. T. 167.—*IR.*

PART III. SECT. 1, SUB-SECT. 2.

h. Licensed vintner—Having yearly tenure—Though rent payable weekly.—Evidence is admissible to prove a

custom in the trade of licensed vintners, according to which the tenant paying licence is deemed to have a yearly tenure, although the rent reserved be payable weekly.—*LUNDY v. REILLY* (1857), 9 Ir. Jur. 397.—*IR.*

should, upon its execution, be delivered by the vendor immediately to the brewers, in exchange for the money advanced by them, without either the lease or money passing through the hands of the purchaser, & stating that the above transaction was completed in that way, & that the publican was introduced to the brewers by the lessor. *Qu.*: whether on such a case being established at the hearing the brewer's lien would be held good.—*MEUX v. SMITH, SEAGER v. SMITH* (1841), 1 Mont. D. & De G. 396; 11 Sim. 410; 10 L. J. Ch. 225; 7 Jur. 821; 59 E. R. 931, L. C.; *subsequent proceedings* (1843), 2 Mont. D. & De G. 789.

Annotations:—*Reid*, Bird v. Philpott, [1900] 1 Ch. 822; *Re Connolly*, Wood v. Connolly (No. 2) (1912), 106 L. T. 738.

597. — Equitable mortgage for beer supplied & to be supplied—Second mortgage to distiller—Subsequent advances with notice of second charge.—In 1858, a publican deposited the lease of his public-house with defts., a firm of brewers, with a memorandum stating that the deposit was to secure payment of a sum of £200, as well as any other sums in which the depositor might become indebted to the brewers on any account, not exceeding £500. The brewers, in July, 1865, made the publican a further advance of £100. Four days after, the publican signed to pltf., a firm of distillers, a memorandum, whereby he declared that the documents deposited with the brewers should, subject to the brewers' charge, be a security to the distillers for a sum of £120 then due, & all other sums that might thereafter become due, to the distillers. Notice of this second equitable mtge. was on the same day given by the distillers to the brewers. After the date of this notice the publican became indebted to the brewers in a further sum of money, the price of beer supplied to the publican. The brewers claimed to be entitled, by virtue of a custom in the trade between brewers & publicans, to add this further sum to the amount secured by the deposit of the lease, in priority to the distillers' charge:—*Held*: the alleged custom was bad in law for want of mutuality, & for want of defined limits; & further, it was imperfectly supported by the evidence.—*DAUN v. CITY OF LONDON BREWERY CO.* (1869), L. R. 8 Eq. 155; 38 L. J. Ch. 454; 20 L. T. 601; 33 J. P. 547; 17 W. R. 663.

Annotation:—*Fold*, *Menzies v. Lightfoot* (1871), L. R. 11 Eq. 459.

598. — — — — ——The lessee of a public-house in London executed at the public-house, & at the time of entering into possession thereof, a mtge. of his lease in favour of the brewer by whom the house was supplied with beer, to secure a sum already advanced, & future advances not to exceed in the whole a given sum. At the same time & place he charged the lease, "subject to the security already given," to the brewer, with the repayment to the distiller who supplied the house with spirits of an advance made by him. The mtge. & charge were both executed in the presence of the solrs. of the brewer & distiller, & the latter there & then gave to the former a formal notice of the charge in favour of his client. Afterwards the publican became indebted to the brewer for the price of beer supplied to the house. The lease having been sold to the brewer under a power of sale in his mtge.:—*Held*: in the absence of any express agreement, the distiller was entitled to be repaid his advancement out of the purchase-money in priority to the debt which had been incurred to the brewer subsequently to the time when notice was given to him of the distiller's charge; & this priority was not affected by a

custom of trade alleged to exist between publicans, brewers & distillers in London.—*MENZIES v. LIGHTFOOT* (1871), L. R. 11 Eq. 459; 40 L. J. Ch. 561; 24 L. T. 695; 19 W. R. 578.

599. Whether "seed barley" means barley fit for malting.—Pltf., having heard that deft. had some barley to sell, went to his countinghouse, when his agent produced a sample which he said was "seed barley," offered to deft. at 39s., & if pltf. would take it at 40s. he might have it. Pltf. looked at the barley & said it was a good sample of seed barley, & agreed to buy it. At pltf.'s request deft. wrote to the person who had offered it to him, saying that he would accept it, & asking what sort it was as it would do well for seed. Pltf. afterwards sold it under a warranty in writing as "Chevalier seed barley." It turned out that it was "barley bigg," a species of barley unfit for malting purposes; & the person to whom pltf. had sold it recovered damages against him for the breach of warranty:—*Held*: (1) there was no warranty by deft. that the barley was "seed barley"; (2) the contract was satisfied by the delivery of barley fit for sowing; & if the term "seed barley" meant barley fit for malting purposes, that ought to be shown by clear & irresistible evidence.—*CARTER v. CHICK* (1859), 4 H. & N. 412; 28 L. J. Ex. 238; 33 L. T. O. S. 166; 7 W. R. 507; 157 E. R. 899.

600. Malting agent—Not usually legal or equitable owner—Barley & malt paid for by brewers.—It was agreed that the judges of the divisional ct. should have the power of drawing inferences of fact, & they have come to the conclusion that, from the notoriety of the mode in which the business of a malting agent is carried on, no creditor dealing with him could have failed to be aware that in many instances he is not the legal or the equitable owner of the barley or the malt, & that the barley & the malt are in truth paid for by the brewers (*BRETT, L.J.*).—*HARRIS v. TRUMAN* (1882), 9 Q. B. D. 264; 51 L. J. Q. B. 338; 46 L. T. 844; 30 W. R. 533, C. A.

Annotations:—*Mentd*, *Re Van Laun, Ex p. Chatterton* (1907), 76 L. J. K. B. 644; *Chicheham & Woldingham Assn. v. Hayward* (1911), 76 J. P. 52.

601. Meaning of "loans" in sale of public house—Loans from brewers & distillers.—*HEITZMANN v. GOWENLOCK* (1891), 7 T. L. R. 611, C. A.

Usages involving reputed ownership in bankruptcy.—*See BANKRUPTCY & INSOLVENCY*, Vol. V., pp. 806, 807, Nos. 6886, 6887, 6893.

SUB-SECT. 3.—BUILDERS.

See, generally, BUILDING CONTRACTS, ENGINEERS & ARCHITECTS, Vol. VII., pp. 331-451.

SUB-SECT. 4.—CARRIERS.

See, generally, CARRIERS, Vol. VIII., pp. 5-228. **Lien of Carriers.**—*See CARRIERS*, Vol. VIII., p. 220, Nos. 1406-1409.

SUB-SECT. 5.—CHINA AND POTTERY TRADES.

602. China trade—Customary holidays.—Where a workman is hired for a year to work at a particular trade, the China trade, under a written agreement, which says nothing as to any periods of absence allowed to the workman, parol evidence may be given that it is the custom of the particular trade for the workmen employed

Sect. 1.—Trade, commerce and industry: Sub-sects. 5, 6, 7 & 8.]

in it to take certain holidays, & to absent themselves on such occasions from their work without the permission of their masters. The sessions should not send up a case with a view to its being re-heard by them, but should decide both ways provisionally.

If the evidence had been admitted, it might have shown a custom so universal that no workman could be supposed to have entered into this service without looking to it as part of the contract. & the supposed condition is not inconsistent with the written agreement; for that is merely to work at a trade from Nov. 11, 1815 to Nov. 11, 1817, which does not necessarily bind the party for every part of the whole year. The evidence, therefore, might have been receivable for the purpose of qualifying the contract (LORD DENMAN, C.J.).

I have always understood that general usage was evidence in a case of this kind, on the ground that its notoriety makes it virtually part of the contract. The evidence offered here was within that principle & not contradictory to the written agreement (COLERIDGE, J.).—*R. v. STOKE UPON TRENT (INHABITANTS)* (1843), 5 Q. B. 303; *Dav. & Mer.* 357; 13 L. J. M. C. 41; 2 L. T. O. S. 148; 8 J. P. 197; 8 Jur. 34; 114 E. R. 1263.

Annotations :—*Consd.* *Devonald v. Rosser*, [1906] 2 K. B. 728; *Meek v. Port of London Authority* (1918), 119 L. T. 196. *Mentd.* *R. v. Kesteven JJ.* (1844), 8 Jur. 445.

603. Pottery trade—To work from Martinmas to Martinmas subject to one month's notice—Duty of potter's printer "to find transferrer."—*Resp.*, who was an earthenware manufacturer, employed applt. as a potter's printer, & by the custom of the potting trade the employment was from Martinmas to Martinmas, subject to a month's notice on either side. By the custom of the trade it was the duty of applt. to find a person called a "transferrer" to assist him.—*GRAINGER v. AYNLEY, BROMLEY v. TAMS* (1880), 6 Q. B. D. 182; 50 L. J. M. C. 48; 43 L. T. 608; 45 J. P. 142; 29 W. R. 242.

Annotation :—*Mentd.* *Morgan v. London General Omnibus Co.* (1884), 48 J. P. 503.

SUB-SECT. 6.—CLOTH, LINEN AND SILK TRADES.

604. Cloth merchants—To send goods for inspection.—*WOOD v. WOOD*, No. 340, *ante*.

605. —Cloth not approved & returned by tailor—Lost in transit—Need not be paid for.—*Semle*: there is not any custom in the cloth trade, by which a tailor, who receives cloth from a clothier which he does not approve, is bound to pay for it, if, when sent back, it does not reach the seller, unless he shows that he has delivered it to the seller's order in writing.—*DAVIES v. HALTON* (1831), 5 C. & P. 69, N. P.

606. Linen merchants—Credit to American correspondents for twelve months—Interest at five per cent. subsequently.—A usage appears to have

existed in the American linen trade for merchants in this country to allow to their American correspondents twelve months' credit, & then to charge them five per cent. for interest, & for the tradesmen here to allow the merchant fourteen months' credit, & then to charge five per cent.—*EDDOWES v. HOPKINS* (1780), 1 Doug. K. B. 376; 99 E. R. 242.

Annotations :—*Mentd.* *Richardson v. Mellish* (1825), 3 Bing. 334; *Arnott v. Rodfern* (1826), 3 Bing. 353; *Corner v. Shew* (1838), 1 Horn & H. 215; *Marlanski v. Cairns* (1852), 19 L. T. O. S. 277; *L. C. & D. Ry. v. S. E. Ry.*, [1893] A. C. 429.

607. —Credit to merchants from tradesmen for fourteen months—Interest at five per cent. subsequently.—*EDDOWES v. HOPKINS*, No. 606, *ante*.

608. —Usual credit three months.—*SWAN-COTT v. WESTGARTH* (1803), 4 East, 75; 102 E. R. 758.

Silk merchants—Lien for general balance.—*See LIEN.*

SUB-SECT. 7.—COAL TRADE.

Customs of the port.—*See SHIPPING AND NAVIGATION.*

609. London port dues on coals from Newcastle.—Coals sent from Newcastle to London pay a port duty according to the Newcastle chaldron.

Undoubtedly these special port duties may be maintained in law, but they cannot be supported by any other evidence but that of immemorial prescription. The prescription must apply to the case before the Ct.; & the usage being clearly proved to be, that coals coming from Newcastle have always paid according to the Newcastle measure, deft. cannot alter the case by proving that coals coming from other ports have paid different duties (LORD KENYON).—*LINSKILL v. READ* (1795), Peake, Add. Cas. 68, N. P.

610. Delivery daily—Payment at end of month—By bill at two months.—Evidence that according to the custom of the trade pitfcs. delivered coals to H. daily, & that at the end of every month he gave a bill, payable in two months :—*Held*: not sufficient to charge deft. upon a guarantee for the payment of coals to be delivered to H. at a credit of two months from the delivery.—*HOLL v. HADLEY* (1828), 5 Bing. 54; 2 Moo. & P. 136; 130 E. R. 980.

611. To allow demurrage—& for "balk days."—*HOENE v. CORY* (1837), 6 L. T. 257.

612. London coal trade—Usage of coal merchants to hire barges—Name of hirer painted on barges.—A coal-merchant had hired barges of deft., it being the custom for coal-merchants to hire barges, & to paint on them the name of the hirer. Upon a question whether the barges passed to the coal-merchant's assignees under his bkpcy. :—*Held*: it was properly left to the jury to find whether the custom to hire was generally notorious in the coal trade; & it was not necessary to direct them to inquire whether the custom was notorious

PART III. SECT. 1.—SUB-SECT. 7.

k. Whether to accept weight certified by railway company.—*M.* claimed that there was a trade custom among coal dealers to accept the weight of coal as certified by the railway co. :—*Held*: there is no such custom.—*RE EUTENIER & BROTHERS* (1908), 9 W. L. R. 627.—*CAN.*

l. Whether interchange of work by workmen.—Four men were engaged in the unloading of a collier. Three of these, a tipper & two winchmen, were

employed by the shipowner; the fourth, a barrow-man, was employed by the coal merchant who chartered the ship. The tipper got tired of his work, & asked the barrow-man to exchange work with him, which was done, the barrow-man tipping the tubs of coal as they were hoisted from the hold into the barrow, and the tipper wheeling off the barrow when full. While the barrow-man was thus occupied in tipping he was accidentally knocked into the hold by a tub and was killed. The three surviving workmen proved

that it was the habit of men so employed at the port to interchange work in this manner when unloading colliers, & there was no evidence to the contrary; the employers did not deny their knowledge of the practice, nor allege that they prohibited it. There was no other evidence of any custom to interchange work at the port when unloading coal :—*Held*: no such custom was proved.—*HENNERBERRY v. DOYLE BROTHERS*, [1912] 2 I. R. 529; 46 I. L. T. 70.—*IR.*

to the world at large.—*WATSON v. PEACHE* (1834), 1 Bing. N. C. 327; 1 Scott, 149; 4 L. J. C. P. 49; 131 E. R. 1143.

Annotations.—*Reid. Priestley v. Pratt* (1867), 36 L. J. Ex. 89; *Re Couston, Ex p. Watkins* (1873), 8 Ch. App. 520. **Mentd.** *Leake v. Loveday* (1842), 4 Man. & G. 972; *Marnier v. Banks* (1867), 16 W. R. 62; *Cooke v. Hemming* (1868), L. R. 3 C. P. 334.

613. Scottish coal trade in London—Terms for payment of freight.—“As usual.”—*HARRIS v. TIMBERLEY* (1840), 4 L. T. 742.

614. Right of commission agent to sell on credit.—It is clear that by the usage of the trade a commission agent may sell without making the purchaser pay to his principal ready money (*CRESSWELL, J.*).—*BODEN v. FRENCH* (1851), 10 C. B. 886; 20 L. J. C. P. 143; 17 L. T. O. S. 77; 138 E. R. 351.

615. Newcastle coal trade—“About”—Allowance of 5 per cent. in quantity contracted to be sold—More or less.—Defts. sold to plffs. “about” 18,500 tons of Northumberland coal under two contracts, deliveries to be in as nearly equal monthly instalments as possible over a given period. Defts. having so far made the deliveries in approximately equal quantities, delivered as their last monthly instalment a shipment of 455 tons short. In an action by the purchasers for damages for short delivery:—*Held*: there was a custom of the Newcastle coal trade that the word “about” gave to the vendors an option up to 5 per cent. in either direction, & the custom being proved, defts. had made no default in fulfilling their contracts, inasmuch as the word “about” referred to the total amounts to be delivered under each contract respectively, & not merely to the “last instalment.”—*SOCIÉTÉ ANONYME L'INDUSTRIELLE RUSSO-BELGE v. SCHOLEFIELD* (1902), 7 Com. Cas. 114, C. A.

616. Newcastle coke trade—Loading “in turn.”—By a charterparty, the ship was to proceed to Newcastle, & on arrival there “be ready forthwith, in regular turns of loading, to take on board a full & complete cargo of four keels of coals & the remainder coke.” The loading of coal at Newcastle is by Act of Parliament regulated by “turns” but there is no statutory regulation as to the loading of coke. In an action upon the charterparty in the county ct., for not loading the coke within a reasonable time:—*Held*: the expression “regular turns of loading” with reference to coal, meant, in “turn” at the spout, as directed by the Act of Parliament; & that evidence which was offered to show that the usage or practice of Newcastle, was to load coke “in turn” in the same manner, was improperly rejected.—*LEIDEMANN v. SCHULTZ* (1853), 14 C. B. 38; 23 L. J. C. P. 17; 17 J. P. 745; 2 C. L. R. 87; 139 E. R. 17; *sub nom. SCHULTZ v. LEIDEMANN*, 1 Saund. & M. 163; 22 L. T. O. S. 101; 18 Jur. 42; 2 W. R. 35.

Annotations.—*Reid. Tapscott v. Balfour* (1872), L. R. 8 C. P. 46; *Postlethwaite v. Freeland* (1879), 4 Ex. D. 155. **Mentd.** *Foster v. Smith* (1856), 18 C. B. 156; *Hudson v. Clementson* (1856), 18 C. B. 213; *Schroder v. Ward* (1863), 13 C. B. N. S. 410.

Usage involving reputed ownership in bank-

ruptcy.—*See BANKRUPTCY & INSOLVENCY*, Vol. V., pp. 804, 806, Nos. 6870, 6886, 6887.

SUB-SECT. 8.—CORN AND GRAIN TRADE.

Customs of the port.—*See SHIPPING & NAVIGATION.*

617. Meaning of “good” or “fine” barley.—*HUTCHISON v. BOWKER*, No. 433, *ante*.

618. “St. Giles Marais Wheat”—Wheat & barley mixed.—*RYDER v. WOODLEY*, No. 504, *ante*.

619. Payment by buyer to factor upon discount—Within two months of ordinary time of payment—Either for our own accommodation—Or that of factor.—By custom in the Corn Market, a buyer may pay the factor upon discount, within the two months which constitute the ordinary time of payment, either for his own accommodation or that of the factor, etc.; therefore, where a factor stopped payment after he had received the money for corn sold, but before the expiration of the two months:—*Held*: the principal could not sue the buyer, but must look to the factor.—*HEISCH v. CARRINGTON* (1833), 5 C. & P. 471, N. P.; *subsequent proceedings* (1835), 11 Ad. & El. 555, n. **Annotation.**—*Mentd. Sanders v. Vanzeller* (1843), 4 Q. B. 260.

620. Variation from sample—Buyers must reject on day of sale—Liverpool trade—Usage reasonable.—A custom of the Liverpool corn market, that, when corn is sold by sample, if the buyer does not, on the day the corn is sold, examine the bulk & reject it, he cannot afterwards reject it, or refuse to pay the whole price:—*Held*: to be a reasonable custom.—*SANDERS v. JAMESON* (1848), 2 Car. & Kir. 557, N. P.

621. — Unless excessive or unreasonable—London trade.—*Re WALKERS, WINNER & HAMM & SHAW, SON & CO.*, No. 340, *ante*.

622. For agents to sell on del credere commission—In own name—Instructions by principal to sell oats of certain quality at certain price on account—London trade.—*JOHNSTON v. USBORNE*, No. 473, *ante*.

623. — Without disclosing name of purchaser.—*HASTIE v. COUTURIER* (1853), 9 Exch. 102; 22 L. J. Ex. 299; 21 L. T. O. S. 289; 17 Jur. 1127; 1 W. R. 495; 1 C. L. R. 623; 156 E. R. 43, Ex. Ch.; *affd. sub nom. COUTURIER v. HASTIE* (1856), 5 Il. L. Cas. 673, Il. L.

Annotations.—*Reid. Fleet v. Merton* (1871), L. R. 7 Q. B. 126; *Mollett v. Robinson* (1872), L. R. 7 C. P. 84. **Mentd.** *Covas v. Bingham* (1855), 2 E. & B. 836; *Wickham v. Wickham* (1855), 2 K. & J. 478; *Hall v. Conder* (1857), 2 C. B. N. S. 22; *Pritchard v. Merchant's & Tradesman's Mutual Life-Assec. Soc.* (1858), 3 C. B. N. S. 622; *Itshour v. Bruckner* (1858), 30 L. T. O. S. 258; *Hare v. Browne* (1859), 5 Jur. N. S. 711; *Itali v. Universal Marine Inace.* (1862), 4 De G. F. & J. 1; *Reader v. Kingham* (1862), 32 L. J. C. P. 108; *Mallett v. Bateman* (1864), 16 C. B. N. S. 530; *The John Bellamy* (1870), L. R. 3 A. & E. 129; *Mountstephen v. Lakeman* (1871), 25 L. T. 755; *Jeffreys v. Fair* (1876), 36 L. T. 10; *Jolliffe v. Baker* (1883), 11 Q. B. D. 255; *Sutton v. Grey*, [1894] 1 Q. B. 285; *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K. B. 778; *Griffith v. Brymer* (1903), 19 T. L. L. 434; *Davys v. Buswell*, [1913] 2 K. B. 47; *Gabriel v. Churchill & Sim* [1914] 3 K. B. 1272.

PART III. SECT. 1, SUB-SECT. 8.

m. Oats—Option to buyer to direct delivery at points either this side or beyond place of original delivery—Method of calculating freight.—In reference to the sale of a quantity of oats, plff. wrote defts. as follows:—
“I confirm sale to you by telephone of 10,000 bushels of Island black oats at 24½ cents per bushel f.o.b. cars at P., or 28 cents delivered at E., whichever way you may prefer to order them forward. If you intend having them

go to different stations kindly give me instructions as early as possible.” Defts. replied as follows:—

“Yours of 7 inst. to hand and we now complete purchase, and will forward the bags to you at once for the oats, when we hope to be able to instruct you as to where to ship the same.” At the trial it was agreed that it was the usage of the trade, if oats were to be delivered at a certain point on the railway, at a certain price, with an option to the buyer to direct delivery

at points either this side or beyond the place of delivery, that the freight should be either added or deducted as the case might be.—*SUMNER v. THOMPSON* (1898), 31 N. S. R. 481.—**CAN.**

n. — Whether to accept oats of different grade to those ordered.—In an action on a contract for the sale of “No. 2 white oats; one cent less if grade No. 3,” respondents alleged that the oats delivered were of grade No. 3, whereas they had contracted to

Sect. 1.—Trade, commerce and industry: Sub-sects. 8, 9, 10, 11 & 12.]

624. Deficiency between amount of cargo & amount specified in bill of lading—Over one per cent. made good by seller.]—THE MARY & ELLEN, LIVINGSTON v. RALLI (1856), 6 L. T. 165, 195, 661.

625. Method of loading—Danube grain trade.]—HUDSON v. EDE (1868), L. R. 3 Q. B. 412; 8 B. & S. 631; 37 L. J. Q. B. 166; 18 L. T. 764; 16 W. R. 940; 3 Mar. L. C. 114 Ex. Ch.

Annotations:—*Consd.* Kay v. Field (1882), 10 Q. B. D. 241; Stephens v. Harris (1887), 57 L. J. Q. B. 203; *Sailing* Ship Allerton v. Falk (1888), 6 Asp. M. L. C. 287; Smith & Service v. Rosario Nitrate Co., [1894] 1 Q. B. 174. *Refd.* Postlethwaite v. Freeland (1880), 5 App. Cas. 599; Grant v. Coverdale, Todd (1884), 9 App. Cas. 470; The Alne Holme, [1893] P. 173; Furness v. Forwood (1897), 77 L. T. 95; Temple, Thomson & Clarke v. Runnalls (1902), 18 T. L. R. 822. *Mentd.* The Austin Friars (1894), 71 L. T. 27.

626. Rate of discharge in port of Bristol—Grain cargoes from River Plate—Not limited to five hundred tons a day.]—THE COUNTY OF SALOP (1886), cited in 92 L. T. at p. 331; 21 T. L. R. at p. 247; 10 Com. Cas. at p. 73.

Annotation:—*Refd.* Ropner v. Stoate Hosegood (1905), 10 Com. Cas. 73.

627. ————.]—ROPNER & Co. v. STOATE, HOSEGOOD & Co., No. 359, ante.

628. Equivalent to one ton—Two thousand pounds—New Zealand flour trade.]—BANK OF NEW ZEALAND v. LONDON BANK OF MEXICO & SOUTH AMERICA (1893), 9 T. L. R. 444, C. A.

629. Form of documents—American meal trade.]—A parcel of meal was sold to a London firm at £5 8s. 9d. per ton c.i.f. London, under a contract which provided for dispatch of the meal from the mills in the interior of America to an American port, thence to be shipped per steamer; "all other conditions as per the American maize germ meal contract." The meal was forwarded from a town in Illinois under two through bills of lading issued in the customary form of the Illinois Ry. Co., which provided that the meal should be carried to the port of New Orleans & thence by Leyland Line to London, & further that the property covered by them was subject to all conditions expressed in the regular forms of bills of lading in use by the steamship co. at time of shipment. The Leyland Line is a well-known line trading between New Orleans and London, having a regular form of bill of lading upon which all goods by that line are shipped. By that form of bill of lading the Leyland Line reserved liberty to proceed to the port stated in the bill of lading "via any other port or ports in any order or rotation, outwards or forwards, whether in or out of or in a contrary direction to or beyond the customary or advertised route," & likewise reserved power to tranship the goods at any port into any other steamer or sailing vessel. Under the American maize germ meal contract the sellers were to give policies & certificates of insurance in respect of the meal in question, & certificates in the customary form were in fact given which took the place of a policy which was duly issued & which contained the following clause: "In event of deviation or of change of voyage held covered at a premium to be fixed by insurers."

buy grade No. 2. Reaps. further alleged that by usage of trade the words used in the contract in question meant that they would be obliged to accept a small quantity of No. 3 oats if these were included in the delivery of No. 2, but that they would not be obliged to accept a delivery which was all No. 3. This usage or understanding was denied by appellants:—*Held*:

the contract was quite clear & unequivocal for the purchase of No. 2 oats; the evidence as to usage or understanding was properly rejected.—*MICHAUD v. MELADY* (1907), 4 E. L. R. 164.—*CAN.*

**PART III. SECT. 1. SUB-SECT. 9.
o. Ownership of cotton in press.]—**

The steamship in which the meal was carried having deviated to Bremen before reaching London, thus causing delay, the buyers refused to accept delivery, & the question as to their right to do so was submitted to the trade tribunal, which decided against them, finding that all the documents relating to the carriage of the meal were usual & customary & were in forms well known in the trade, & constantly received, & hitherto without objection, in fulfilment of similar contracts of sale:—*Held*: (1) the adoption by the sellers under the through bills of lading of the method of sea carriage in question was not necessarily inconsistent with the terms of the contract of sale, & therefore that the buyers were not justified in refusing to accept delivery; (2) as the certificate of insurance was in the usual form & covered deviation, it satisfied the requirements of the c.i.f. contract.—*BURSTALL v. GRIMSDALE* (1906), 11 Com. Cas. 290.

Annotation:—*As to* (2) *Refd.* Diamond Alkali Export Corp'n v. Bourgeois, [1921] 3 K. B. 443.

Rice trade.]—See No. 656, post.

Liability of wharfinger as insurer.]—See BAILMENT, Vol. III., p. 79, Nos. 169, 170.

SUB-SECT. 9.—COTTON TRADE.

630. Meaning of "bale."—TAYLOR v. BRIGGS, No. 500, ante.

631. Yorkshire—For incoming tenant to take over engines & machinery of mill at valuation.]—HUBBARD v. BAGSHAW (1831), 4 Sim. 326; 58 E. R. 122.

Annotations:—*Mentd.* Re Ogden & Walmsley, *Ex p.* Loyd (1834), 3 Deac. & Ch. 765; *Re* Mabery, *Ex p.* Belcher (1835), 4 Deac. & Ch. 703; *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403.

632. Bombay—Whether to pay freight on measurement at port of loading.]—BOTTOMLEY v. FORBES, No. 363, ante.

633. ————.]—BUCKLE v. KNOOP, No. 337, ante.

634. Liverpool—Bill drawn against goods deposited with acceptor—Proceeds of sale first applicable in discharge of bill.]—By the custom of the cotton trade at Liverpool, if a merchant places cotton in his broker's hands for sale, & the broker accepts his principal's drafts, & such draft is negotiated, then, in case the broker makes sale of such cotton & receives the proceeds, it is his duty to apply such proceeds to meet his acceptances.—*INMAN v. CLARE* (1858), John. 769; 32 L. T. O. S. 353; 5 Jur. N. S. 89; 70 E. R. 629.

Annotations:—*Mentd.* Frith v. Forbes (1862), 31 L. J. Ch. 793; *Re* Barned's Banking Co., *Ex p.* Stephens (1868), 3 Ch. App. 753; *Re* Leggett, *Re* Gledstanes, *Ex p.* Dewhurst (1873), 8 Ch. App. 965; *Re* Yglesias, *Ex p.* Gomez (1875), 10 Ch. App. 639; *Re* Strachan, *Ex p.* Cooke (1876), 4 Ch. D. 123; *Re* Suse, *Ex p.* Dever (1884), 15 Q. B. D. 760; *Brown, Shipley v. Kough* (1885), 29 Ch. D. 848; *Spartali v. Crédit Lyonnais* (1885), 2 T. L. R. 178.

635. Manchester—"Payment in from six to eight weeks"—Does not give eight weeks' credit.]—ASHFORTH v. REDFORD, No. 436, ante.

Contract with agent on behalf of unnamed principal.]—See AGENCY, Vol. I., p. 468, No. 1528.

According to mercantile usage in the cotton trade in T. where a dealer delivers cotton to the owner of a cotton press but not in pursuance of any special contract, the property in the cotton vests in the owner of the press.—*VOLKART BROTHERS v. VETTELU NADAN* (1888), 1 L. R. 11 Mad. 439.—*IND.*

SUB-SECT. 10.—DRUG TRADE.

See, generally, FOOD & DRUGS.

636. Mode of disapproving contract.]—Where a broker sold on a Saturday certain goods of debt. to pltf. for a stipulated price, subject to pltf.'s approval of the quality upon the Monday following, & sent the sold note to pltf. on the Saturday, marked with the words "Quality to be approved on Monday"; but did not send the bought note to debt. then, because he had met & informed him of the contract on the same day; but pltf. not having signified his disapproval of the contract on the Monday, the broker sent the sold note to debt. on the Friday, with the words "Quality to be approved on Monday," struck out; which note debt. returned within 24 hours, which by the custom of the drug trade signified his disaffirmance of the contract, as far as in him lay:—*Held*: debt. could no longer disaffirm it after the Monday, when pltf., not having signified his disapproval, was also bound by it.—*HUMPHRIES v. CARVALHO* (1812), 16 East, 45; 104 E. R. 1006.

Annotations:—*Mentd.* Dixon v. Hovill (1828), 4 Bing. 665; Cowie v. Reinfrey (1846), 5 Moo. P. C. C. 232.

637. Declaration of sea damage—On sale by auction.]—It being usual in the sale of auction of drugs, if they are sea-damaged, to express it in the broker's catalogue, & drugs which are re-packed, or the packages of which are discoloured by sea-water, bearing an inferior price, although not damaged; debts., who had purchased some sea-damaged pimento, re-packed it, & advertised it in catalogues, which did not notice that it was sea-damaged or re-packed, but referred it to be viewed, with little facility, however, of viewing it; they exhibited impartial samples of the quality, & sold it by auction:—*Held*: this was equivalent to a sale of the goods, as & for goods that were not sea-damaged, & that an action lay for the fraud.—*JONES v. BOWDEN* (1813), 4 Taunt. 847; 128 E. R. 565.

Annotation:—*Reid.* Curtis v. Peek (1864), 13 W. R. 230.

638. Meaning of soda crystals.]—A description of an article which, according to the custom of the trade, is commonly taken to indicate an article made of particular materials, etc., is a "false trade description" within the meaning of the Merchandise Marks Act, 1887 (c. 28), if applied to an article not made of those materials, etc., notwithstanding that from a scientific point of view it may be a true description of the latter article:—*Held*: though the expression "soda crystals" may, from a scientific point of view, be used with equal truth to describe crystallised sulphate of soda & crystallised carbonate of soda, yet, on a prosecution under the Act, if the justices come to the conclusion that "soda crystals" according to the custom of the trade is commonly taken to indicate an article consisting substantially of crystallised carbonate of soda, they are justified in holding that the expression is a false trade description as applied to an article consisting of crystallised carbonate mixed with a large percentage of crystallised sulphate of soda.—*FOWLER v. CRIPPS*, [1906] 1 K. B. 16; 75 L. J. K. B. 72; 93 L. T. 808; 70 J. P. 21; 54 W. R. 299; 22 T. L. R. 73; 50 Sol. Jo. 45; 21 Cox, C. C. 52; 4 L. G. R. 9, D. C.

SUB-SECT. 11.—FISHING TRADE.

Fishing trade.]—*See FISHERIES; SHIPPING & NAVIGATION.*

SUB-SECT. 12.—FRUIT TRADE.

639. To receive cargo immediately ship ready for discharge.]—In an action by the consignees of goods against shipowner for non-delivery of goods according to bills of lading, in which there was a condition that the goods should be taken from the ship by the consignees immediately the ship was ready for discharge, & that otherwise they would be landed or put into craft at the merchant's risk & expense, & the goods having been landed at a dock the day after the ship was ready for discharge, but after the consignees were ready to receive on payment of freight, & the goods having been detained for some time for dock charges, payment of which was refused:—*Held*: it was for the jury whether the consignees had complied with the condition, or whether, if not, debt. had gone beyond it in landing the goods, but even if pltf. were entitled to recover, yet they might have received the goods on payment of a small sum under protest, they would not be entitled to recover full damages for the delay, as their proper course was to have paid the disputed sum under protest, & then sued to recover it.

When a man is called upon by a contract to do an act, & no time is specified, he is allowed a reasonable time for doing it; & what is a reasonable time may depend on all the circumstances of the case. The word "immediately" implies that there is a more stringent requisition than what is ordinarily implied in the word "reasonable," still it must receive a reasonable interpretation, so far that it cannot be considered as imposing an obligation to do what is impossible. This condition is inserted in cases of consignments of cargoes perishable in their nature, such as fruit, & requiring to be cleared quickly, & the shipowner or master cannot know to whom the bills of lading have been assigned; it is not unreasonable such in cases that the merchant, making use of such means as he may have for hearing of the arrivals of vessels, should be bound to get his papers & his entries passed, & have his craft ready alongside the ship when she is ready to discharge (*COCKBURN, O.J.*).—*ALEXIADI v. ROBINSON* (1861), 2 F. & F. 679.

640. Broker selling from different owners to one buyer—Separate sold notes & one bought note.]—A broker having bought fruit of the same description from different sellers for the same buyer, & sent separate sold notes, but one bought note of whole:—*Held*: evidence that in such a case this was according to custom, would be admitted.

There is a custom to repudiate fruit in 24 hours after delivery of note.

When a broker sells fruit of two or more owners to the same person at the same price, there is a custom in the market as to bought & sold notes; that in such a case there are separate sold notes but one bought note.—*FISENDEN v. LEVY* (1862), 3 F. & F. 477; *subsequent proceedings* (1863), 11 W. R. 259.

641. Repudiation within twenty-four hours—After delivery of note.]—*FISENDEN v. LEVY*, No. 640, *ante*.

642. Personal liability of agent or broker—Acting for undisclosed principal—London trade.]—*FLEET v. MURTON*, No. 425, *ante*.

643. — Signing on behalf of principal.]—Where an agent or broker signs a contract or sold note in his own name simply, the usage of the fruit trade puts the liability upon the principal.—*GADD v. HOUGHTON & Co.* (1876), 33 L. T. 811; *reversd.* on other grounds, 1 Ex. D. 357, C. A.

Annotations:—*Reid.* Universal Steam Navigation Co. v. McKelvie, [1923] A. C. 492. *Mentd.* Hough v. Manzano (1879), 4 Ex. D. 104; Ogden v. Hall (1879), 40 L. T. 151;

Sect. 1.—Trade, commerce and industry: Sub-sects. 12, 13, 14 & 15.]

Pike v. Ongley (1887), 18 Q. B. D. 708; Hough v. Stuart (1890), 7 T. L. R. 134; Royal Albert-Hall Corp'n. v. Winchelsea (1891), 7 T. L. R. 362; Glover v. Langford (1892), 8 T. L. R. 628; Hahn v. North German Pitwood Co. (1892), 8 T. L. R. 557; Harper v. Keller, Bryant (1915), 84 L. J. K. B. 1696; Lovesy v. Palmer, [1916] 2 Ch. 233; Brandt v. Morris, [1917] 2 K. B. 784; Mercer v. Wright, Graham (1917), 33 T. L. R. 343; Miller, Gibb v. Smith & Tyrer, [1917] 2 K. B. 141; Rederi Akt. Transatlantic v. Drugbom, [1918] 1 K. B. 394; Ariadne S.S. Co. v. McKelvie, [1922] 1 K. B. 518.

644. Insertion of force majeure clause—In bought & sold notes.]—The ct. found that since the outbreak of war in 1914 it had been a universal custom in the dried fruit trade to insert in all contracts for the sale of sultanias a clause as follows: "Should shipment be prevented by force majeure such as prohibition of export, blockade, war, or any consequence of warlike operations, this contract or the then unfulfilled part thereof to be cancelled without claim." The ct., therefore, rectified certain bought & sold notes by the addition of this clause on the ground that the parties must be taken to have contracted on this basis.—*CARAMAN ROWLEY & MAY v. APERGHIS* (1923), 40 T. L. R. 124.

Usages affecting liability of principal.]—See *AGENCY*, Vol. I., pp. 477, 635, 630, Nos. 1585, 2576, 2579.

SUB-SECT. 13.—FURNITURE AND UPHOLSTERY TRADE.

645. Picture frames part of picture—Carriers Act, 1830 (c. 68), s. 1.]—Gilt frames, in which were oil paintings, sent, without any declaration within the above Act, on depts.' railway were injured:—*Held*: though painting & frame consist of two parts, the frame, being both by custom & for the sake of protecting the painting, so often accessory to it, cannot be treated as distinct from the painting, & must, therefore, come within the protection of the above Act given to "paintings, engravings, pictures."—*ANDERSON v. LONDON & NORTH WESTERN RY. Co.* (1870), L. R. 5 Exch. 90; 39 L. J. Ex. 55; 21 L. T. 756; 18 W. R. 352. See, generally, *CARRIERS*, Vol. VIII.

Usage to hire furniture.]—See *BANKRUPTCY & INSOLVENCY*, Vol. V., p. 803, Nos. 6859, 6860.

Usage to let furniture—On hire purchase.]—See *BANKRUPTCY & INSOLVENCY*, Vol. V., p. 805, No. 6881.

To hotel proprietors.]—See *BANKRUPTCY & INSOLVENCY*, Vol. V., p. 806, Nos. 6888–6891.

Usage to let pianos—On hire purchase.]—See *BANKRUPTCY & INSOLVENCY*, Vol. V., p. 807, Nos. 6894, 6895.

Usage to supply furniture—On sale or return.]—See *BANKRUPTCY & INSOLVENCY*, Vol. V., p. 806, No. 6882.

Usage of upholstery trade—To have wholesale manufacturers' patterns.]—See *BANKRUPTCY & INSOLVENCY*, Vol. V., p. 808, No. 6901.

Usage of clockmaking trade—To take in clocks for cleaning.]—See *BANKRUPTCY & INSOLVENCY*, Vol. V., p. 805, No. 6870.

SUB-SECT. 14.—GLOVE, FUR AND HAT TRADES.

646. Glove trade—Wages of framework knitter—Subject to deductions for rent of frame, etc.]—Pltf., a framework knitter, worked as a weaver of gloves for deft., in frames provided by deft., at an agreed gross price per dozen pairs. Deft. was a sub-contractor, furnishing the work, by agreement, to a master manufacturer, who found machinery & materials. Deft. settled with pltf. weekly for the work done, deducting out of the gross price per dozen certain charges, which were according to the known custom of the trade: namely: 1. A frame rent per week. 2. A payment per week for use of deft.'s premises to work in, standing room for the frame, deft.'s trouble & loss of time in procuring materials & conveying them to pltf., deft.'s responsibility to the master manufacturer under whom he contracted for the work, superintendence of the work, sorting the goods when made, & delivering them to the master manufacturer. 3. Payments to a boy for winding the yarn; & wear & tear of machinery. 4. A penny per shilling on the net sum earned by pltf. above 14s. per week, as compensation to deft. for a percentage paid by him to the master manufacturer on the amount of goods manufactured by deft. for him with machinery rented of him by deft. There was no written contract between pltf. & deft.:—*Held*: the agreement to pay pltf.'s wages with these deductions was not a contract to pay part of such wages otherwise than in the current coin, within Truck Act, 1831 (c. 37), s. 1, nor was a contract in writing under sect. 23 necessary to legalise such deductions.—*CHAWNER v. CUMMINGS* (1846), 8 Q. B. 311; 15 L. J. Q. B. 161; 6 L. T. O. S. 364; 10 J. P. 229; 10 Jur. 454; 115 E. R. 893.

Annotations:—*Consd.* *Archer v. James* (1859), 2 B. & S. 61. *Mentd.* *Ingram v. Barnes* (1857), 7 E. & B. 115; *Homer v. Taunter* (1860), 29 L. J. Ex. 318; *Hewlett v. Allen*, [1892] 2 Q. B. 662; *Abram Coal Co. v. Southern* (1903), 19 T. L. R. 579; *Williams v. North's Navigation Collieries* (1889), Ltd., [1906] A. C. 136.

647. Termination of agency—On six months' notice.]—Defts., who were glove manufacturers, by an agreement in writing agreed to give to pltf. "2½ per cent. commission on all business you for us in London, whether you send the buyers to buy or orders come through the post, or you take them & send them direct. You let us know to whom you show our samples, & if business result from the transaction, we will forward your commission quarterly as you suggested. This refers to orders executed." Defts. having terminated the agreement, without notice, pltf. brought an action for wrongful dismissal, alleging that he was employed by defts. as their agent for the sale of gloves, & that there was a custom in the glove trade for commission agents to give & receive six months' notice to terminate the agency:—*Held*: there was no agreement by defts. to employ pltf. as their agent; the agreement only came to this—that if pltf. obtained orders which were accepted by defts. they would pay him commission; & it was inconsistent with that agreement to add a term to it requiring six months' notice of intention to terminate it.—*JOYNSON v.*

PART III. SECT. 1, SUB-SECT. 13.

p. "First-class chairmaker"—*Effect of local usage of trade on the term.*—Appl., a furniture manufacturer & dealer, of W., advertised in S. & elsewhere for a first-class chairmaker to work for him in W. Resp., a chairmaker in S., answered the advertisement, & was engaged on the representation that he was a first-

class chairmaker. He proved unable to do a certain class of chairmaking work—namely, the boring of wood in the round for certain parts of a chair—& was dismissed. The evidence was that in Australia that particular class of work was not done by workmen called chairmakers, but that the wood was bored in the square by turners before being turned, & then passed on to the chairmakers:—*Held*: if a man

undertakes that he is a first-class chairmaker he ought to be able to do all the work in connection with chairmaking, & that it was quite immaterial that, according to a local custom in the place in which resp. had been working, a chairmaker only did certain kinds of chairmaking work.—*FIEDLER v. CHRISTOFANI* (1901), 20 N. Z. L. R. 491.—N.Z.

HUNT & SON (1905), 93 L. T. 470; 21 T. L. R. 692, C. A.

Annotation.—*Mentd.* Levy v. Goldhill, [1917] 2 Ch. 297.

648. Fur trade—Goods ordered sent on approval—Are at risk of consignee.—There is a custom in the fur trade that a party ordering goods to be delivered "on memorandum," or, in other words, "on approval," is liable to the party of whom he orders them for any loss of, or injury occurring to, the same while in the hands of the party so ordering them, before he may have signified his approval of the same.—*BEVINGTON & MORRIS v. DALE & CO., LTD.* (1902), 7 Com. Cas. 112.

649. Hat trade—Injury caused by dyeing—Deducted from dyers' charges.—Where by the custom of the hat trade the amount of the injury sustained by the hats in the process of dyeing is always to be deducted from the charge for dyeing, deff. is entitled to such deductions, in an action brought by the dyer, without giving any notice of set-off, & although there has not been any previous adjustment of the amount of the damage.—*BAMFORD v. HARRIS* (1816), 1 Stark. 343, N. P.

SUB-SECT. 15.—GROCERY AND PROVISION TRADES.

650. Butter—Pound's weight eighteen ounces—Sale in lumps of certain weight.—A custom that every pound of butter sold in a particular market town shall weigh 18 ounces is bad. *Qu*: Whether a custom that butter shall be sold in lumps of a certain weight may not be supported.—*NOBLE v. DURELL* (1789), 3 Term Rep. 271; 100 E. R. 569.

651. — Liability of consignor for carriage.—A carrier who by the usage of the butter trade, is to be paid for the carriage of goods by the consignor, has no right to retain them against the consignee for a general balance due to him for the carriage of other goods of the same sort sent by the consignor.—*BUTLER v. WOOLCOTT* (1805), 2 Bos. & P. N. R. 64; 127 E. R. 546.

As to carrier's lien.—*See* CARRIERS, Vol. VIII., pp. 219–224, Nos. 1391–1429.

652. Bacon—"Prime slinged bacon"—Slightly tainted.—*YATES v. PYM*, No. 524, *ante*.

653. — Rejection at time of examination.—*YATES v. PYM*, No. 524, *ante*.

654. New Zealand frozen meat trade—Documents accompanying letter of credit—To include "all in" policy.—*BORTHWICK v. BANK OF NEW ZEALAND* (1900), 17 T. L. R. 2; 6 Com. Cas. 1.

See, further INSURANCE.

655. Rice trade—Liability of broker for undisclosed principal—Although name mentioned orally.—In the rice trade a custom exists that, where a broker does not disclose in the contract note the name of the principal dealt with, although he may mention it orally, he is liable on the contract as a principal.—*BACMEISTER v. FENTON LEVY & CO.* (1883), 1 Cab. & El. 121, N. P.

656. Tapioca sold as sago.—Resp. being asked to sell sago, delivered to the applt. as purchaser

pearl tapioca of a quality & description which, by the custom of the trade, was sold as sago. There was no appreciable difference in the value of the two articles, but the pearl tapioca being whiter looking, the public, as a rule, had for a considerable number of years demanded it in preference to the darker coloured sago by the name of sago. Resp. was summoned under Sale of Food & Drugs Act, 1875 (c. 63), s. 6:—*Held*: the justices might find that such sale was not to the prejudice of the purchaser, & might, on that ground, dismiss the information.—*SANDYS v. RHODES* (1903), 67 J. P. 352, D. C.

Annotation.—*Refd.* Hunt v. Richardson, [1916] 2 K. B. 446.

657. Demerara sugar—Generic term referring to process of manufacture.—Resp. was summoned under the Sale of Food & Drugs Act, 1875 (c. 63), s. 6, for selling as "Demerara sugar" crystallised cane sugar grown in Mauritius & coloured with an organic dye. Evidence was given that the sugar was equal to the best West Indian cane sugar & that the public expect under the designation "Demerara sugar" a yellow crystallised cane sugar without reference to its origin. The magistrate found that "Demerara sugar" had become a generic term referring to a process & not to a place, & he dismissed the summons:—*Held*: although the sugar was not grown in Demerara, yet as it was "Demerara sugar" in every other respect, the magistrate's decision must be affirmed.—*ANDERSON v. BRITCHER* (1913), 110 L. T. 335; 78 J. P. 65; 30 T. L. R. 78; 24 Cox, C. C. 60; 13 L. G. R. 10, D. C.

Annotation.—*Refd.* Hunt v. Richardson, [1916] 2 K. B. 446.

658. To hire vans used in grocery business—Usage not established.—*Re* JENSEN, *Ex p.* CALLOW (1886), 4 Morr. 1, D. C.

659. To include paper bag in weighing commodity.—H., a grocer, was charged under Weights & Measures Act, 1878 (c. 49), s. 26, with committing a fraud in using his scales. A. bought sugar, tea, & currants, & in each case a paper bag was weighed along with the article, the total deficiency being 46 drams. A. knew of the practice & did not complain:—*Held*: the magistrate was wrong in convicting H. of fraud, of which there was no evidence.—*HARRIS v. ALLWOOD* (1892), 57 J. P. 7, D. C.

Annotations.—*Consd.* King v. Spencer (1904), 68 J. P. 530. *Mentd.* Lane v. Rondall (1899), 48 W. R. 153; L. C. C. v. Payne (1903), 68 J. P. 21.

660. ——*KING v. SPENCER* (1904), 91 L. T. 470; 68 J. P. 530; 20 Cox, C. C. 692; 2 L. G. R. 979, D. C.

See, further, WEIGHTS & MEASURES.

661. To compel buyers to accept with allowance Deficiency or inferiority in quality.—*Re* GREEN & CO. & BALFOUR, WILLIAMSON & CO. (1890), 63 L. T. 325; 6 T. L. R. 445, C. A.

Usages involving reputed ownership in bankruptcy.—*See* BANKRUPTCY & INSOLVENCY, Vol. V., p. 803, No. 6861.

Usage in Irish provision trade as to determination of agent's authority.—*See* AGENCY, Vol. I., p. 693, No. 3022.

PART III. SECT. 1, SUB-SECT. 15.

q. Usage in Dublin as to paying for goods supplied by bills.—Deft. gave to plffs. the following guarantee: "10th April, 1863. Gentlemen,—I beg leave to inform you that, at the request of F., of K., who has lately opened an establishment of general merchant & dealer in groceries of all kinds, I have consented to

give you a general guarantee for a sum not exceeding £200, for any orders he may give you for the carrying on of his house of business at K., & for the goods you may supply him under this letter of agreement. This guarantee to be in force against me till recalled, reserving the right to do so when occasion shall require, & on notice to you." In an action brought to recover the price of goods supplied

to F. by plffs.:—*Held*: deff. was not discharged by plffs. having taken bills from F. for the amount due to them, in accordance with the custom of the wholesale grocery trade of the city of D., he being under an obligation, if he did not know, to inquire as to the usage upon which the trade was carried on.—*WOONS v. ARMSTRONG* (1864), 16 Ir. Jur. 292.—*IR.*

Sect. 1.—Trade, commerce and industry: Sub-sects. 16, 17, 18 & 19.]

SUB-SECT. 16.—HOP TRADE.

662. Time for payment—Second Saturday after purchase.]—*BLOXAM v. SANDERS* (1825), 4 B. & C. 941; 7 Dow. & Ry. K. B. 396; 107 E. R. 1309.

*Annotations:—**Reid. Wilmshurst v. Bowker* (1841), 2 Man. & G. 792; *Scott v. England* (1844), 4 L. T. O. S. 141; *Re Oxley, Ex p. Turnbull* (1868), 19 L. T. 463; *Re Edwards, Ex p. Chalmers* (1873), 8 Ch. App. 289. *Mentd. Clay v. Harrison* (1829), 5 Man. & Ry. K. B. 17; *Winks v. Hassall* (1829), 9 B. & C. 372; *Miles v. Gorton* (1834), 2 Cr. & M. 504; *Wilmshurst v. Bowker* (1839), 5 Bing. N. C. 541; *Milgate v. Kebble* (1841), 3 Man. & G. 100; *The Norway* (1864), Brown. & Lush. 226; *The Norway* (1865), 13 W. R. 296; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585; *Grice v. Richardson* (1877), 3 App. Cas. 319; *Adelphi Bank v. Halifax Sugar Refining Co.* (1887), 4 T. L. R. 21.

663. ———.]—According to the custom of the hop-market, the purchase money for hops would be payable, in due course, on the succeeding Saturday week (*CROMPTON, J.*).—*DURRELL v. EVANS* (1862), 1 H. & C. 174; 31 L. J. Ex. 337; 7 L. T. 97; 9 Jur. N. S. 104; 10 W. R. 665; 158 E. R. 848, Ex. Ch.

*Annotations:—**Mentd. Simmonds v. Humble* (1862), 13 C. B. N. S. 258; *Murphy v. Boese* (1875), L. R. 10 Exch. 126.

664. How price calculated—"Eighteen pockets of hops at 100s."—100s. per cwt.]—Declaration stated that defts. had sold pltf. eighteen pockets of Kent hops at the price of 100s. per cwt., but failed to deliver according to promise. Issue being joined on *non assumpsit*, it appeared that the contract was in writing as follows: sold 18 pockets Kent hops, at 100s.; & that a pocket contained more than a cwt.:—*Held*: evidence might be given to show that by usage of the hop trade a contract so worded was understood to mean 100s. per cwt.—*SPICER v. COOPER* (1841), 1 Q. B. 424; 1 Gal. & Dav. 52; 10 L. J. Q. B. 241; 5 Jur. 1036; 113 E. R. 1195.

*Annotations:—**Consd. Sarl v. Bourdillon* (1856), 1 C. B. N. S. 188. *Reid. Newell v. Radford* (1867), L. R. 3 C. P. 52. *Mentd. Foster v. Monitor Life Assoc.* (1854), 18 Jur. 827.

665. Right to refuse acceptance where part damaged by water.]—Pltf., a hop grower in Kent, sent to London by defts.' railway some pockets of hops consigned to a purchaser. Defts. kept the hops for some days on their premises in an open van whereby a small portion was stained by wet, & the purchaser rejected the whole as he was entitled to do by the custom of the market. Pltf. dried the stained hops & they were rendered as good as ever for actual use, but the staining had depreciated the market value of the bulk. Pltf. sent the hops to a factor for sale, but at that time the market price of hops had considerably fallen from what it was at the time the hops ought to have been delivered. Defts. had no notice that the hops were sent to London for sale:—*Held*: pltf. was entitled to recover, as damages, the amount of the depreciation in the market value of the hops, & was not confined to the value of the parts actually damaged.—*COLLARD v. SOUTH EASTERN RY. CO.* (1861), 7 H. & N. 79; 30 L. J. Ex. 393; 4 L. T. 410; 7 Jur. N. S. 950; 9 W. R. 697; 158 E. R. 400.

*Annotation:—**Reid. The Parana* (1877), 2 P. D. 118.

666. Quality not up to sample—Right of vendors to replace with others up to sample—Or to make allowance.]—Where a pltf. claimed damages for alleged breach of contract on a sale of hops to deft., the action raised a question as to the existence of a custom in the hop trade. When part of a parcel of hops was not up to sample:—*Held*: there was no custom whereby, if hops sold in packets were not up to sample, the vendor had a right to replace them by others of contract quality or make an

allowance in the price & to insist that the purchaser should take delivery of the whole parcel so made up or on the terms of the allowance.—*PEENE v. TAYLOR* (1916), 32 T. L. R. 674.

667. Personal liability of broker contracting for unnamed principal.]—Defts., who were hop brokers, gave to pltf. the following sold note: "Sold by O. & T. (defts.) to P. & Co., for & on account of owner, 100 bales . . . hops . . . (Signed) for O. & T., S.T." In an action for non-delivery of hops according to sample, pltf. sought to make defts. personally liable on the above contract, & tendered evidence to show that by the custom of the hop trade brokers who do not disclose the names of their principals at the time of making the contract are personally liable upon it as principals, although they contracted as brokers for a principal. No request was made by pltf. to defts. to name their principal:—*Held*: the custom gave a remedy against the brokers as well as against the principals, that it was not in contradiction of the written contract, & evidence of the custom was properly admitted at the trial.—*PIKE v. ONGLEY* (1887), 18 Q. B. D. 708; 56 L. J. Q. B. 373; 35 W. R. 534; 3 T. L. R. 549, C. A.

*Annotations:—**Consd. Miller, Gibb v. Smith & Tyrer*, [1917] 2 K. B. 141. *Reid. Cooper v. Strauss* (1898), 14 T. L. R. 233; *Universal Steam Navigation Co. v. McKelvie*, [1923] A. C. 492.

668. Right of purchaser to treat factor as principal for purpose of payment.]—*COOPER v. STRAUSS & Co.* (1898), 14 T. L. R. 233.

To leave goods purchased with merchants for resale.]—*See* *BANKRUPTCY & INSOLVENCY*, Vol. V., p. 1126, No. 9155.

As to vendor's lien.]—*See* *BANKRUPTCY & INSOLVENCY*, Vol. V., p. 1126, No. 9155; *LIEN*.

SUB-SECT. 17.—HORSE AND CATTLE TRADE.

669. Notice to jobmaster of return of horses.—Whether extending to yearly hiring.]—In an action against the hirer of horses pltf. endeavoured to prove a custom among job-masters of having three months' notice of return of horses. The evidence tended to show a usage in the trade to give notice. The jury were directed that no evidence of such a custom, in the case of a yearly hiring, had been proved; & they found for deft.

A written contract governs the rights of the parties to it, & cannot be varied, added to, or qualified; with one exception, that in some cases the custom of a trade may be annexed as incident to the contract; that is, not where the custom contradicts the contract, but where it is consistent with it (*CHANNELL, B.*).—*ARBON v. FUSSELL* (1862), as reported in 1 New Rep. 31; 7 L. T. 283.

670. Warranty of soundness by horse dealer.—When certificate obtained by horse dealer.]—Where a horse dealer, on a single occasion, employs another horse dealer, who occasionally assists in his business, to sell a horse for him, the latter has an implied authority to give a warranty of soundness; & evidence of an alleged custom among horse dealers not to give a warranty where the purchaser obtains a veterinary surgeon's certificate of soundness, is not admissible to contradict such implied authority.—*HOWARD v. SHEWARD* (1866), L. R. 2 C. P. 148; 36 L. J. O. P. 42; 15 L. T. 183; 12 Jur. N. S. 1015; 15 W. R. 45.

*Annotation:—**Consd. Baldry v. Bates* (1885), 52 L. T. 620.

671. ——— Right of purchaser to return if unsound—Usage of Eastern Counties.]—*ORMOND v. VERGETTE* (1909), 127 L. T. Jo. 85.

672. For horse dealer to buy outright & sell at profit.]—*Re LEIGH'S ESTATE; ROWCLIFFE v. LEIGH*, No. 443, *ante*.

For horse dealer to take horses for sale or return.]—*See BANKRUPTCY & INSOLVENCY*, Vol. V., p. 806, No. 6885.

To let horses to coal merchants, brewers, etc. for hire.]—*See BANKRUPTCY & INSOLVENCY*, Vol. V., p. 806, Nos. 6886–6887.

For purchaser to have cattle on vendor's premises.]—*See BANKRUPTCY & INSOLVENCY*, Vol. V., p. 805, No. 6875.

Agistment.]—*See ANIMALS*, Vol. II., p. 255, Nos. 366, 367.

SUB-SECT. 18.—INNS AND INNKEEPERS.

See, generally, INNS & INNKEEPERS; INTOXICATING LIQUORS.

Usages involving reputed ownership in Bankruptcy.]—*See BANKRUPTCY & INSOLVENCY*, Vol. V., pp. 791, 804, 806, 807, Nos. 6774, 6867, 6869, 6871, 6888, 6891.

SUB-SECT. 19.—IRON AND STEEL TRADES.

673. To pay wharfage—At Christmas after importation.]—The wharfage, etc., due upon goods imported was, by the course of trade paid by the importer at the Christmas following the importation whether the goods were in the meantime removed or not. The goods were sold to A., & after Christmas, the merchant importer became bkpt.:—*Held*: there was no lien on the goods for the wharfage, etc., as against A.—*CRAWSHAY v. HOMFRAY* (1820), 4 B. & Ald. 50; 106 E. R. 856.

Annotations:—*Consd. Christie v. Lewis* (1821), 2 Brod. & Bing. 410; *Fisher v. Smith* (1788), 4 App. Cas. 1. *Refd. Spartali v. Benecke* (1850), 10 C. B. 212. *Mentd. Walker v. Clyde* (1861), 10 C. B. N. S. 381.

674. To accept offer in course of post.]—A., of Glasgow, offers by letter to sell to C., of Liverpool, a quantity of iron on certain terms. By the usage of the trade, C. is bound to accept or refuse in course of post. C. writes, & posts a letter accepting the offer in due time. By an accident connected with the transmission of the letters by the post office, C.'s letter does not reach A. until one post later than it ought to have done:—*Held*: C.'s acceptance of the offer was complete, & A. was bound to fulfil the contract.—*DUNLOP v. HIGGINS* (1848), 1 H. L. Cas. 381; 12 Jur. 295; 9 E. R. 805, H. L.

Annotations:—*British & American Telegraph Co. v. Colson* (1871), L. R. 6 Exch. 108; *Household Fire Insce. v. Grant* (1879), 4 Ex. D. 216; *Henthorn v. Fraser*, [1892] 2 Ch. 27. *Mentd. Duncan v. Topham* (1849), 8 C. B. 225; *Owen v. Routh* (1854), 2 C. L. R. 365; *R. v. Leominster* (1862), 2 B. & S. 391; *Borries v. Hutchinson* (1865), 18 C. B. N. S. 445; *Williams v. Reynolds* (1865), 6 B. & S. 495; *Re National Savings Bank Asscn., Hebb's Case* (1867), L. R. 4 Eq. 9; *Re Imperial Land Co. of Marseilles, Harris' Case* (1872), 7 Ch. App. 687; *Evans v. Nicholson* (1873), 32 L. T. 778; *Tinn v. Hoffman* (1873), 29 L. T. 271; *Taylor v. Jones* (1875), 1 C. P. D. 87; *Byrne v. Van Tienhoven* (1880), 5 C. P. D. 344; *Stevenson v. McLean* (1880), 5 Q. B. D. 346; *Re Scottish Petroleum Co., MacLagan's Case* (1882), 46 L. T. 880; *Grundy v. Townsend* (1888), 36 W. R. 551; *Ströms Bruks Akt. v. Hutchison*, [1905] A. C. 515.

675. "No. 1 pig iron"—Equivalent to "Clyde & Dundee iron."—M. bought from T. & T., metal brokers, Clyde & Dundee iron. T. & T. thereupon delivered certain delivery notes of D., W., & Co. to M., in the following form: "We hold 100 tons No. 1 pig iron, deliverable, f.o.b. here, to the bearer of this document, only on presentation.—D., W., & Co." M. sought to insist, as against D., W., & Co., on delivery of the quality of iron he had bought of T. & T., & endeavoured by evidence to connect the two contracts, & show they referred to the same quality of iron:—*Held*: evidence for that purpose was admissible, & its sufficiency was for the jury to pronounce on. Mercantile usage is provable by the multiplication or congregation of a great number of particular instances, showing a given course of business, & a generally established understanding concerning it.—*MACKENZIE v. DUNLOP* (1856), 3 Macq. 22; 28 L. T. O. S. 313; 2 Jur. N. S. 957; 4 W. R. 815, H. L.

676. "During the next two months"—Includes whole of two succeeding months in calendar.]—A contract was entered into between plffs. & defts., on June 17, 1872, whereby the latter agreed to supply the former with a certain quantity of puddled iron, "for immediate delivery, or say during the next two months." Defts. did not deliver any iron in June or July, but on Aug. 15 they sent a small portion of iron to plffs., & on Aug. 21, plffs., acting on the notion that under the contract the time for the delivery had expired on Aug. 17, wrote to defts. that as the time for delivery had expired, they would receive no more iron, & they afterwards commenced the present action for breach of contract in not delivering the iron on or before Aug. 17. At the trial the judge received evidence that in the iron trade a usage or custom prevails whereby the entire months of July & August would be included in the terms "during the next two months":—*Held*: the evidence was properly admissible.—*BISSELL v. BEARD* (1873), 28 L. T. 740.

677. "30,000 tons more or less"—Glasgow steel trade.]—*TANCRED, AIRROL & Co. v. STEEL CO. OF SCOTLAND*, No. 553, *ante*.

678. Delivery warrants—Whether wharfinger's certificates equivalent to.]—By a contract for the supply of iron rails, it was agreed that payment should be made by buyers' acceptance of sellers' drafts at six months' date, against inspector's certificate of approval & wharfinger's certificate of each 500 tons being stacked ready for shipment. Inspector's certificates & wharfinger's certificates were from time to time handed to the buyers in exchange for their acceptances, & were pledged with T. as security for advances made by him, it being an alleged custom of the trade to treat such certificates as delivery warrants. The buyers having become insolvent before the first acceptance became due:—*Held*: no custom of the trade could give to the certificates the effect of warrants, & T. therefore had no lien on the rails.—*GUNN v. BOLCKOW, VAUGHAN & Co.* (1875), 10 Ch. App. 491; 44 L. J. Ch. 732; 32 L. T. 781; 23 W. R. 739, L. J.

Annotation:—*Mentd. Re Defries, Eichholz v. Defries*, [1909] 2 Ch. 423.

679. — Pass property to holders for value—

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r. "In about two weeks"—*Whether time can be extended.*—A firm of iron merchants undertook in writing to deliver certain steel rails "in about two weeks." The rails were delivered, but not within the time specified. In

an action by the seller for the balance of the price of the rails, the purchasers averred that they had suffered damage to the extent of the sum sued for, owing to this delay in delivery. Purchasers averred in reply that they did not manufacture the rails in question; this fact was known to the purchasers,

& in accordance with a well known custom of trade the contract in question was subject to extension as regards time:—*Held*: averments with regard to custom of trade were not relevant.—*MACLELLAN v. PRATTIN'S TRUSTEES* (1903), 5 F. (Ct. of Sess.) 1031.—*SCOT.*

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Free from vendor's lien.]—By the usage of the iron trade warrants for goods "deliverable, f.o.b., to A. B., or their assigns, by indorsement hereon," are considered to pass to the holders for value free from any vendor's lien.—The P. B. Co., manufacturers of steel rails, contracted with S. & Co., iron merchants, for the sale of a quantity of rails to be rolled at their works, & to be delivered at intervals, payment to be made as to three-fifths at three days' sight, & as to two-fifths by buyer's acceptances at four months. On the completion of each portion of goods a warrant for the same in the above form was sent to S. & Co. with an invoice & drafts for the purchase-money, & the goods referred to in the warrants were stacked at the works. In the meantime S. & Co. pledged the several warrants, & indorsed the same to plffs. Before the contract was completed, when only part of the goods were paid for, S. & Co. became bkpt., & their acceptances were dishonoured. At that time part of the goods had been dispatched in waggons sent by order of S. & Co., & were stored in a railway co.'s warehouse, addressed to the agents of S. & Co., & part remained stacked at the works:—*Held*: by the usage of the iron trade, as well as by the intention of the parties as shown by their course of dealing, plffs., as holders for value of the warrants, were entitled to the goods free from any vendor's lien.—**MERCHANT BANKING CO. OF LONDON v. PHENIX BESSEMER STEEL CO.** (1877), 5 Ch. D. 205; 46 L. J. Ch. 418; 36 L. T. 395; 25 W. R. 457.

Annotation:—**Reld**. Longbottom v. Bass, Walker, [1922] W. N. 245.

680. For manufacturer of iron plates to supply his own make.]—In a contract to supply goods by a firm who manufacture, but do not otherwise deal in the goods, there is, where no usage or custom to the contrary is shown, an implied term that the goods shall be of the firm's own make. Plffs., a firm who were manufacturers of but did not otherwise deal in iron goods, by a contract in writing agreed to supply to defts. a quantity of ship-plates of a specified quality, & description by monthly deliveries at defts.' shipyard. The contract was headed with the name of plffs.' works, & had their trade mark on its margin, & it contained a clause providing that in case of any strike of workmen causing a stoppage of the works, the supply of the plates might be suspended during the continuance of the strike. Before the deliveries were completed plffs. closed their works, & proposed to complete the contract by delivering plates of the specified quality & description, but manufactured by other firms. Defts. having refused to accept delivery of these plates, plffs. sued them for breach of contract, & at the trial defts. tendered evidence of a custom in the iron trade that the buyer of iron plates from a firm of manufacturers of them is, in the absence of any stipulation to the contrary, entitled to require plates to be supplied of the sellers' own make:—*Held*: the evidence of custom did not contradict the written contract, & was therefore admissible.—**JOHNSON v. RAYLTON** (1881), 7 Q. B. D. 438; 50 L. J. Q. B. 753; 45 L. T. 374; 30 W. R. 350, C. A.

Annotation:—**Mentid**. Stacey v. Chilworth Gunpowder Co. (1889), 24 Q. B. D. 90.

681. Defective castings to be returned to founder—To be replaced or allowed for.]—An alleged custom in the iron trade that defective castings might be returned by the purchaser to the founder, & that in such a case the purchaser had no claim against the founder except to have

them replaced by sound castings or to receive credit for their cost price, could not apply to a contract which expressly provided that the purchaser relied upon the founder's inspection of the castings, & would use them on receiving them, & that the responsibility must rest on the founder.—**VICKERY'S PATENTS, LTD. v. HILL** (1917), 33 T. L. R. 536.

For manufacture of iron safes to send safe to retailer on sale or return or to sell as agent.]—*See* **BANKRUPTCY & INSOLVENCY**, Vol. V., p. 805, No. 6880.

For landlord to furnish machinery to iron-works.]—*See* **BANKRUPTCY & INSOLVENCY**, Vol. V., p. 807, No. 6892.

For vendor to retain deposit as security for breach of contract.]—*See* **BANKRUPTCY & INSOLVENCY**, Vol. IV., p. 281, No. 2630.

SUB-SECT. 20.—JEWELLERY TRADE.

682. Owner or holder for sale—To part with possession to dealer or expected purchaser.]—In an action by a bailee of a jewel for sale, against a sub-bailee for sale, for some injury done to it during the sub-bailment:—*Held*: assuming there was no positive direction by the bailee to the sub-bailee, not to part with it out of his possession, it would be for the jury to say; either on express evidence, or on their own knowledge, whether it would be according to the usage of trade for the sub-bailee thus to part with it temporarily to an expected purchaser, or whether it would be improper & negligent to do so, in which case deft. would be liable for the diminution in value. *Semble*: it is a usual thing in the precious stone trade for the owner of a jewel or one who holds it for sale to entrust it to a dealer.—**VON MINDEN v. PYKE** (1865), 4 F. & F. 533, N. P.

683. Goods supplied on sale or return—Whether at risk of person supplied.]—*Held*: on the evidence plffs. had failed to prove that in the jewellery trade there is a custom whereby goods supplied to a retailer on approbation or on sale or return are at the risk of the person to whom they are delivered.—**BLANCKENSEE & SON, LTD. v. SAQUI** (1917), 33 T. L. R. 246.

Authority of agent to pledge jewellery.]—*See* **AGENCY**, Vol. I., pp. 336, 337, Nos. 503, 505.

SUB-SECT. 21.—OIL TRADE.

684. Palm oil—Sale from two ships in alternative—Oil must be accepted from either ship whenever arriving.]—A broker gave the following bought & sold notes: 1. "We have this day bought for your use, from B., 100 tons dry palm oil, at £31 10s. per ton, to be taken from the quay at landing weights, with customary allowances, etc., in cash at fourteen days from delivery, less 2½ per cent. discount; the above oil to be delivered from the Speedy or Charlotte, expected to arrive about Nov. or Dec. next." 2. "We have this day sold for your use, payment in fourteen days by cash, less 2½ per cent. discount from delivery, 100 tons dry palm oil, at £31 10s. per ton, ex Speedy & Charlotte, to arrive:—"*Held*: evidence of mercantile usage was admissible to explain all the variances between these notes; & being so explained, the variances were not material, & did not avoid the contract.—**BOLD v. RAYNER** (1836), 1 M. & W. 343; 2 Gale, 44; Tyr. & Gr. 820; 5 L. J. Ex. 172; 150 E. R. 465.

Annotations:—**Reld**. Sievwright v. Archibald (1851), 17 Q. B. 103; Brown v. Byrne (1854), 3 E. & B. 703.

685. — "Wet" oil — Oil not unmerchantable but compensated for at an allowance.]—A. entered into a contract with B., to proceed to the coast of Africa, & there procure & ship for B. in England, palm-oil & other produce, A. to receive as a remuneration for his services a commission of 20 per cent. on the net proceeds of the dry merchantable palm-oil received by B.; the agreement further provided that A. should not be entitled to any commission on "any wet, dirty, or unmerchantable palm-oil" that might be received:—*Held*: A. was entitled to no commission in respect of palm-oil which was in the understanding of the trade "wet" oil, though such wetness did not render the oil unmerchantable, but was compensated for by an allowance to the purchasers of from 1½ to 2 per cent. on the price.—*WARDE v. STUART* (1856), 1 C. B. N. S. 88; 28 L. T. O. S. 85; 5 W. R. 6; 140 E. R. 36.

686. — Best oil, wet oil at an allowance—Contract satisfied if substantial part "best oil."]—Pltfs. sold to deft. "50 tons best palm oil, expected to arrive" "per The Chalco," "at £10 10s. per ton; wet, dirty & inferior oil, if any, at a fair allowance." The oil, on arrival, contained one-fifth only of "best oil." In an action for not accepting the oil:—*Held*: oral evidence was admissible to show that, according to mercantile usage, the contract in question was satisfied if the oil delivered contained a substantial portion of "best" oil: & such evidence was for the jury.—*LUCAS v. BRISTOW* (1858), 1 E. B. & E. 907; 27 L. J. Q. B. 361; 31 L. T. O. S. 214; 5 Jur. N. S. 68; 6 W. R. 685; 120 E. R. 747.

Annotation:—*Refd.* *Field v. Lelean* (1861), 6 H. & N. 617.

687. Rape oil — Whether "foreign refined" when mixed with hemp oil.]—By the terms of a written contract A. agreed to sell to B. 45 tons of "foreign refined rape oil, warranted only equal to sample." On an action for not accepting the article tendered under this contract, it appeared that deft. knew, when he made the contract, that the samples contained rape oil adulterated with hemp oil, such adulteration being generally known, & such adulterated article being frequently sold in the market as "refined rape oil":—*Held*: the jury were rightly directed that the contract must be construed by its terms, & pltf., whatever the knowledge of deft. & the state of the market might be, was bound to deliver an article which satisfied the description & character in the contract, unless there was a general custom binding on all the trade that by "foreign refined rape oil," would be meant a mixture of hemp & rape oils.—*NICHOL v. GODTS* (1854), 10 Exch. 191; 23 L. J. Ex. 314; 23 L. T. O. S. 162; 2 C. L. R. 1468; 156 E. R. 410.

Annotations:—*Consd.* *Jostling v. Kingsford* (1863), 13 C. B. N. S. 447. *Refd.* *Bannerman v. White* (1861), 31 L. J. C. P. 28; *Jones v. Just* (1868), L. R. 3 Q. B. 197; *Mody v. Gregson* (1868), 38 L. J. Ex. 12; *Randall v. Newton* (1877), 2 Q. B. D. 102. *Mentd.* *Bostock v. Nicholson*, [1904] 1 K. B. 725; *Wallis, Son & Wells v. Pratt & Haines* (1910), 79 L. J. K. B. 1013.

688. — Payment cash on delivery.]—A., having a quantity of rape oil at H.'s wharf, contracted to sell five tons thereof to B. The bought note was as follows:—"Bought for account of B., of A., five tons of first quality foreign refined rape oil at 53s. per cwt.; usual allowances: to be free delivered & paid for in fourteen days in cash less 2½ per cent. discount." A. sent an order to the wharf directing the wharfinger to transfer into B.'s name five tons of the oil; & the wharfinger's clerk made the usual entry in his book, & gave A.'s clerk a transfer order addressed to B., acknowledging to hold the five tons for him. A.'s clerk took the invoice & transfer order to B.'s counting

house & offered them to him at the same time demanding a cheque for the amount. B. without, as the jury found, the consent of A.'s clerk took the transfer order, but refused to give a cheque. The clerk thereupon returned to the wharf & gave notice to the wharfinger not to deliver the oil to B. In defiance, however, of this notice, the oil was afterwards delivered. In trover by A., against B., for the oil & the transfer order:—*Held*: under the circumstances, neither the property nor the right to the possession thereof passed to B. *Semble*: upon the true construction of the order the seller was not bound to deliver the oil without payment of the price, but that, at all events, deft.'s counsel having, on cross-examination of one of pltf.'s witnesses, elicited from him that that was the understanding of such contracts in the particular trade, deft. was bound by it.—*GODTS v. ROSE* (1855), 17 C. B. 229; 25 L. J. C. P. 61; 1 Jur. N. S. 1173; 4 W. R. 129; 139 E. R. 1058.

Annotations:—*Refd.* *Campbell v. Morsey Docks* (1863), 14 C. B. N. S. 412. *Mentd.* *Fitzgerald v. Dressler* (1859), 6 Jur. N. S. 598.

689. Oil left in possession of vendors—Whether in the order & disposition.]—On appeal by N. from the refusal by the judge of a county ct. of an application made by him that the official receiver, appointed under a bkpcy. petition presented by W. might be ordered to deliver up to appct. certain oil which was in the possession of debtor at the date of the petition, on the ground that it was the property of appct. The receiver alleged that the oil was in the possession of debtor as reputed owner, with the consent of appct. A large number of affidavits were read in order to prove the existence of a custom in the oil trade for purchasers to leave the oil upon the premises of the vendors, & it was argued that any one connected with the oil trade would be perfectly well aware that possession did not mean ownership. On behalf of the other side an equal number of affidavits were produced exactly to the contrary effect:—*Held*: no specific instances having been produced there was no cause to justify the existence of a custom, which could only be tested by instances or by its reasonable character.—*Re WALKER, Ex p. NICKOLL* (1884), 13 Q. B. D. 469; 1 Morr. 188; *subsequent proceedings*, 1 Morr. 249, C. A.

690. Oil seed—Resale—Buyers to accept original shippers' appropriation.]—By a contract dated May 30, 1912, the Produce Brokers Co. agreed to sell & deliver to the Olympia Oil & Cake Co. 6,000 tons of Soya beans to be shipped from an Eastern port to Hull. In fulfilment of this contract the sellers on Feb. 4, 1913, declared & appropriated a cargo of beans shipped at Vladivostok on a ship called the *Canterbury* by the East Asiatic Co. This cargo had on Feb. 4 been tendered to & accepted by the sellers under a contract in similar terms by which the East Asiatic Co. had sold to them the same quantity of Soya beans. On Feb. 3 the *Canterbury* had in fact met with disaster near Vladivostok, & on Feb. 4 she sank with her cargo. The fact of the loss became known to the sellers on Feb. 4, in the interval between the receipt by them of the tender from the East Asiatic Co. & the handing of that tender to the buyers. On an arbn. between the parties it was found by the Board of Appeal of the Incorporated Oil Seed Assocn. that by the custom of the trade in case of resales, buyers under this form of contract were bound to accept the original shipper's appropriation, if passed on without delay, provided that the original shipper's appropriation was valid & in order at the time of being made by the original shipper to his buyers; & that their sellers would be under

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no obligation to make any appropriation other than that of passing on a copy of original shipper's appropriation without delay, even though the appropriation at the time of being passed on might, apart from such custom, be invalid & not in order. It was further found that the appropriation in question by the sellers was made under a resale to which the custom applied, & that the appropriation of the original shippers, the East Asiatic Co. was valid & in order. The arbitrators awarded that the buyers were bound to accept the sellers' appropriation, although at the time it was made the cargo was at the bottom of the sea. On motion by the buyers to set aside the award:—*Held*: the custom was neither unreasonable nor inconsistent with the contract.—*PRODUCE BROKERS CO., LTD. v. OLYMPIA OIL & CAKE CO., LTD.*, [1917] 1 K. B. 320; *sub nom.* *OLYMPIA OIL & CAKE CO. v. PRODUCE BROKERS CO.*, 86 L. J. K. B. 421; 116 L. T. 1; 33 T. L. R. 95, C. A.

Annotations:—*Refd.* Westcott v. Hahn, [1918] 1 K. B. 495; Clark v. Cox, McEuen, [1921] 1 K. B. 139. *Mentd.* Olympia Oil & Cake Co. v. Macandrew & Moreland (1918), 34 T. L. R. 581; Manbre Saccharine Co. v. Corn Products Co., [1919] 1 K. B. 198.

691. Usage that broker contracting for undisclosed principal looked to as principal.]—DALE v. HUMFREY, No. 546, *ante*.

SUB-SECT. 22.—PACKING TRADE.

692. Parting with goods—Form of receipt.]—Evidence of the usage of trade is admissible to show the meaning of ambiguous words in a packer's receipt for goods.—*BOWMAN v. HORSEY* (1837), 2 Mood. & R. 85, N. P.

Lien for general balance.]—See LIEN.

SUB-SECT. 23.—PRINTING AND PUBLISHING TRADE.

See, generally, PRESS AND PRINTING.

693. Printing trade—Not to be paid for part till whole work delivered.]—Although a workman is, in general, entitled to be paid for his labour where the work is destroyed, without any default of his own, before it is completed or delivered to the employer, yet the law, in this respect, may be controlled by the usage of a particular trade.

It was proved that the printer, by the general usage, was not entitled to be paid for any part of his work until the whole was completed & delivered. This custom is the law of the trade, & as far as it extends, it controls the general law (*LORD MANSFIELD, C.J.*).—*GILLET v. MAWMAN* (1808), 1 Taunt. 137; 127 E. R. 784.

Annotation:—*Mentd.* Capon v. Dillamore (1824), 8 Moore, C. P. 516.

694. — Liability to insure paper of books printed—For booksellers.]—There is no general custom of trade by which printers are bound to insure for the booksellers the paper of the works which they print.—*MAWMAN v. GILLET* (1809), 2 Taunt. 325, n.; 127 E. R. 1103.

Annotations:—*Mentd.* Lloyd v. Archbowle (1810), 2 Taunt. 324; Capon v. Dillamore (1824), 8 Moore, C. P. 516.

695. — Custom to hire machines—Other than type.]—Re THACKRAH, Ex p. HUGHES & KIMBER, LTD. (1888), 4 T. L. R. 659; 5 Morr. 235.

— Whether lien of plates supplied for printing.]

— See LIEN.

— See, also, AGENCY, Vol. I., p. 481, No. 1616.

696. Publishing trade—Right to alter novel published serially.]—HUMPHREYS v. THOMSON & CO., LTD. (1908), *Times*, May 1.

— Quotation in one newspaper from another.]—See COPYRIGHT, Vol. XIII., p. 207, No. 419.

SUB-SECT. 24.—STONE TRADE.

697. Caen stone trade—Freight paid half in cash & half by bill at two months.]—The custom of the Caen stone trade being to pay freight half in cash & half by a bill at two months, the agent of the owners of Caen stone which was brought by a vessel to an English port, verbally offered the captain of the vessel which brought it half the amount of the freight in cash, & also offered to give the captain *per proc.* the acceptance of the principal for the other half, if the captain would draw a bill. This the captain refused:—*Held*: a sufficient tender of the freight, as it was the duty of the captain to draw the bill.—*LUARD v. BUTCHER* (1846), 2 Car. & Kir. 29, N. P.

698. Portland stone trade—Stone shipped for quarry owner—Freight payable by purchaser.]—Deft., manager of a stone quarry, signed a shipping note, expressing that stone was shipped on board pltf.'s vessel to be carried for the owner of the quarry, who, however, never appeared. In reality it was shipped for the purchaser of the stone, the real consignee. In an action for freight & demurrage, evidence of usage that in such cases the quarry owner never paid freight, etc., was admitted, & the question whether the stone was shipped for deft., was left to the jury upon all the circumstances.

There is no contract in writing & the usage is not as between consignor & consignee, but as between shipper & shipowner, therefore the evidence is admissible (*BLACKBURN, J.*).—*DICKENSON v. LANO* (1860), 2 F. & F. 188, N. P.

SUB-SECT. 25.—SUGAR TRADE.

Customs of the Port.]—See SHIPPING & NAVIGATION.

699. Sale by sample—Purchaser to accept subject to allowance.]—In the sale of goods by sample, if the bulk does not accord with the sample, the purchaser is not bound to accept or pay for the goods, on any terms; although no fraud was intended on the part of the vendor, & although the custom of the sugar trade may have been that, under such circumstances, the bargain shall stand good, upon an allowance being made for the inferiority.—*HIBBERT v. SHEE* (1807), 1 Camp. 113, N. P.

700. "Full & complete cargo"—Sugar & molasses packed in hogsheads & puncheons—Though ship able to hold more if packed in smaller packages—Custom at Trinidad.]—A charterparty was made at London, & the agreement was that pltf.'s vessel should proceed to Barbadoes or Trinidad at deft.'s option, & should there receive & take on board "a full & complete cargo of sugar, molasses & other lawful produce"; there was no stipulation for "broken stowage"; sugar & molasses packed in hogsheads & puncheons were laden according to the custom at Trinidad, by which custom a cargo of sugar & molasses packed in hogsheads & puncheons is a full & complete cargo of sugar & molasses, though the ship would hold more if packed in smaller packages; but there still remained a depth of three feet of "broken

stowage," which might have been filled with tierces & barrels, or other produce:—*Held*: evidence of such custom was admissible to explain the contract; the cargo loaded was a full & complete cargo within the meaning of the contract; & the custom was a reasonable one, sugar & molasses being ordinarily packed in hogsheads & puncheons, that being the most convenient & advantageous way of carrying such produce. There is no usage at the port of London as to loading sugar & molasses, & the question is whether, when the parties contracted at London, they did not mean that the contract was to be performed according to the custom of the port of loading? That brings us to the last consideration, viz. whether the custom controls or is inconsistent with the contract or is merely explanatory of it? We think that the custom does nothing more than explain the meaning of the term "full & complete cargo" (COLERIDGE, J.).—CUTHBERT v. CUMMING (1855), 11 Exch. 405; 24 L. J. Ex. 310; 25 L. T. O. S. 234; 1 Jur. N. S. 686; 3 W. R. 553; 3 C. L. R. 1301; 156 E. R. 889, Ex. Ch.

Annotations:—*Apld.* Greaves v. Legg (1856), 11 Exch. 642. *Refd.* Kirchner v. Venus (1859), 12 Moo. P. C. C. 361; Tancred, Arrol v. Steel Co. of Scotland (1890), 15 App. Cas. 125.

701. Mauritius sugar trade—Where agent unable to execute whole order—Purchase of full quantity in different lots—& at different times.]—Deft., in London, wrote to plffs., commission agents at the Mauritius: "Should the beet crop prove less than usual, there may be a good chance of something being made by importing cane sugar, at about the limit I am going to give you as a maximum, say 26s. 9d. for nos. 10 to 12, & you may ship me 500 tons, to cover cost, freight, & insurance; 50 tons more or less of no moment, if it enable you to get a suitable vessel." So large a quantity of sugar as 500 tons could not be purchased in one lot at the Mauritius, & it was the customary course of business there, in carrying out an order for a large quantity of sugar, to purchase it in smaller quantities from time to time of different persons. Plffs. had purchased 400 tons for deft. when prices rose, & before the order could be completed, deft. countermanded it:—*Held*: the clause as to "50 tons more or less" was not a limitation of the quantity to be purchased, but was a discretion left to plffs., that they might not be fettered in obtaining a vessel to carry the quantity ordered; the letter was therefore simply an order to purchase 500 tons; but deft. must be taken to have been giving an order with reference to the circumstances of the Mauritius market; & therefore that each quantity, as it was purchased by plffs. from the several sellers, was purchased on behalf of deft.; & he was bound to accept & pay for the 400 tons.—IRELAND v. LIVINGSTON (1866), L. R. 2 Q. B. 99; 36 L. J. Q. B. 50; 15 L. T. 206; 15 W. R. 152; *reversd.* on other grounds (1870), L. R. 5 Q. B. 516, Ex. Ch.; *restored* on other grounds (1872), L. R. 5 H. L. 395, H. L.

Annotations:—*Mentd.* Johnston v. Kershaw (1867), L. R. 2 Exch. 82; Imperial Ottoman Bank v. Cowan (1874), 31 L. T. 336; Jefferson v. Querner (1874), 30 L. T. 867; *Re* Tappenbeck, *Ex p.* Banner (1876), 24 W. R. 476; Cassabogion v. Gibb (1883), 11 Q. B. D. 797; Lindsay, Gracie v. Barte (1885), 2 T. L. R. 4; Dufourcq v. Bishop (1886), 18 Q. B. D. 373; Loring v. Davis (1886), 32 Ch. D. 625; Bank of England v. Vagliano (1891), A. C. 107; Swan v. Mellen (No. 2) (1892), 36 Sol. Jo. 668; Furness, Withy v. White, [1894] 1 Q. B. 483; Schofield v. Londonborough, (1896) A. C. 514; Dupont v. British South Africa Co. (1901), 13 T. L. R. 24; Ströms Bruks Akt. v. Hutchinson, (1905) A. C. 515; Miles v. Haslehurst (1906), 23 T. L. R. 142; Houlder v. Public Works Comr., Public Works Comr. v. Houlder, (1908) A. C. 276; Kepitigalla Rubber Estates v. National Bank of India, [1909] 2 K. B. 1010; Biddell v. Clemens Horst Co., [1911] 1 K. B. 934; Landauer v. Craven & Speeding, [1912] 2 K. B. 94; Groom v. Barber, [1915] 1 K. B. 316; The Kronprinzessin Cecilie

(1915), 32 T. L. R. 139; Karberg v. Blythe, Groom, Jourdain, Schneider v. Burgett & Newsam, [1916] 1 K. B. 495; Welgall v. Runciman (1916), 85 L. J. K. B. 1187; Macmillan v. London Joint Stock Bank, [1917] 2 K. B. 439; Manbre Saccharine Co. v. Corn Products Co., [1919] 1 K. B. 198; Gould v. S. E. & C. Ry., [1920] 2 K. B. 186; Johnson v. Taylor, [1920] A. C. 144; Wilson, Holgate v. Belgian Grain & Produce Co., [1920] 2 K. B. 1; Diamond Alkali Export Corp'n. v. Bourgeois, [1921] 3 K. B. 443; Weiss, Biheller & Brooks v. Farmer, [1923] 1 K. B. 226. See No. 657, *ante*.

SUB-SECT. 26.—TALLOW TRADE.

702. Usage to reject name of principal when disclosed—& hold broker responsible.]—TRUEMAN v. LODER, No. 507, *ante*.

703. Usage for broker purchasing in own name—To supply goods to principal employing him.]—ROBINSON v. MOLLETT, No. 270, *ante*.

SUB-SECT. 27.—TEA AND COFFEE TRADES.

704. Green tea—Painted or faced with gypsum or prussian blue.]—*Apltd.*, a tea dealer, was convicted under 35 & 36 Vict. c. 74, s. 2, for selling as unadulterated, "green tea" which was adulterated. A person asked for two ounces of "green tea" at applt.'s shop, for which he paid 5d., the shopman, stating that he was authorised by his employers to guarantee all their green teas of the value of 3s. per pound & upwards as genuine green teas. On analysis, the tea was proved to be painted or faced with gypsum & prussian blue for the purpose of colouring it. The tea was sold in the same state in which it comes from abroad. The tea which is imported from China as green tea, & generally known as such in the tea trade, is painted & faced in this manner; but this practice is not known to the public. Pure green tea, though not known generally in the trade as "green tea," is imported from Japan:—*Held*: the conviction was right.—ROBERTS v. EGERTON (1874), L. R. 9 Q. B. 494; 43 L. J. M. C. 135; 30 L. T. 633; 38 J. P. 485; 22 W. R. 797.

Annotations:—*Refd.* Dyke v. Gower (1891), 61 L. J. M. C. 70. *Mentd.* Sherras v. De Rutzen, [1895] 1 Q. B. 918; Hobbs v. Winchester Corp'n., [1910] 2 K. B. 471.

705. Tea—To buy in Calcutta at "garden weight."]—LISTER & BIGGS v. BARRY & Co. (1886), 3 T. L. R. 99.

—Custom for country dealers to leave warrants with London dealers.]—See BANKRUPTCY & INSOLVENCY, Vol. V., p. 808, No. 6900.

—Leaving goods with vendor as pledge for full payment—Liberty of vendor to re-sell on non-payment.]—See BANKRUPTCY & INSOLVENCY, Vol. IV., p. 255, No. 2428.

706. Coffee—Delivery of dock warrants by broker to purchaser—Complete transfer—Right of stoppage in transitu defeated.]—A. having some coffees in the West India Docks, employed a broker to sell them; the broker informed him that he had found a purchaser, & required to be put in possession of the dock warrants. A. delivered them to the broker, indorsed in blank, upon receiving his, the broker's, cheque for the price of the coffee. The broker then sold the coffee to plffs., & received immediate payment upon handing over the dock warrants. The broker's cheque, given to A., was dishonoured, & A. immediately stopped the goods in the dock warehouse:—*Held*: plffs. had a right to recover in trover against A. on the ground that the delivery of the dock warrants by the broker to plffs., upon payment made to him, constituted a complete transfer by the custom & usage of trade;

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one removing, the whole expense of entertainments, which were necessary in the trade, fell upon the other. The accounts having been annually balanced without such allowance was conclusive.

There being no universal custom in the trade to make such an allowance to the acting partner, & it being, on the contrary, the common practice to insert such a clause in the agreement where it is intended to be made, this should have been inserted in the original articles of co-partnership or made the subject of a fresh agreement if it arose subsequently, & there being no such agreement, the ct. cannot make one (*per* CUR.).—THORNTON v. PROCTOR (1794), 1 Anst. 94; 145 E. R. 810.

717. Meaning of "cider"—In Devonshire.]—Where a contract was made between A. & B., whereby A., having a quantity of apples, agreed to sell his cider to B. at a certain price per hogshead, to be delivered at T. at a future time, & to lend such pipes as he had for the use of the cider, to be manufactured on his, A.'s premises, & to be paid for before it was removed, & A., in pursuance, delivered a quantity of juice expressed from the apples to a servant hired by B. to manufacture the cider on A.'s premises, & before the cider was completely manufactured, it was seized by the Excise officers, because the place where it was deposited had not been entered, & was condemned in the Exchequer as B.'s property, together with the casks, & in *assumpsit* for goods sold & delivered, brought by A. against B., it appeared that the word cider, at the place where the contract was made, meant the juice of the apples as soon as it was expressed:—*Held*: the contract must be construed to have been for the sale of cider in that sense of the word, & the property passed to B. as soon as the apple juice was delivered to his servant.—STUDDY v. SANDERS (1826), 5 B. & C. 628; 8 Dow. & Ry. K. B. 403; 4 L. J. O. S. K. B. 290; 108 E. R. 234.

Annotation:—*Mentd.* Johnson v. Kirkaldy (1840), 4 Jur. 988.

718. London docks—To deliver only on production of warrants indorsed by party to whom issued.]—*Re* LEECH, *Ex p.* DAVENPORT (1832), Mont. & B. 165; 1 Deac. & Ch. 397; 1 L. J. Bcy. 101, Ct. of R.

719. — Tasting order must be signed by clerk of vault.]—By the practice of the London docks, a tasting order is directed to the cooper at a particular vault, & signed by the owner of the wines; but the cooper is not to obey it unless it have the signature of the clerk of the vault:—*Held*: the presenting to the clerk of a tasting order signed by the owner was an uttering of a forged order.—R. v. ILLIDGE (1849), 2 Car. & Kir. 871; 1 Den. 404; T. & M. 127; 18 L. J. M. C. 179; 13 J. P. 425; 13 Jur. 543; 3 Cox, C. C. 552, C. C. R.

720. Meaning of "Cash with the usual prompt"—Cash on delivery at end of two months—Subject to discount on earlier delivery.]—GREGSON v. RUCK (1843), 4 Q. B. 737; 114 E. R. 1075.

Annotation:—*Mentd.* Fitzgerald v. Dressler (1859), 7 C. B. N. S. 374.

721. Rum trade—One month's wine house rent deducted from price.]—F., a broker in London, having some rum for sale, made a contract with L., & gave him a sale note in these terms: "L., London, Jan. 15, 1861.—I have this day bought in my own name for your account of T. 259

puncheons of Cuba rum, sold at 1s. 9d. per gallon. Landing charges 5s. *per* puncheon, to be paid by the buyer; landing gauges prompt, Mar. 23; Brokerage $\frac{1}{4}$ per cent.; money on delivery or £5 per cent.; I am your obedient servant, F., broker." A portion of the price of the rum was afterwards paid to T., & received by him:—*Held*: evidence was not admissible to show that F. & L. at the time of the bargain had agreed by word of mouth that a deduction of two months' warehouse rent should be made from the price of the rum, & the custom of the trade as to allowing only one month's warehouse rent should not attach.—FAWKES v. LAMB (1862), 31 L. J. Q. B. 98; 8 Jur. N. S. 385; 10 W. R. 348.

Annotations:—*Mentd.* Bramwell v. Spiller (1870), 21 L. T. 672; Fairlie v. Fenton (1870), 39 L. J. Ex. 107.

722. General lien over warehoused goods of customer—Wine merchants also warehousemen & bonded cellar keepers—In Bristol.]—*Re* HANCOCK, *Ex p.* LUDLOW, [1879] W. N. 65.

As to ownership of goods sold in bond.]—*See* BANKRUPTCY & INSOLVENCY, Vol. V., pp. 752, 808, Nos. 6487, 6898, 6899.

To let out trade utensils to traders.]—*See* BANKRUPTCY & INSOLVENCY, Vol. V., p. 709, No. 6830.

SUB-SECT. 32.—WOOL TRADE.

723. Delivery not made till payment.]—SPARTALI v. BENECKE, No. 526, *ante*.

724. Where one broker employed by vendor & vendee—Notice to broker amounts to notice to other party.]—GRAVES v. LEGG, No. 441, *ante*.

725. Agreement to serve as agent or representative—Determinable on month's notice by either side.]—By an agreement in writing *pltf.* engaged to serve *deft.*, who was a manufacturer of woollen cloths, as agent or representative, at the salary of £150 *per annum*, provided that, if at the end of the year *deft.* found *pltf.* had done sufficient business to justify him in recompensing him by making up his salary to £180, *deft.* was to do so, "being a donation of £30 to the stipulated amount of £150." There was a custom in the trade in which the above agreement of service was made, for either party to determine the service upon giving to the other one month's notice. In an action by *pltf.* for a wrongful dismissal before the end of the year, in which *deft.* pleaded the custom:—*Held*: the questions whether the custom applied to this agreement & whether the parties intended to exclude it therefrom were for the ct., & as there was nothing in the agreement to exclude the custom, which was not inconsistent therewith, *deft.* was entitled to discharge *pltf.* upon giving the month's notice.—PARKER v. IBBETSON (1858), 4 C. B. N. S. 346; 27 L. J. C. P. 236; 31 L. T. O. S. 101; 22 J. P. 659; 4 Jur. N. S. 536; 6 W. R. 519; 140 E. R. 1118.

Annotation:—*Mentd.* Bridges v. Potts (1864), 17 C. B. N. S. 314.

726. Broker entitled to contract in name of principal—Or make himself personally liable—Liverpool trade.]—A usage in the wool trade in Liverpool, that, when a broker is employed to buy wool, he may either contract in the name of his principal, or, at the request of the seller, may, without communicating the fact to his principal, make himself personally responsible for the price:—*Held*:

PART III. SECT. 1, SUB-SECT. 32.

g. New Zealand wool trade—No guarantee as to quality at auction.]—At wool-sales in Auckland it is the

custom not to put anything in the catalogue as to the quality of any parcel intended to be submitted for sale, & the auctioneer in calling over the lots does not state their condition. Prior

to the sale intending purchasers are free to examine every bale.—LANGLEY v. COLBROCK & Co. (1896), 14 N. Z. L. R. 540.—N.Z.

a good & reasonable usage.—*CROPPER v. COOK* (1868), L. R. 3 C. P. 194; 17 L. T. 603; 16 W. R. 596.

Annotations:—*Reid*, *Calder v. Dobell* (1871), L. R. 6 C. P. 486; *Mollett v. Robinson* (1872), L. R. 7 C. P. 84.

727. Freight—London Baltic rates.—*RUSSIAN STEAM-NAVIGATION TRADING CO. v. SILVA*, No. 305, ante.

728. Time for weighing wool—Sold by auction at weight.—*FORDER v. WALDRON* (1901), 45 Sol. Jo. 655, D. C.

729. Australian wool trade—Stevedores' receipt equivalent to mate's receipt.—The frequent practice of the port of Sydney is that wool arriving there for shipment is not delivered direct to the ship for which it is intended but is conveyed to the stores belonging to the persons who are acting as stevedores of the ship, & is there pressed for the purpose of reducing its bulk. By the practice & course of business the stevedores' receipt is regarded as between the ship & shippers as equivalent to the mate's receipt, & bills of lading are given in exchange for it.—*AUSTRALIAN AGRICULTURAL CO. v. SAUNDERS* (1875), L. R. 10 C. P. 668; 44 L. J. C. P. 391; 33 L. T. 447; 3 Asp. M. L. C. 63, Ex. Ch.

SUB-SECT. 33.—OTHER TRADES.

Bookselling trade.—See *BANKRUPTCY & INSOLVENCY*, Vol. V., pp. 797, 798, Nos. 6815, 6816.

730. Brickmaking trade—Land never hired from year to year.—A. agreed to let, & B. agreed to hire, a piece of land containing about 15 acres, at an annual surface rent, & to use the land for the purpose of making bricks, & to pay to A., his exors., etc., 3s. per 1,000 on the quantity made, the quantity made to be not less than 4,000,000 annually; the ground not to be excavated beyond the depth of eight feet, without the special permission of A. in writing. A portion of the land being required by a railway co., B.'s claim for compensation in respect of his estate & interest in the land so required, & for deterioration to the residue, was referred to arbn., under the provisions of Lands Clauses Consolidation Act, 1845 (c. 18). The umpire, by his award, found that the interest of B. under the agreement was that of merely a tenant from year to year; & he assessed the compensation upon that basis.—*Held*: the construction put by the umpire upon the agreement was correct; & evidence tending to show that by the custom of the brickmaking trade, brick land

is never hired from year to year, was properly rejected.—*Re STROUD* (1849), 8 C. B. 502; 11 L. J. C. P. 117; 14 L. T. O. S. 291; 137 E. R. 604
Coachbuilding trade.—See *BANKRUPTCY & INSOLVENCY*, Vol. V., p. 805, No. 6878.

731. Cycle trade—Purchaser for resale at profit—Known as agents for sale.—*JOHN GRIFFITHS CYCLE CORPN., LTD. v. HUMBER & CO., LTD.*, [1899] 2 Q. B. 414; 68 L. J. Q. B. 959; 81 L. T. 310 C. A.; *reversd.* on other grounds, *sub nom* *HUMBER & CO. v. JOHN GRIFFITHS CYCLE CO* (1901), 85 L. T. 141, H. L.

Annotations:—*Mentd.* *Daniels v. Trefusis*, [1914] 1 Ch. 788
Thirkell v. Camb., [1919] 2 K. B. 590; *Grindell v. Bass* [1920] 2 Ch. 487.

732. Gum trade—Gum senegal—Considered a rough gum senegal on arrival in England.—Declarations upon a contract for not delivering quantity of gum senegal may be supported by evidence of a contract for rough gum senegal, appearing in evidence that all gum senegal, on its arrival in this country, is called rough.—*SILVER v. HESELTINE* (1819), 1 Chit. 39.

733. Hemp trade—Delivery orders of good warehoused in bulk—Word "about" inserted before quantity designated.—Evidence of usage of trade that delivery orders of goods warehoused in bulk always contain the word "about" before the quantity designated, is not admissible in reference to a contract to sell & deliver goods simply; but such evidence is admissible in reference to a contract to sell & deliver goods in a warehouse.—*MOORE v. CAMPBELL* (1854), 10 Exch. 323; 23 L. J. Ex. 310; 2 C. L. R. 1084; 150 E. R. 407.

Annotations:—*Mentd.* *Humfrey v. Dale* (1858), 31 L. T. O. S. 328; *Noble v. Ward* (1867), L. R. 2 Exch. 135; *Ogle v. Vane* (1867), 7 B. & S. 855; *Tyers v. Rosedale & Ferryhill Iron Co.* (1873), L. R. 8 Exch. 305; *Stewart v. Eddowes Hudson v. Stewart* (1874), L. R. 9 C. P. 311.

734. Leather trade—Meaning of "bale" o gambler.—A. contracted to sell to B. 1170 "bales" of gambier, "now on passage from Singapore, & expected to arrive in London, viz. per 'Ravenscraig,' 805 bales, per 'Lady Agnes Duff,' 365 bales: "—*Held*: evidence was admissible to show, that, by the usage of the trade, a "bale" of gambier was understood to mean a package of particular description; & the contract was not satisfied by a tender of packages of a totally different size & description.—*GORRISSEN v. PERRIN* (1857), 2 C. B. N. S. 681; 27 L. J. C. P. 29; 3 Jur. N. S. 867; 5 W. R. 709; 140 E. R. 583; *sub nom* *GORRISSEN v. PERRIN*, 29 L. T. O. S. 227.

Annotation:—*Mentd.* *Corkling v. Massey* (1873), L. R. 8 C. P. 395.

PART III. SECT. 1, SUB-SECT. 33.

h. Bookbinding trade—Not to pay for holidays.—Appnts. entered into a written contract in E. to employ resp. in the bookbinding trade in N.Z. for two years "at a weekly wage of sixty shillings for forty-eight hours, overtime, if required, to be paid for at the rate of time & one-third, payment being made in each week." The contract was confirmed & re-executed in N.Z., & resp. entered upon his duties. He was regularly paid his weekly wage, but a deduction at the rate of 1s. 3d. per working hour was made in respect of all public holidays during which he did not work. The industrial award in force when the agreement was made fixed a minimum wage for competent journeymen at 43s. per week for forty-eight hours' work, & an extra rate for work done on holidays, but contained no provision requiring employers to pay wages for time not worked on holidays. The custom of the trade was not to pay for

holidays during which no work was done.—*Held*: the custom was not inconsistent with the written contract & was incorporated therein.—*WHITCOMBE & TOMES v. TAYLOR* (1907), 27 N. Z. L. R. 237.—N.Z.

k. Cattle trade—For purchasers of cattle to pay on delivery.—It is the general practice of the trade not to purchase upon credit, but to pay at the time of delivery.—*STEWART v. GORDON* (1831), 9 Sh. (Ct. of Sess.) 466.—SCOT.

l. Glass trade—"Cutting shop" includes steam engine & stock as accessories thereof.—*WATSON v. KIDSTON* (1839), 1 Dunl. (Ct. of Sess.) 1254.—SCOT.

m. Lace curtain trade—As to use of pattern cards.—In Irvine Valley there exists a custom of trade to the effect that no goods should be manufactured from pattern cards except for the original owner of the designs unless with the consent express or implied of such owner.—*MORTON (WILLIAM) & CO. v. MUIR BROTHERS*

& Co., [1907] S. C. 1211.—SCOT.

n. Milling trade—To sell for forward delivery & pay in advance.—Where a quantity of flour in a mill, the property in which has passed from the miller to a baker by sale, is placed in a heap by itself apart from the bulk of the miller's flour, each bag of the flour sold to the baker having a mark on it the miller's flour having no such mark, it is a reasonable inference, in view of a custom in the milling trade to sell for forward delivery & to pay in advance, that the flour sold to the baker has been paid for, & has been appropriated to fulfil a particular order, & therefore is not in the reputed ownership of the miller on his bankruptcy.—*Re RYLEY, Ex p. SWANWICK* (1896), 15 N. Z. L. R. 325.—N.Z.

o. Soap trade—Guarantee of weight in invoice.—*HUNTER v. BONAR* (1823), 2 Sh. (Ct. of Sess.) 554.—SCOT.

p. Whether if bags containing cooked mutton-birds are sound, buyer must

Sect. 1.—Trade, commerce and industry: Sub-sect. 33. Sect. 2: Sub-sects. 1, 2, 3 & 4, A. & B.; sub-sects. 5, 6, 7, 8 & 9. Sects. 3, 4, & 5.]

Salvage—Usages in connection with.]—See SHIPPING & NAVIGATION.

Shipwrights' lien.]—See LIEN; SHIPPING & NAVIGATION.

735. Undertaking trade—To charge full cost of articles used for temporary purpose.]—PAXTON v. COURTNEY, No. 351, ante.

SECT. 2.—PROFESSIONS AND OCCUPATIONS.

SUB-SECT. 1.—ARCHITECTS AND ENGINEERS.

See, generally, BUILDING CONTRACTS, ENGINEERS & ARCHITECTS, Vol. VII., p. 331.

Remuneration of.]—See BUILDING CONTRACTS, ENGINEERS & ARCHITECTS, Vol. VII., p. 445, Nos. 455, 456.

SUB-SECT. 2.—AUCTIONEERS.

See, generally, AGENCY, Vol. I., p. 267; AUCTION & AUCTIONEERS, Vol. III., p. 2.

Right to remuneration.]—See AUCTION & AUCTIONEERS, Vol. III., pp. 33, 34, Nos. 244, 245, 250, 251.

Payment of deposit by cheque.]—See AUCTION & AUCTIONEERS, Vol. III., p. 20, No. 144.

SUB-SECT. 3.—BANKERS.

See, generally, BANKERS & BANKING, Vol. III., p. 123.

Banker's draft.]—See BANKERS & BANKING, Vol. III., p. 200, No. 453.

Cheques.]—See BANKERS & BANKING, Vol. III., pp. 202, 203, 218, 219, 224, 240, Nos. 462, 463, 468, 554, 556, 558, 559, 585, 681.

Interest.]—See BANKERS & BANKING, Vol. III., pp. 265–267, Nos. 811–831.

Letters of credit.]—See BANKERS & BANKING, Vol. III., p. 254, No. 754.

Lien.]—See BANKERS & BANKING, Vol. III., pp. 285–293, Nos. 878–919.

Money on current account.]—See BANKERS & BANKING, Vol. III., p. 185, No. 360.

Short bills.]—See BANKERS & BANKING, Vol. III., p. 211, No. 510.

Sale & purchase of securities for customer.]—See BANKERS & BANKING, Vol. III., p. 178, No. 328.

SUB-SECT. 4.—BROKERS.

A. In General.

Bought & sold notes—Whether contract constituted by.]—See SALE OF GOODS.

Authority of broker.]—See AGENCY, Vol. I., pp. 308, 309, 370, Nos. 310–319, 324–327, 784.

Relation between principal & broker.]—See AGENCY, Vol. I., pp. 480, 549, Nos. 1607, 1609, 2002.

Relation between broker & third parties—In regard to contracts.]—See AGENCY, Vol. I., pp. 584, 633, 635–637, Nos. 2223, 2562, 2576–2590.

Shipbrokers—Liability to third parties.]—See AGENCY, Vol. I., p. 635, No. 2576.

Right to remuneration.]—See AGENCY,

Vol. I., pp. 490, 499, 500, 503, 505, 516, 517, Nos. 1671–1674, 1707–1708, 1712, 1730, 1731, 1742, 1786, 1795, 1801.

—.]—See, further, SHIPPING & NAVIGATION.

736. Colonial brokers—Carrying on business by bills of exchange.]—SCHWEITZER v. LONG (1863), 3 F. & F. 687.

B. STOCK AND SHARE BROKERS.

See STOCK EXCHANGE.

Authority of broker.]—See AGENCY, Vol. I., pp. 309, 345, Nos. 320–323, 566.

Insolvency of broker.]—See AGENCY, Vol. I., p. 539, No. 1941.

SUB-SECT. 5.—ESTATE AGENTS AND SURVEYORS.

Estate agents.]—See, generally, AGENCY, Vol. I., p. 267.

Remuneration of.]—See AGENCY, Vol. I., pp. 498, 503, 505, 514, Nos. 1713, 1728, 1743, 1778, 1779.

737. Surveyor employed by vendor—Custom of purchaser to pay remuneration—Extent of.]—A conveyance of part of an estate at Reading contained a covenant by the purchasers not to erect any building otherwise than in accordance with such drawings & specifications as might be previously approved of in writing by the vendor's surveyor:—*Held*: an alleged general custom that the purchasers should pay the surveyor's fees in such cases did not extend to Reading, & it was doubtful whether it obtained even in London.—READING INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. v. PALMER, [1912] 2 Ch. 42; 81 L. J. Ch. 454; 106 L. T. 626.

Surveyors.]—See, generally, BUILDING CONTRACTS, ENGINEERS & ARCHITECTS, Vol. VII., p. 331.

Construction of building contract.]—See BUILDING CONTRACTS, ENGINEERS & ARCHITECTS, Vol. VII., p. 334, No. 16.

Quantity surveyor.]—See BUILDING CONTRACTS, ENGINEERS & ARCHITECTS, Vol. VII., pp. 448, 449, 450, Nos. 472, 474, 475, 479, 482, 485.

Remuneration.]—See BUILDING CONTRACTS, ENGINEERS & ARCHITECTS, Vol. VII., p. 445, Nos. 455, 456.

SUB-SECT. 6.—LEGAL PROFESSION.

738. Expenses of drawing up legal documents—Deed of appointment.]—A., on the marriage of his daughter with B., executed a deed of appointment under a power contained in his father's marriage settlement in favour of his daughter, appointing to his daughter a sum of £4,000. This B. settled on his marriage. The marriage settlement of B. & the deed of appointment, were both prepared by C., who was originally the solr. of A. There was no evidence to show whether A. had agreed to give his daughter £4,000 or to execute an appointment of that sum:—*Held*: whether A. or his daughter was to pay C. the expenses of this deed of appointment, was not a question of usage, but a question of contract, & it was for the jury to determine upon whose credit the business was done.—HAYWARD v. FIOTT (1837), 8 C. & P. 59, N. P.

739. — Marriage settlements—Payable by

accept birds as sound.]—Resp. sold 976 cooked mutton-birds to applt.; on their arrival at their destination they were found to be bad & were

condemned. Resp. proved a usage that mutton-birds are packed in bags & that if at the time delivery is taken the bags are sound the buyer

must accept the birds as sound:—*Held*: the usage was an unreasonable one.—MOSS, LTD. v. ANDERSEN, [1914] 33 N. Z. L. R. 606.—N.Z.

husband.]—The father of a lady, an infant, who was about to be married, instructed his solrs. to prepare the marriage settlement by which the intended husband was to settle £10,000 & £100 a year on the lady. The parties having been married, the solrs. brought an action against the husband & wife to recover the costs of preparing the settlement, & on a special case stated for the opinion of the ct.:—*Held*: if the father was not acting as agent for his daughter, there was a usage that the husband should pay the costs of preparing the settlement, & such usage would bind him to indemnify any one who, on the part of the wife, had properly incurred expense in retaining a solr. for that purpose.—*HELPS v. CLAYTON* (1864), 17 C. B. N. S. 553; 5 New Rep. 191; 34 L. J. C. P. 1; 11 L. T. 476; 29 J. P. 263; 10 Jur. N. S. 1184; 13 W. R. 161; 144 E. R. 222.

Annotations:—*Mentd. Re Gray*, [1901] 1 Ch. 239; *Wales v. Carr* (1902), 71 L. J. Ch. 483; *Steeden v. Walden*, [1910] 2 Ch. 393.

740. ————*Re LAWRENCE, BOWKER v. AUSTIN*, [1894] 1 Ch. 556; 63 L. J. Ch. 205; 70 L. T. 91; 42 W. R. 265; 8 R. 102.

Annotation:—*Mentd. Re Dee Estates, Wright v. Dee Estates*, [1911] 2 Ch. 85.

Leases.—*See* LANDLORD & TENANT; SOLICITORS.

Conveyance.—*See* SALE OF LAND; SOLICITORS.

Barristers.—*See* BARRISTERS, Vol. III., p. 320, No. 176.

Solicitors.—*See* SOLICITORS.

Mortgage Transactions.—*See* MORTGAGES; SOLICITORS.

SUB-SECT. 7.—MEDICAL PROFESSION.

See MEDICINE & PHARMACY.

SUB-SECT. 8.—THEATRICAL PROFESSION.

See THEATRES & OTHER PLACES OF ENTERTAINMENT.

SUB-SECT. 9.—OTHER OCCUPATIONS.

Advertising agent—Continuing advertisements.—*See* AGENCY, Vol. I., p. 522, No. 1822.

Army agents—Business discount.—*See* AGENCY, Vol. I., p. 482, No. 1618.

Commission agents—Liability of.—*See* AGENCY, Vol. I., p. 476, No. 1581.

Customs house agent.—*See* REVENUE.

Commercial traveller—Authority to pledge principal's credit.—*See* AGENCY, Vol. I., p. 353, No. 615.

Return of expenses.—*See* AGENCY, Vol. I., p. 440, No. 1298.

SECT. 3.—HORSE RACING.

741. To pay in all stakes for sweepstakes—Before start of first race of day.—Declaration stated that by the established usage of racing, it was regulated that in all races to be run for, all stakes for sweepstakes should be made before the hour of starting for the first race of the day, & be paid into the hands of the person appointed by the stewards to receive the same. In default thereof by any person, he should pay the whole stake as a loser, whether his horse should come in

first or not. It then alleged that certain races were appointed to be run at L., & that by a regulation of the L. races all stakes should be paid to the clerk of the races before eleven o'clock on the day of running or the owner should not be entitled though a winner; that pltf. paid his stakes before the hour of starting & before eleven o'clock; that deft.'s horse came in first, & would have received the whole stakes but for his default in not paying before the hour of starting or before eleven o'clock; that pltf.'s horse came in second & therefore he was entitled to the whole stakes, & deft. was liable to pay to him the stake which he ought to have paid to the clerk of the races. Plea, that deft. tendered his stakes to the clerk of the races before the hour of starting for the first race of the day, & before the running of the race, but it was refused. Replication, that it was not tendered before eleven o'clock. On demurrer:—*Held*: even if there were no departure, which *semble* there was, yet the L. regulation did not make deft. liable to pay as a loser, but only prevented him from receiving as a winner.—*LACEY v. UMBERS* (1835), 2 Cr. M. & R. 112; 5 Tyr. 741; 4 L. J. Ex. 182; 150 E. R. 47.

742. Meaning of "across a country."—In a memorandum respecting a race, the race was described as "four miles across a country":—*Held*: evidence was admissible to show that "across a country" meant that the riders were to go over all obstructions, & were not at liberty to avail themselves of an open gate.—*EVANS v. PRATT* (1842), 3 Man. & G. 750; 1 Dowl. N. S. 505; 4 Scott, N. R. 378; 11 L. J. C. P. 87; 6 Jur. 152; 133 E. R. 1344.

Annotations:—*Mentd. Challand v. Bray* (1842), 11 L. J. Q. B. 204; *Bentlnck v. Connop* (1844), 5 Q. B. 693; *Carr v. Martinson* (1859), K. & E. 456; *Coombs v. Dibble* (1866), 14 L. T. 415; *Sadler v. Smith* (1869), L. R. 4 Q. B. 214.

743. Owner to direct trainer to which races horses to be taken.—*FORTH v. SIMPSON*, No. 458, *ante*.

744. Apprentice to trainer—Setting off charges for clothes & washing—Against wages.—In an action for wages, by an apprentice to a horse-trainer upon an indenture, whereby deft. agreed to find pltf. sufficient meat, drink & certain yearly wages, "lodging & all other necessaries" during the term of apprenticeship, deft. pleaded a set-off of sums paid for clothes & washing for pltf., & sought to show a usage in his particular business for the master to supply such items in the first instance, & to deduct the sums paid in respect thereof from the wages of the apprentice:—*Held*: even if such a usage were proved, it would be repugnant to the express terms of the contract, & the evidence was therefore inadmissible.—*ABBOTT v. BATES* (1875), 45 L. J. Q. B. 117; 33 L. T. 491; 40 J. P. 71; 24 W. R. 101, C. A.

SECT. 4.—USAGES BETWEEN LANDLORD AND TENANT.

See AGRICULTURE, Vol. II., pp. 10–40, Nos. 31–225; LANDLORD & TENANT.

SECT. 5.—CUSTOMS OF THE COUNTRY.

As to agricultural leases.—*See* AGRICULTURE, Vol. II., pp. 10–40, Nos. 31–225.

As to timber.—*See* AGRICULTURE, Vol. II., pp. 61, 62, Nos. 352, 358–376, p. 101, Nos. 811–815.

Construction of leases.—*See* LANDLORD & TENANT.

Sect. 5.—Customs of the country. Sects. 6, 7, 8, 9, 10 & 11.]

Agricultural custom—To allow property to remain on land after sale—Crops.]—See BANKRUPTCY & INSOLVENCY, Vol. V., pp. 804, 805, No. 6874.

SECT. 6.—CUSTOMS OF THE PORT.
See SHIPPING & NAVIGATION.

SECT. 7.—IN RELATION TO INSURANCE.
See INSURANCE.

SECT. 8.—IN RELATION TO SHIPPING.
See SHIPPING & NAVIGATION.

SECT. 9.—MASTER AND SERVANT.
See MASTER & SERVANT.

SECT. 10.—AS TO NEGOTIABLE INSTRUMENTS.

Bills of Exchange—Time for acceptance.]—See BILLS OF EXCHANGE, Vol. VI., p. 62, No. 496.

—Signature.]—See BILLS OF EXCHANGE, Vol. VI., p. 103, No. 722, p. 109, No. 747.

—Consideration.]—See BILLS OF EXCHANGE, Vol. VI., p. 131, No. 874.

—Liability of indorser & drawer.]—See BILLS OF EXCHANGE, Vol. VI., p. 203, No. 1246.

—Payment to holder.]—See BILLS OF EXCHANGE, Vol. VI., p. 345, No. 2293.

Other negotiable instruments—How negotiability established.]—See BILLS OF EXCHANGE, Vol. VI., pp. 444–5, Nos. 2853–2857.

—Foreign bonds.]—See BILLS OF EXCHANGE, Vol. VI., pp. 447, 448, 450, Nos. 2868, 2873, 2880.

—Wharfinger's certificate.]—See BILLS OF EXCHANGE, Vol. VI., p. 455, No. 2908.

SECT. 11.—OTHER USAGES.

745. Interest on money lent—Mercantile usage—Interest on balances.]—A. & debt. were merchants, & early in 1847 had a final balance of accounts. In Jan. 1847, A. wrote to debt., "The balance settled as due by you to me payable in the course of the present year without interest." Debt. assented, but did not pay in 1847. In July, 1848, A. wrote to debt., "You can retain the money on allowing me interest from last Jan.; this can continue until you find it convenient to pay the money, or by my giving you six months' notice." By the custom of merchants interest is payable on balances:—*Held*: interest was originally payable after 1847, both by the terms of A.'s letters, & by mercantile usage, & therefore there was no consideration for the agreement set out in the plea, which was consequently bad.—*ORME v. GALLOWAY* (1854), 9 Exch. 544; 23 L. J. Ex. 118; 2 W. R. 263; 2 C. L. R. 480; 156 E. R. 232.

Rules of the Road—To keep to the left.]—See HIGHWAYS, STREETS & BRIDGES; STREET & AERIAL TRAFFIC.

Time—Interpretation of "Month."—See TIME.

Leases—Of charity estate.]—See CHARITIES, Vol. VIII., p. 361, Nos. 1587, 1609.

Navy office usage—Indorsing & negotiating bills by attorney.]—See AGENCY, Vol. I., p. 301, No. 267.

—Under Municipal Corporation Act, 1835 (c. 76).]—See LOCAL GOVERNMENT.

CUSTOMARY FREEHOLDS.

See COPYHOLDS ; DESCENT AND DISTRIBUTION ; SALE OF LAND.

CUSTOMS DUTIES.

See REVENUE.

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DAMAGES.

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<i>Collision</i>	<i>„</i> SHIPPING AND NAVIGATION.		
<i>Compensation</i>	<i>„</i> ANIMALS ; COMPULSORY PURCHASE OF LAND AND COMPENSATION ; MASTER AND SERVANT.		<i>See PARTICULAR TITLES passim.</i>
<i>Damnum absque Injuria</i>	<i>„</i> ACTION.		
<i>Divorce, Damages in</i>	<i>„</i> HUSBAND AND WIFE.		
<i>Injuria sine Damno</i>	<i>„</i> ACTION.		

NOTE.—This title deals only with the general principles of the law of damages ; for particular cases reference must be made to particular titles *passim*.

Part I.—Definitions, Nature and Classification.

1. Compensation—Not punishment.]—Where a servant is wrongfully dismissed from his employment the damages for the dismissal cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment.

I have always understood that damages for breach of contract were in the nature of compensation, not punishment. There are three well-known exceptions to the general rule, applicable to the measure of damages for breach of contract, namely, actions against a banker for refusing to pay a customer's cheque when he has in his hands funds of the customer's to meet it, actions for breach of promise of marriage, & actions like that in *Flureau v. Thornhill* [No. 303, *post*], where the vendor of real estate, without any fault on his part, fails to make title. I know of none other. In many other cases of breach of contract there may be circumstances of malice, fraud, defamation or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress, he may, no doubt, recover exemplary damages, or what is sometimes styled vindictive damages; but if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action. One of these consequences is, I think, this: that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, & no more (LORD ATKINSON).—*ADDIS v. GRAMOPHONE CO., LTD.*, [1909] A. C. 488; 78 L. J. K. B. 1122; 101 L. T. 466, H. L.

Annotations:—*Apld.* *Re Rubel Bronze & Metal Co., & Vos*, [1918] 1 K. B. 315. *Consd.* *Wilson v. United Counties Bank*, [1920] A. C. 102. *Refd.* *Quirk v. Thomas*, [1916] 1 K. B. 516; *Turpin v. Victoria Palace*, [1918] 2 K. B. 539.

2. Damages distinguished from statutory compensation.]—Damages for injury to the shipowner's reputation by reason of the provisional detention of the ship under M. S. Act, 1876 (c. 80), s. 6 upon the ground that she was unsafe cannot be recovered under sect. 10.

The expression "compensation" is not ordinarily used as an equivalent for "damages." It is used in such Acts as these in relation to a lawful act which has caused injury. Therefore that word would not, I think, include damages at large (ESHER, M.R.).—*DIXON v. CALCRAFT*, [1892] 1 Q. B. 458; 61 L. J. Q. B. 529; 66 L. T. 554; 56 J. P. 388; 40 W. R. 598; 8 T. L. R. 397; 7 Asp. M. L. C. 161, C. A.

3. Classification.]—Now, with respect to damages, in general, they are of three kinds. First, nominal damages; which occur in cases where the judge is bound to tell the jury only to give such; as, for instance, where the seller brings an action for the non-acceptance of goods, the price of which has risen since the contract was made. The second kind is general damages. They are such as the jury may give when the judge cannot point out any measure by which they are

to be assessed, except the opinion & judgment of a reasonable man. Thirdly, special damages are given in respect of any consequences reasonably or probably arising from the breach complained of (MARTIN, B.).—*PREHN v. ROYAL BANK OF LIVERPOOL* (1870), L. R. 5 Exch. 92; 39 L. J. Ex. 41; 21 L. T. 830; 18 W. R. 463.

Annotations:—*Mentd.* *Re Oriental Commercial Bank* (1871), L. R. 12 Eq. 501; *Larios v. Bonany y Gurety* (1873), L. R. 5 P. C. 346; *Re General South American Co.* (1877), 7 Ch. D. 637; *Re English Bank of the River Plate, Ex p. Bank of Brazil*, [1893] 2 Ch. 438; *Banque Populaire De Bienne v. Cavé* (1895), 1 Com. Cas. 67; *Wallis Chlorine Syndicate v. American Alkali Co.* (1901), 17 T. L. R. 656; *Barnett v. Hart* (No. 1) (1903), 48 Sol. Jo. 14; *Wilson v. United Counties Bank*, [1920] A. C. 102.

4. General damages.]—"General damages," as I understand the term, are such as the law will presume to be the direct natural or probable consequence of the act complained of. "Special damages," on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, & therefore, they must be claimed specially & proved strictly (LORD MACNAGHTEN).—*STRÖMS BRUKS AKT. v. HUTCHISON*, [1905] A. C. 515; 74 L. J. P. C. 130; 93 L. T. 562; 21 T. L. R. 718; 10 Asp. M. L. C. 138; 11 Com. Cas. 13, H. L.

Annotations:—*Mentd.* *Wertheim v. Chicoutimi Pulp Co.*, [1911] A. C. 301; *Phosphate Mining Co. & Coronet Phosphate Co. v. Rankin, Gilmour* (1916), 115 L. T. 211; *Watts, Watts v. Mitsui*, [1917] A. C. 227; *Montevideo Gas & Drydock Co. v. Clan Line Steamers* (1921), 37 T. L. R. 544.

5. Special damages—Defined.]—*STRÖMS BRUKS AKT. v. HUTCHISON*, No. 4, *ante*.

6. — In contract or tort.]—Pltf. purchased champagne lying at deft.'s wharf at 14s. *per dozen*, & resold it at 24s. to the captain of a ship about to leave England. Defts. refused to deliver the wine, & pltf. was unable to fulfil his contract, champagne of a similar quality not being procurable in the market. Defts. had no knowledge of the sale, or of the purpose for which pltf. required delivery of the champagne. In an action for the conversion:—*Held*: pltf. was entitled, as damages, to the price at which he had sold the champagne.

In the case of contract special damages, reasonably resulting from the breach of it, may be considered within the contemplation of the parties. In case of trover it is not in general special damage which can be recovered but a special value attached by special circumstances to the article converted (*per CUR.*).—*FRANCE v. GAUDET* (1871), L. R. 6 Q. B. 199; 40 L. J. Q. B. 121; 19 W. R. 622.

Annotations:—*Refd.* *Horne v. Mid. Ry.* (1873), L. R. 8 C. P. 131; *The Star of India* (1876), 1 P. D. 466; *Johnson v. Hook* (1883), 31 W. R. 812. *Mentd.* *Attenborough v. London & St. Katharine Docks Co., Attenborough v. Same, Diego Lopez, claimant* (1878), 26 W. R. 583.

Special damage.]—*See* Nos. 15, 301, *post*.

7. Nominal damages—Defined.]—"A peg to hang costs on."—Nominal damages are a mere peg on which to hang costs. Nominal damages, in fact, mean a sum of money that may be spoken of, but that has no existence in point of quantity (MAULE, J.).—*BEAUMONT v. GREATHEAD* (1846),

PART I.

a. "Damages"—*Various meanings of.*
—The word "damages" in an undertaking as to damages included in an order granting an interim injunction against the sale by deft. of goods, otherwise than to pltf. should be given

a very general meaning, & not necessarily the same meaning as that given to the word when used in connection with breach of contract. The ct. will consider whether or not deft. has, in all the circumstances, sustained any real harm by reason of the injunc-

tion.—*VICTORIAN ONION & POTATO GROWERS ASSOCN. v. FURNJAN*, [1922] V. L. R. 819.—*AUS.*

b. *Special damages*—*Whether special inconvenience caused by obstruction of public right of way.*—Special inconvenience caused by obstruction of a

2 C. B. 494; 3 Dow. & L. 631; 15 L. J. C. P. 130; 6 L. T. O. S. 297; 135 E. R. 1039.

Annotations.—*Refd.* Thame v. Boast (1848), 12 Q. B. 808; Cook v. Hopewell (1856), 11 Exch. 555; Gowens v. Moore (1858), 3 H. & N. 540; Neville v. London "Express" Newspaper, [1919] A. C. 368; Soc. Des Hôtels Le Touquet Paris Plage v. Cummings, [1922] 1 K. B. 451. **Mentd.** Addison v. Gibson (1847), 8 L. T. O. S. 467; Nosotti v. Page (1851), 20 L. J. C. P. 81; Goodwin v. Cremer (1852), 18 Q. B. 757; Randall v. Moon (1852), 12 C. B. 261; Tetley v. Wanless (1867), L. R. 2 Exch. 275; Laurie v. Scholesfield (1869), 38 L. J. C. P. 290; Harper v. Linthorpe Dinsdale Smelting Co. (1909), 101 L. T. 608.

8. ————]—*Deft.*, an English lady, having in 1914 contracted in France a debt to pltf's. of 18,035 francs, undertook to pay that sum to them in France in French money before the end of that year. *Deft.* did not pay the money within the time specified, & in Nov., 1919, by which date the value of the French franc as expressed in English currency had heavily fallen, pltf's. commenced an action against her in England on a specially indorsed writ claiming the amount of sterling which would have been the equivalent of 18,035 francs at the end of the year 1914. While the action was pending *deft.* went to France & paid in French money to the then hotel manager of pltf's. the sum of 18,035 francs. The manager, who did not know the amount of *deft.*'s debt, nor that an action had been begun, did not when taking the money intend to accept it in full satisfaction, & gave *deft.* a receipt as for money deposited with him. By French law interest is not payable on money due in the absence of an express agreement to pay it. *Deft.* then pleaded that after action brought she had satisfied pltf's. claim by payment. On the question whether upon the facts above stated that plea had been established:—*Held*: the debt, being payable in France in French currency, did not cease to be a French debt by reason of its being sued for in England, & as, if the action had been brought in France, the payment made would have been a good discharge of the debt notwithstanding the depreciation of the French franc as expressed in English currency since the date when the money became due, that payment must equally be a good discharge of the debt for the purposes of the English action; & pltf's. were entitled to recover no more than nominal damages for the non-payment at the due date, & the costs of action down to plea pleaded.

Nominal damages in respect of the non-payment of a debt are a fond thing vainly invented "a mere peg on which to hang costs" (ATKIN, L.J.).—*SOCIÉTÉ DES HÔTELS LE TOUQUET PARIS-PLAGE v. CUMMINGS*, [1922] 1 K. B. 451; 91 L. J. K. B. 288; 126 L. T. 513; 38 T. L. R. 221; 66 Sol. Jo. 269, C. A.

Annotations.—*Refd.* *Re* British American Continental Bank, Lissner & Rosenkranz's Claim, [1923] 1 Ch. 276. **Mentd.** *Re* British American Continental Bank, Credit General Liègeois' Claim, [1922] 2 Ch. 589; Pocahontas Fuel Co. (Incorporated) v. Ambatielos (1922), 27 Com. Cas. 148; *Re* Chesterman's Trusts, Mott v. Browning, [1923] 2 Ch. 466.

9. ————]—The owner of a chattel who is wrongfully deprived of its use may recover substantial damages for the deprivation, though he may have incurred no out-of-pocket expenses consequent thereon.

"Nominal damages" is a technical phrase, which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right, which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your

legal right has been infringed. But the term "nominal damages" does not mean small damages (LORD HALSBURY, C.).

The whole region of inquiry into damages is one of extreme difficulty. You very often cannot even lay down any principle upon which you can give damages; nevertheless it is remitted to the jury, or those who stand in place of the jury, to consider what compensation in money shall be given for what is a wrongful act. Take the most familiar & ordinary case: how is anybody to measure pain & suffering in moneys counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact amount of money which would represent such a thing as the pain & suffering which a person has undergone by reason of an accident. In truth, I think it would be very arguable to say that a person would be entitled to no damages for such things. What manly mind cares about pain & suffering that is past? But nevertheless the law recognises that as a topic upon which damages may be given (LORD HALSBURY, C.).—*MEDIANA (OWNERS) v. COMET (OWNERS, ETC.)*, *THE MEDIANA*, [1900] A. C. 113; 69 L. J. P. 35; 82 L. T. 95; 48 W. R. 398; 16 T. L. R. 194; 44 Sol. Jo. 259; 9 Asp. M. L. C. 41, H. L.

Annotations.—*Apld.* *The Bodlewell*, [1907] P. 286. *Refd.* *The Astrakhan*, [1910] P. 172; *The Tugela* (1913), 30 T. L. R. 101; *Admiralty Comrs. v. Valeria S.S.*, [1922] 2 A. C. 242. **Mentd.** *The Kingsway*, [1918] P. 344.

10. Exemplary damages—Nature of.]—*ADDIS v. GRAMOPHONE CO., LTD.*, No. 1, *ante*.

11. ————]—Damages given for "example's sake" are clearly punitive or exemplary in nature. In such an action there are three distinct heads of damage namely, (1) pecuniary loss; (2) compensation for wounded feelings & injured pride; (3) a sum of money of a penal nature in addition to the compensating damage given for either pecuniary or physical & mental suffering (MCCARDIE, J.).—*BUTTERWORTH v. BUTTERWORTH & ENGLEFIELD*, *COLLINS v. COLLINS & HARRISON*, *BARRATT v. BARRATT & FOX*, *HOWELL v. HOWELL & WALKER*, *ADAMS v. ADAMS & WARD*, *ELLWORTHY v. ELLWORTHY & LEDGARD*, [1920] P. 126; 89 L. J. P. 151; 122 L. T. 804; 36 T. L. R. 265.

Annotations.—*Refd.* *Ewer v. Ewer & Charlton* (1920), 123 L. T. 240. **Mentd.** *Gibbs v. Gibbs & Heathcote* (1920), 123 L. T. 206; *Hensley v. Hensley & Nevin* (1920), 122 L. T. 814; *Taylor v. Taylor & Kraft* (1920), 123 L. T. 112; *Gray v. Gee* (1923), 39 T. L. R. 429.

12. Liquidated damages—Defined.]—*Pltf.* entered into a contract with *deft.*, who was a builder, to sell him an estate for £70,000, which was to be expended by *deft.* in building on the estate. The contract contained numerous provisions, & amongst other things that a deposit of £5,000 should be paid by *deft.* into the bankers to the joint account of *pltf.* & *deft.*, of which £500 was to be paid on the execution of the contract & the remainder within seven months. If *pltf.* could not make a good title the deposit of the £500 was to be returned, & *pltf.* was to pay *deft.* £5,000 as liquidated damages, & if *deft.* should commit a substantial breach of the contract, either in not proceeding with due diligence to carry out the works, or in failing to perform any of the provisions of the contract, then & in either of such events the deposit of £5,000 should be forfeited, & if it had not been paid *deft.* should forfeit & pay to *pltf.* £5,000 by way of liquidated damages, & the agreement should be void & of no

public right of way does not constitute special damage.—*ROBINSON v. KELLY* (1913), 47 L. T. 248.—*IR.*

c. Exemplary damages—Doctrine

founded on malice.]—The English doctrine of "exemplary damages" which was founded on malice, cannot apply to cases where the person sued

is not the actual wrongdoer, but is only responsible on the ground of *respondent superior*.—*BLACK v. NORTH BRITISH RY.*, [1908] S. C. 444.—*SCOT.*

effect, & pltf. should regain possession of the estate; but credit was to be given to deft. for all moneys actually expended; & it was provided that such breach should not be the consequence of a misconstruction of the meaning of any of the provisions of the contract. Deft. did not pay the £500 deposit, & altogether failed in carrying out the contract, & pltf. brought an action to recover £5,000 as liquidated damages:—*Held*: the condition of forfeiture was not intended to apply to the payment of the deposit of £500 which was to be paid on the execution of the contract, but to a substantial breach of any of the subsequent stipulations, & therefore the £5,000 was not to be regarded as a penalty but as liquidated damages, the payment of which could be enforced against deft.

Where a contract contains a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for payment of an ascertained sum of money, the general rule is that the sum named is not to be treated as a penalty, but as liquidated damages.

Where a sum of money is stated to be payable either by way of liquidated damages, or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, that is really as penalty, & you can only recover the actual damage, & the ct. will not sever the stipulations (JESSEL, M.R.).

Liquidated damages means that it shall be taken as the sum which the parties have by the contract assessed as the damages to be paid, whatever may be the actual damage (COTTON, L.J.).—*WALLIS v. SMITH* (1882), 21 Ch. D. 243; 52 L. J. Ch. 115; 47 L. T. 389; 31 W. R. 214, C. A.

Annotations:—*Appld* *Barton v. Capewell Continental Patents Co.* (1893), 68 L. T. 857; *Ward v. Monaghan* (1895), 11 T. L. R. 529. *Consd.* *Willson v. Love*, [1896] 1 Q. B. 626; *Pye v. British Automobile Commercial Syndicate*, [1906] 1 K. B. 425; *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A. C. 79. *Refd.* *General Credit & Discount Co. v. Glegg* (1883), 22 Ch. D. 549; *Catton v. Bennett* (1884), 51 L. T. 70; *Law v. Redditch* L. B., [1892] 1 Q. B. 127; *Stegmann v. O'Connor* (1899), 80 L. T. 234. *Mentd.* *Re Russell, Son & Scott & Wallis* (1885), 54 L. J. Ch. 948; *Re Russell, Son & Scott* (1886), 55 L. T. 71; *Dewar v. Mintoft*, [1912] 2 K. B. 373.

— *Distinguished from penalty*.—*See* Part VI., *post*.

13. Damages at large—Nature of.—In order to support an action for maliciously inducing persons to break their business contracts with pltf. proof of specific damage need not be given; it is sufficient to prove facts from which it may properly be inferred that some damage must result to pltf. from deft.'s wrongful acts.

Under a contract made between pltf. & the committee of the London Stock Exchange, valuable information as to the prices of stocks & shares from time to time during the day was collected on the Stock Exchange, & supplied to pltf., & printed on tapes & sheets of letterpress in their office. Deft., having surreptitiously obtained such information, published it in the same form before its publication by pltf.:—*Held*: pltf. had a right of property at common law in the information, & were entitled to an injunction to restrain deft. from infringing that right by continuing to publish it.

A man who does such a wrongful act as deft. has done lays himself open to be told by the tribunal before whom he appears "You have damaged pltf. You have done a contemptible & fraudulent act against him." In such a case the jury may

give any damages. It is not necessary to give proof of specific damage. The damages are damages at large (LORD ESHER, M.R.).—*EXCHANGE TELEGRAPH CO. v. GREGORY & CO.*, [1896] 1 Q. B. 147; 65 L. J. Q. B. 262; 74 L. T. 83; 60 J. P. 52; 12 T. L. R. 18, C. A.

Annotations:—*Consd.* *Summers v. Boyce & Kinmond* (1907), 97 L. T. 505; *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335. *Refd.* *Fenning Film Service v. Wolverhampton, Walsall & District Cinemas*, [1914] 3 K. B. 1171; *Goldson v. Goldman*, [1914] 2 Ch. 603; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244; *Said v. Butt*, [1920] 3 K. B. 497. *Mentd.* *Exchange Telegraph Co. v. Central News*, [1897] 2 Ch. 48; *Sports & General Press Agency v. "Our Dogs" Publishing Co.*, [1916] 2 K. B. 880.

14. — — — — — *By* an agreement dated Sept. 8, 1913, pltf. agreed to let a certain cinematograph film to defts. for a period of one week for exhibition as to three days at the Strand Theatre, Wolverhampton, & as to the other three days at the Cinema de Luxe, Walsall. Defts. agreed not to exhibit or suffer to be exhibited the film or any part of it at any place other than the two above-mentioned theatres. Defts. in fact exhibited or suffered to be exhibited the film at places other than the two above-mentioned theatres & also announced their intention by means of posters & handbills circulated in or about the town of Bilston of exhibiting the film at a theatre called the Alhambra in that town:—*Held*: in addition to pltf.'s right to damages for the breach of contract, defts. by the advertising at Bilston had, within the meaning of Copyright Act, 1911 (c. 46), s. 1 (2), authorised a performance of the work, & therefore there had been an infringement by defts. of pltf.'s copyright in the film within the meaning of the Act, s. 1, sub-sect. 2 for which pltf. were entitled to recover damages under sect. 6.

The damages are, in the language of LORD ESHER, M.R., "at large," & therefore I can give what amount I think right as if I were a jury (HORDRIDGE, J.).—*FENNING FILM SERVICE, LTD. v. WOLVERHAMPTON, WALSALL & DISTRICT CINEMAS, LTD.*, [1914] 3 K. B. 1171; 83 L. J. K. B. 1860; 111 L. T. 1071.

15. Special damage—Defined.—In an action for words not actionable *per se*, but constituting an untrue statement maliciously published about pltf.'s business, which statement is intended or reasonably likely to produce, & in the ordinary course of things does produce, a general loss of business as distinct from the loss of particular customers, evidence of such general loss of business is admissible & sufficient to support the action.

The term "special damage," which is found for centuries in the books, is not always used with reference to similar subject-matter, nor in the same context. At times, both in the law of tort & of contract, it is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be super-added to the general damage which the law implies in every breach of contract & every infringement of an absolute right. In all such cases the law presumes that some damage will flow in the ordinary course of things from the mere invasion of pltf.'s rights, & calls it general damage. Special damage in such a context means the particular damage, beyond the general damage, which results from the particular circumstances of the case, & of pltf.'s claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial. But where no actual & positive right, apart from the damage done, has been disturbed, it is the damage done that is the wrong; & the expression "special damage," when used of this

damage, denotes the actual & temporal loss which has, in fact, occurred. The term "special damage" has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or a highway, to denote that actual & particular loss which pltf. must allege & prove that he has sustained beyond what is sustained by the general public, if his action is to be supported, such particular loss being, as is obvious, the cause of action (BOWEN, L.J.).—*RATCLIFFE v. EVANS*, [1892] 2 Q. B. 524; 61 L. J. Q. B. 535; 66 L. T. 794; 56 J. P. 837; 40 W. R. 578; 8 T. L. R. 597; 36 Sol. Jo. 539, C. A.

Annotations.—*Consd.* *Royal Baking Powder Co. v. Wright*, Crossley (1900), 18 R. P. C. 95; *Shapiro v. La Morta* (1923), 40 T. L. R. 39. *Refd.* *Hubbuck v. Wilkinson*, Heywood & Clark, [1899] 1 Q. B. 86; *Lyne v. Nicholls* (1906), 23 T. L. R. 36; *Barrett v. Associated Newspapers* (1907), 23 T. L. R. 666; *Concaris v. Duncan*, [1909] W. N. 51; *Leatham v. Rank* (No. 1) (1912), 57 Sol. Jo. 111; *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C.*, [1922] 2 K. B. 260. *Mentd.* *Mollin v. White*, [1894] 3 Ch. 276; *Ajello v. Worsley*, [1898] 1 Ch. 274; *Allen v. Flood*, [1898] A. C. 1; *Weld-Blundell v. Stephens*, [1920] A. C. 956.

16. — *Particular damage.*—Special damage here means damage brought on the individual complaining, which might be perhaps more properly styled particular damage, or "a

special damage more than the rest of" Her Majesty's "subjects," & not that sort of damage only which may or may not ensue from the act done, but entitles pltf., when it does occur, to specific reparation in the form of damages (LORD DENMAN, C.J.).—*DOBSON v. BLACKMORE* (1847), 9 Q. B. 991; 16 L. J. Q. B. 233; 11 J. P. 601; 11 Jur. 556; 115 E. R. 1554.

Annotations.—*Refd.* *Chamberlain v. West End of London & Crystal Palace Ry.* (1862), 2 B. & S. 605. *Mentd.* *Kidgill v. Moor* (1850), 9 C. B. 364.

— *Action for public nuisance—Obstruction of highway.*—*See* HIGHWAYS, STREETS & BRIDGES.

17. — *Trover.*—In trover, damages may be given in respect of special damage, besides the value of the goods converted, if special damage be laid in the declaration. As where, in trover for carpenter's tools, special damage was laid in respect of pltf., a carpenter, being hindered from working.—*BODLEY v. REYNOLDS* (1846), 8 Q. B. 779; 15 L. J. Q. B. 219; 7 L. T. O. S. 61; 10 Jur. 310; 115 E. R. 1066.

Annotations.—*Apprvd.* *Wood v. Bell* (1856), 5 E. & B. 772. *Refd.* *France v. Gaudet* (1871), L. R. 6 Q. B. 199.

Prospective damages.—*See* Nos. 77, 85, *post*.

Continuing damages.—*See* Nos. 76, 82, *post*.

Part II.—Rules and Principles in Awarding Damages.

SECT. 1.—IN GENERAL.

18. *General rule.*—No damages can be given on an indictment.—*SEELE'S CASE* (1639), Cro. Car. 557; 79 E. R. 1080.

Annotation.—*Mentd.* *Layton's Case* (1705), 11 Mod. Rep. 59.

19. —]—"In all civil acts the law doth not so much regard the intent of the actor as the loss & damage to the party suffering."—*BESSEY v. OLLIOT & LAMBERT* (1682), T. Raym. 467; 83 E. R. 244; *sub nom.* *LAMBERT & OLLIOT v. BESSEY*, T. Raym. 421; *sub nom.* *OLLIOT v. BESSEY*, T. Jo. 214; *sub nom.* *OLLYETT v. BESSEY*, cited in 2 Lut. at p. 937.

Annotations.—*Refd.* *Scot v. Shepherd* (1773), 2 Wm. Bl. 892; *Humphreys v. Cousins* (1877), 46 L. J. Q. B. 438; *Smith v. Kenrick* (1849), 7 C. B. 515; *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330; *Crowhurst v. Amersham Burial Board* (1878), 4 Kx. D. 5. *Mentd.* *Goodwin v. Gibbons* (1767), 4 Burr. 2107; *Barker v. Braham & Norwood* (1773), 2 Wm. Bl. 866; *Badkin v. Powell* (1776), 2 Cowp. 476; *Henderson v. Preston* (1888), 21 Q. B. D. 362; *Demer v. Cook* (1903), 88 L. T. 629.

20. —]—Every injury imports a damage, though it does not cost the party one farthing & it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right. As in an action for slanderous words though a man does not lose a penny by reason of the speaking them, yet he shall have an action (HOLT, C.J.).—*ASHBY v. WHITE* (1703), 2 Ld. Raym. 938; Holt, K. B. 524; 6 Mod. Rep. 45; 1 Salk. 19; 3 Salk. 17; 92 E. R. 126; *reversd.* on other grounds (1704), 1 Bro. Parl. Cas. 62, H. L.; *subsequent proceedings* (1705), 14 State Tr. 695.

Annotations.—*Consd.* *Drowe v. Coulton* (1787), 1 East, 563, n.; *Burdett v. Abbot* (1811), 14 East, 1; *Tozer v. Child* (1857), 7 E. & B. 377; *Bowen v. Hall* (1881), 6 Q. B. D. 333; *Allen v. Flood*, [1898] A. C. 1; *Weld-Blundell v. Stephens*, [1920] A. C. 956. *Refd.* *R. v. Paty* (1704), 2 Ld. Raym. 1105; *Kendall v. John* (1708), Fortes. Rep. 104; *Selwyn v. Honeywood* (1744), 9 Mod. Rep. 419; *Myddelton v. Wynn* (1746), Willes, 597;

R. v. Montacute (1750), 1 Wm. Bl. 60; *Chapman v. Pickersgill* (1762), 2 Wils. 145; *Harman v. Tappenden* (1801), 1 East, 555; *Williams v. Mostyn* (1838), 4 M. & W. 145; *Hampden v. Macmullen* (1843), 3 Notes of Cases, Supp. 1; *Pryce v. Belcher* (1847), 4 C. B. 866; *Embrey v. Owen* (1851), 6 Exch. 353; *King v. Rochdale Canal Co.* (1851), 14 Q. B. 136; *Er v. Mawby* (1854), 18 Jur. 906; *Nieklm v. Williams* (1854), 10 Exch. 259; *Chamberlain v. West End of London & Crystal Palace Ry.* (1863), 2 B. & S. 617; *Fotherby v. Met. Ry.* (1866), L. R. 2 C. P. 188; *Smith v. Thackeray* (1866), L. R. 1 C. P. 564; *Morgan v. Met. Ry.* (1868), 37 L. J. C. P. 265; *Metropolitan Board of Works v. McCarthy* (1874), L. R. 7 H. L. 243; *Wood v. Wood* (1874), L. R. 9 Exch. 190; *Humphreys v. Cousins* (1877), 46 L. J. Q. B. 438; *Bradlaugh v. Erskine* (1883), 47 L. T. 618; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524; *Chaffers v. Goldsmid*, [1894] 1 Q. B. 186; *Clark v. London General Omnibus Co.*, [1906] 2 K. B. 648; *I. R. Comrs. v. Joicey* (No. 1), [1913] 1 K. B. 445; *Hamerton v. Dysart*, [1916] 1 A. C. 57; *Neville v. London "Express" Newspaper*, [1919] A. C. 368; *Simmonds v. Newport Abercrom Black Vein Steam Coal Co.*, [1921] 1 K. B. 616. *Mentd.* *R. v. Loggen & Froome* (1718), 1 Stra. 73; *R. v. Midhurst Borough* (1750), 1 Wils. 283; *R. v. Pasmore* (1789), 3 Term Rep. 199; *Schnottl v. Bumsted* (1796), 6 Term Rep. 646; *Tewkesbury Corp. v. Diston* (1805), 6 East, 438; *Cullen v. Morris* (1819), 2 Stark. 577; *Stockdale v. Hansard* (1839), 9 Ad. & El. 1; *Ferguson v. Kin-noull* (1842), 9 Cl. & Fin. 251; *Harnett v. Maitland* (1847), 16 M. & W. 257; *R. v. James* (1850), 3 Car. & Kir. 167; *Crouch v. L. & N. W. Ry.* (1854), 14 C. B. 255; *Waite v. N. E. Ry.* (1859), E. B. & E. 728; *Basébé v. Matthews* (1867), L. R. 2 C. P. 684; *Dalton v. Angus* (1881), 6 App. Cas. 740; *Spaight v. Tedcastle* (1881), 44 L. T. 589; *Mills v. Armstrong, The Bernina* (1888), 13 App. Cas. 1; *Manton v. Brocklebank*, [1923] 2 K. B. 212.

21. —]—(1) An action on the case may be maintained for the breach of a mere implied contract, & without proving special damage.

(2) There is an implied contract between a banker & each of his customers, that the former will pay the cheques of the latter upon presentment, provided the money be paid into his office in such time as that his clerks may reasonably be required to know the fact. Where money was paid in a few minutes before eleven o'clock, & ten minutes before three, a cheque was presented & was refused payment for want of sufficient assets, the clerk

PART II. SECT. 1.

18 *General rule.*—As a general principle, compensation must be commensurate with the injury sustained.—*NAT RAM v. SHIB DAT* (1882), I. L. R. 5 All. 238.—*IND.*

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Sect. 1.—In general. Sects. 2 & 3.]

who refused not being aware of the payment that morning:—*Held*: the customer was entitled to maintain an action against the banker & to have a verdict for nominal damages, although he did not prove that the refusal had caused him any actual damage.

(3) Wherever there is a breach of contract or any injury to the right arising out of that contract, nominal damages are recoverable (PARKE, J.).—*MARZETTI v. WILLIAMS* (1830), 1 B. & Ad. 415; 1 Tyr. 77, n.; 9 L. J. O. S. K. B. 42; 109 E. R. 842.

Annotations:—*As to (1) Consd.* *Boorman v. Brown* (1842), 3 Q. B. 511. *Reid, Godefroy v. Jay* (1831), 7 Bing. 413; *Wylie v. Birch* (1843), 4 Q. B. 566; *Woods v. Flinn* (1852), 16 Jur. 936; *Rollin v. Steward* (1854), 14 C. B. 595; *Swinfen v. Cholmsford* (1860), 2 L. T. 406; *Steljos v. Ingram* (1903), 19 T. L. R. 534. *As to (2) Reid, Godefroy v. Jay* (1831), 7 Bing. 413; *Bushell v. Beavan* (1834), 1 Bing. N. C. 103; *Boorman v. Brown* (1842), 3 Q. B. 511; *Re Wise, Ex p. Atkins* (1842), 3 Mont. D. & De G. 103; *Clifton v. Hooper* (1844), 6 Q. B. 468; *Westaway v. Frost* (1848), 17 L. J. Q. B. 286; *Beckham v. Drake* (1849), 2 H. L. Cas. 579; *Bell v. Carey* (1849), 8 C. B. 887; *Re Gibson & Sturt, Re St. Alban's Bank* (1850), 15 L. T. O. S. 95; *Tandall v. Moon* (1852), 12 C. B. 261; *Churchill v. Siggers* (1854), 2 C. L. R. 1509; *Rollin v. Steward* (1854), 14 C. B. 595; *Dent v. Turpin* (1861), 2 John. & H. 139; *Hyde v. Bulmer* (1868), 18 L. T. 293; *Prehn v. Royal Bank of Liverpool* (1870), L. R. 5 Exch. 92; *Larios v. Bonany y Gurety* (1873), L. R. 5 P. C. 346; *Re General South American Co.* (1877), 47 L. J. Ch. 67; *Cole v. Christie, Manson & Woods* (1910), 26 T. L. R. 469; *Turpin v. Victoria Palace* (1918), 88 L. J. K. B. 569; *Neville v. London "Express" Newspaper*, [1919] A. C. 368; *Wilson v. United Counties Bank*, [1920] A. C. 102. *As to (3) Reid.* *Pray v. Voules* (1859), 1 E. & E. 839. *Generally, Mentd.* *Gould v. Oliver* (1840), 2 Man. & G. 208; *De Medina v. Grove* (1847), 10 Q. B. 72; *Roberts v. Tucker* (1851), 20 L. J. Q. B. 270; *Bononi v. Backhouse* (1859), 5 Jur. N. S. 1345; *Emanuel v. Roberts* (1868), 9 B. & S. 121; *Re Thellusson, Ex p. Abdy*, [1919] 2 K. B. 735.

22. ——*J*.—Pltfs. sent goods to defts. to be warehoused & delivered to pltf.'s order only. Defts. delivered the goods to the order of G., who was pltf.'s agent, for some purposes, but not authorised by them to give delivery orders. A few days afterwards pltfs. sent defts. orders for the delivery of the goods to certain purchasers who indorsed the orders over to G. Pltfs. having been unable to obtain payment for the goods sued defts. for the full value of them:—*Held*: pltfs. were entitled to nominal damages for a conversion of the goods by defts.

I think that the unauthorised act, whether it be a conversion, or whether it be a breach of contract, or a breach of duty did vest the right of action, & for this reason that the law presumes a damage in respect of that unlawful act (THESIGER, L.J.).—*HIORT v. LONDON & NORTH WESTERN Ry. Co.* (1879), 4 Ex. D. 188; 48 L. J. Q. B. 545; 40 L. T. 674; 27 W. R. 778, C. A.

23. ——*J*.—If in an action for wrongful detention by one man of that which belongs to another, there be no substantial loss at all sustained, but the mere denial of the right, which right is vindicated in the course of the action, in such a case, there being no pecuniary damage sustained, no pecuniary compensation is given, & nominal damages will be enough; but if a substantial loss has been suffered in consequence of the wrongful

act, what those who have to redress the wrong; ought to do is to give compensation for the loss (BOWEN, L.J.).—*WILLIAMS v. PEEL RIVER LAND & MINERAL Co., LTD.* (1886), 55 L. T. 689; 3 T. L. R. 76, C. A.

Annotations:—*Consd.* *Dreyfus v. Peruvian Guano Co.* (1889), 42 Ch. D. 66. *Reid, Simmons v. London Joint Stock Bank, Little v. London Joint Stock Bank*, [1891] 1 Ch. 270; *Peruvian Guano Co. v. Dreyfus*, [1892] A. C. 166; *Shaw v. Holland*, [1900] 2 Ch. 305.

24. — Pain & suffering.]—*MEDIANA (OWNERS) v. COMET (OWNERS, ETC.), THE MEDIANA*, No. 9, ante.

Damage—Injuria absque damno.]—*See ACTION*, Vol. I., p. 29, Nos. 231, 232.

— Damnum absque injuria.]—*See ACTION*, Vol. I., pp. 29–35, Nos. 233–274.

SECT. 2.—JURISDICTION TO AWARD.

25. Court of equity—Where specific performance refused—Breach of contract to advance money.]—A Gibraltar firm entered into a contract with B., in Spain, in consideration of certain property having been transferred to them, to open a credit in his favour to the extent of \$9,400, & to honour his drafts to that amount. After advancing him some sums of money, they refused to accept a bill for \$1,000 drawn upon them by him, & subsequently refused to make any further advances. Proceedings in equity were thereupon commenced by him in the Supreme Ct. of Gibraltar to enforce a specific performance of the contract, & to obtain an award of damages under Chancery Amendment Act, 1857 (c. 27), for the non-performance of the contract:—*Held*: a Ct. of Equity will not decree the specific performance of a mere agreement to advance money. Moreover, that that being so, it has no jurisdiction to award damages.

On its being contended that the cause of action would be merely the breach of an agreement to pay a sum of money, & that accordingly nothing could be recovered by way of damage but the principal money contracted to be paid & interest:—*Held*: inasmuch as the contract was a special one, whereby the firm became bound to honour, out of moneys agreed to be placed by them to his credit, the drafts of B. up to a certain amount, he was entitled to general & substantial damages for the breach of it.—*LARIOS v. BONANY Y GURETY* (1873), L. R. 5 P. C. 346, P. C.

Annotations:—*Mentd.* *Re General South American Co.* (1877), 47 L. J. Ch. 67; *Western Wagon & Property Co. v. West*, [1892] 1 Ch. 271; *South African Territories v Wallington* (1897), 76 L. T. 520.

In lieu of injunction.]—*See INJUNCTION.*

In lieu of specific performance.]—*See SPECIFIC PERFORMANCE.*

SECT. 3.—RESTITUTIO IN INTEGRUM.

26. General rule—Applicable to all wrongful acts.]—The damages recoverable from a wrongdoer in cases of collision at sea must be measured

PART II. SECT. 2.

25 i. Court of equity—Whether specific performance refused.]—In cases where, prior to Equity Act, 1880, the ct. would refuse specific performance & leave pltf. to his remedy at law, the ct. now has power under sect. 4 of above Act to award damages.—*CRAMPTON v. FOSTER* (1897), 18 N. S. W. Eq. 136.—**AUS.**

25 ii. ——*J*.—Under Adminis-

tration of Justice Act, 1873, s. 32, the ct. of chancery has cognisance of all the rights of parties arising out of an agreement: & it either is entitled to damages, the ct. should ascertain them, & for that purpose a reference may be directed in a suit for specific performance.—*CASEY v. HANLON* (1875), 22 Gr. 445.—**CAN.**

25 iii. ——*J*.—*STANDLY v. PERRY* (1876), 2 A. R. 195; 3 S. C. R. 356.—**CAN.**

25 iv. ——*J*.—*MARTYN v. BLAKE* (1842), 3 Dr. & War. 125.—**IR.**
d. Limitation of jurisdiction—*Division Courts.]—**HYLAND v. WARREN* (1860), 6 U. C. L. J. O. S. 116.—**CAN.**

e. Power of single judge.]—A single judge has power to assess damages during term as well as in vacation.—*MARITIME BANK OF DOMINION OF CANADA v. MCKEAN* (1883), 22 N. B. R. 526.—**CAN.**

according to the ordinary principles of the common law. Cts. of Admty. have no power to give more, they ought not to award less. Speaking generally as to all wrongful acts, whatever arising out of tort or breach of contract, the English law only adopts the principle of *restitutio in integrum* subject to the qualification or restriction that the damages must not be remote, that they must be, in other words, such damages as flow directly & in the usual course of things from the wrongful act. To these the law superadds in the case of a breach of contract, or, to speak according to the view taken by some jurists, the law includes under the head of these very damages, where the case is one of breach of contract, such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of its breach. With this single modification or exception, which is one that applies only to cases of breach of contract, the English law only permits the recovery of such damages as are produced immediately & naturally by the act complained of (BOWEN, L.J.).—THE ARGENTINO (1888), 13 P. D. 191; 58 L. J. P. 1; 59 L. T. 914; 37 W. R. 210; 6 Asp. M. L. C. 348, C. A.; *affd. sub nom.* GRACIE (OWNERS) v. ARGENTINO (OWNERS), THE ARGENTINO (1889), 14 App. Cas. 519, H. L.

Annotations:—Consd. H.M.S. London, [1914] P. 72; Quirk v. Thomas, [1916] 1 K. B. 516; The Kingsway, [1918] P. 344. **Reid.** The Racine, [1906] P. 273; The Bodlewell, [1907] P. 286; The Philadelphia, [1917] P. 101; Spalding v. Gamage (1918), 35 L. P. C. 101; The Veraston, [1920] P. 12; Wilson v. United Counties Bank, [1920] A. C. 102; Admiralty Comrs. v. S.S. Valeria, [1922] 2 A. C. 242; Elliott Steam Tug Co. v. Shipping Controller, [1922] 1 K. B. 127. **Mentd.** The City of Lincoln (1889), 15 P. D. 15; The City of Peking (1890), 15 App. Cas. 438; The Walter D. Walleit, [1893] P. 202; Shelbourne v. Law Investment & Insee. Corpn., [1898] 2 Q. B. 626; The Kate, [1899] P. 165; Remorquage & Hélice (C. Soc. Anon.) v. Bennetts, [1911] 1 K. B. 243; Griffith v. Clay, [1912] 2 Ch. 291; Cointat v. Myham, [1913] 2 K. B. 220; Celia S.S. v. Volturmo S.S., [1921] 2 A. C. 544; The San Onofre, [1922] P. 243; The Zelo, [1922] P. 9.

27. Application of rule—In tort.]—In an action against the hundred of Broxtowe, for the felonious demolition of Nottingham Castle, the principle on which the damages should be calculated is "how much would restore the place to its situation just before the felonious attack was made"? & the questions, whether the party injured is likely to restore it, or whether from its non user, it was of comparatively less value, are questions which ought not to be taken into consideration.—**NEWCASTLE (DUKE) v. BROXTOWE HUNDRED** (1832), 4 B. & Ad. 273; 1 Nev. & M. K. B. 598; 2 L. J. M. C. 47; 110 E. R. 458.

Annotations.—**Consd.** *Yates v. Dunster* (1855), 11 Exch. 15.
Reid. *Hadley v. Baxendale* (1854), 23 L. T. O. S. 69;
Wednesbury Corpn v. Lodge *Holts Colliery Co.* [1871]
 1 K. B. 78. **Mentd.** *Crease v. Barrett* (1835) C. M. & R.
 919; *Dunraven v. Llewellyn* (1850), 15 Q. B. 791; *Shedden*
v. Patrick (1860), 2 Sw. & Tr. 170; *Joyner v. Weeks*,
 [1891] 2 Q. B. 31; *Evans v. Merthyr Tydvil U. D. C.*
 (1898), 79 L. T. 573; *Mercer v. Denne*, [1902] 2 Ch. 538.

28. — — —.]—The principle upon which this ct. proceeds in all matters of this kind is a "*restitutio in integrum*"; in other words, the principle of replacing the party who has received

the damage in the same position in which he would have been, provided the collision had not occurred. Where an injury is committed by one individual to another, either by himself or his servant, for whose acts the law makes him responsible, the party receiving the injury is entitled to an indemnity for the same (DR. LUSEINGTON).—THE COLUMBUS (1849), 3 Wm. Rob. 158; 6 Notes of Cases, 671; 13 Jur. 285.

Annotations.—**Consd.** The Clyde (1856), Sw. 23; The Argentine (1888), 13 P. D. 191; The Kate, [1899] P. 165. **Reid.** Harrison v. R. (1852-6), 10 Moo. P. C. C. 202; The Racine, [1906] P. 273; The Philadelphia, [1917] P. 101. **Mentd.** The Linda (1857), 30 L. T. O. S. 234; British Columbia Saw-Mill Co. v. Nettleship (1888), L. R. 3 C. P. 499.

29. — [—]—I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in setting the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation (**LORD BLACKBURN**).—**LIVINGSTONE v. RAWYARDS COAL CO.** (1880), 5 App. Cas. 25; 42 L. T. 334; 44 J. P. 392; 28 W. R. 357, H. L.

Annotations:—*Reid*. Taylor v. Mostyn (1886), 33 Ch. D. 226; Peruvian Guano Co. v. Dreyfus (1887), [1892] A. C. 170, n. **Mentl**. Tucker v. Linger (1882), 46 L. T. 198; Whitwham v. Westminster Brymbo Coal & Coke Co., [1896] 2 Ch. 538; Bulli Coal Mining Co. v. Osborne, [1899] A. C. 351; *Re* A. B. (No. 2), [1900] 2 Q. B. 429; Eden v. N. E. Ry., [1907] A. C. 400.

30. — In contract.]—As to the damages which pltf. is entitled to recover, the rule of the common law is, that a party who has sustained loss by reason of a breach of contract is, with respect to damages, to be placed in the same situation as he would have been in if the contract had been performed (PARKE, B.).—ROBINSON *v.* HARMAN (1848), 1 Exch. 850; 18 L. J. Ex. 202; 13 L. T. O. S. 141; 154 E. R. 303.

Annotations — **Conrad**, Sikes v. Wildt (1861), 1 B. & S. 587.
Apid, Look v. Fune (1866), L. R. 1 C. P. 441; Engel-
 Fitch (1869), L. R. 1 Q. B. 659; Abraham v. Ickell,
 [1922] 1 K. B. 477. **Reid**, Pounnett v. Fuller (1866),
 17 C. B. 680; Godwin v. Francis (1870), 39 L. J. C. P.
 121; Bain v. Fothergill (1874), L. R. 7 H. L. 158; Wignell
 v. School for Indigent Blind (1882), 8 Q. B. D. 357;
 Quirk v. Thomas, [1916] 1 K. B. 516; Watts, Watts v.
 Mitalu, [1917] A. C. 227; Montevideo Gas & Drydock
 Co. v. Clan Line Steamers (1921), 37 T. L. R. 544. **Mentid**
 Stranks v. St. John (1867), L. R. 2 C. P. 376; Joyner v.
 Weeks, [1891] 2 Q. B. 31.

31. — [—]—Pltf., being in possession under an old lease, had an *interesse termini* under a reversionary lease of the same premises from the same lessor. Before the expiration of the original lease, V., claiming under the lessor by a good title, repudiated the reversionary lease, & subsequently granted to pltf. a lease for a shorter term at an increased rent:—*Held*: the ordinary rule of law, that on a breach of contract that person injured is entitled to be put in the same position as that in which he would have been had the contract been fulfilled, applied.—*Lock v. Furze* (1866), L. R. 1 C. P. 441; *Har. & Ruth.* 379; 35

PART II. SECT. 8.

30 i. *Application of rule*.—In *contract*.—Damages for a breach of covenant apart from nominal damages, are such sum as will put the covenantee in the same pecuniary position as if there had been no breach.—*MEREWETHER v. SCOTTISH AUSTRALIAN MINING CO., LTD.* (1907), 4 C. L. R. 953.—*AUS.*

80 ii. ———.]—In an action for damages for breach of contract:—

Held: pl'tfs. were entitled to be put in the same position as if the contract had been performed.—BRUNSWICK BALKE COLLENDER CO. OF CANADA, LTD. v. FALSETTO (1915), 9 O. W. N. 27.—CAN.

30 iii. ———.]—The general intention of the law in giving damages for breach of contract is that plaintiff should be placed in the same position as he would have been in if the contract had been performed.—TWEESPRUIT DAVIES, LTD. v. MICHELSEN

(1914), C. P. D. 995.—S. AF.

30 iv. 1915. 1.—The sufferer, by a breach of contract to supply a conveyance, was not procurable elsewhere and should be placed in the position he would have occupied had the contract been performed so far as that can be done by the payment of money and without undue hardship to the defaulting party.—**VICTORIA FALLS & TRANSVAAL POWER CO., LTD. v. CONSOLIDATED LANGLAAGTE MINES, LTD. (1915), App. D. 1.—S. AF.**

Sect. 3.—*Restitutio in integrum*. Sect. 4.]

L. J. C. P. 141; 15 L. T. 161; 30 J. P. 743; 14 W. R. 403, Ex. Ch.

Annotations.—*Reid*, Wiggall v. School for Indigent Blind (1882), 8 Q. B. D. 357; Grosvenor Hotel Co. v. Hamilton, [1894] 2 Q. B. 836. *Mentd*, Wall v. City of London Real Property Co. (1874), 30 L. T. 53; Wallis v. Hands, [1893] 2 Ch. 75.

32. ———.]—*Restitutio in integrum* can be had only where the party seeking it is able to put those against whom it is asked in the same situation as that in which they stood when the contract was entered into (LORD CRANWORTH).—WESTERN BANK OF SCOTLAND v. ADDIE, ADDIE v. WESTERN BANK OF SCOTLAND (1867), L. R. 1 Sc. & Div. 145, H. L.

Annotations.—*Reid*, Houldsworth v. City of Glasgow Bank (1880), 5 App. Cas. 317; Adam v. Newbigging (1888), 13 App. Cas. 308; Armstrong v. Jackson, [1917] 2 K. B. 822. *Mentd*, *Re* Overend, Gurney, Oakes v. Turquand & Harding, Pook v. Turquand & Harding (1867), L. R. 2 H. L. 325; Swift v. Winterbotham (1873), 42 L. J. Q. B. 111; Mackay v. Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394; Blake v. Albion Life Assce. Soc. (1878), 4 C. P. D. 94; Erlanger v. New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218; Weir v. Barnett (1878), 38 L. T. 929; Chapleo v. Brunswick Benefit Bldg. Soc. (1880), 5 C. P. D. 331; Newlands v. National Employers Accident Asscn. (1885), 54 L. J. Q. B. 428; Capel v. Sim's Ships Compositions Co. (1888), 57 L. J. Ch. 713; Derry v. Pook (1889), 14 App. Cas. 337; Lynde v. Anglo-Italian Hemp Spinning Co., [1896] 1 Ch. 178; Salomon v. Salomon, Salomon v. Salomon, [1897] A. C. 22; Hambro v. Burnard, [1903] 2 K. B. 599; Citizens Life Assce. v. Brown, [1904] A. C. 423; Lloyd v. Grace, Smith, [1912] A. C. 716.

33. ———.]—The general intention of the law in giving damages for breach of contract is that pltf. should be placed in the same position as he would have been in if the contract had been performed.—WERTHEIM v. CHICOUTIMI PULP Co., [1911] A. C. 301; 80 L. J. P. C. 91; 101 L. T. 226; 16 Com. Cas. 297, P. C.

Annotations.—*Consd*, British Westinghouse Electric & Manufacturing Co., v. Underground Electric Rys. of London, [1912] A. C. 673. *Appld*, Taylor v. Bank of Athens, Pincock v. Bank of Athens (1922), 91 L. J. K. B. 776. *Reid*, Williams v. Aglus, [1914] A. C. 510; Hill v. Showell (1918), 87 L. J. K. B. 1106; Slater v. Hoyle & Smith, [1920] 2 K. B. 11.

34. ———.]—The general rule in the case of contract is that pltf. by way of damages are entitled to be put in the same position as they would have been if the contract had been completed (NEVILLE, J.).—*Re* VIC MILL, LTD., [1913]

1 Ch. 183; 82 L. J. Ch. 117; 108 L. T. 25; 57 Sol. Jo. 211; *affd.*, [1913] 1 Ch. 465, C. A.
Annotation.—*Consd*, Hill v. Showell (1918), 87 L. J. K. B. 1106.

35. Qualification of rule—Remoteness of damage.]—THE ARGENTINO, No. 26, *ante*.

As to remoteness of damage.]—See Part III., *post*.

— Contract for sale of land.]—See SALE OF LAND.

See, also, Nos. 291–306, *post*.

SECT. 4.—WHETHER PROOF OF ACTUAL DAMAGE ESSENTIAL.

36. General rule—Presumption of damage—On injury to right.]—ASHBY v. WHITE, No. 20, *ante*.

37. ———.]—Whenever an injury is done to a right, actual perceptible damage is not indispensable as to the foundation of an action, but it is sufficient to show the violation of the right, & the law will presume damage.—EMFREY v. OWEN (1851), 6 Exch. 353; 20 L. J. Ex. 212; 17 L. T. O. S. 79; 15 Jur. 633; 155 E. R. 579.

Annotations.—*Consd*, Brundsen v. Humphrey (1884), 14 Q. B. D. 141. *Reid*, Nicklin v. Williams (1854), 10 Exch. 259; Neville v. London "Express" Newspaper, [1919] A. C. 368. *Mentd*, Dickinson v. Grand Junction Canal Co. (1852), 7 Exch. 282; Northam v. Hurley (1853), 1 E. & B. 665; Sampson v. Hoddinott (1857), 1 C. B. N. S. 590; Chasemore v. Richards (1859), 7 H. L. Cas. 350; Stockport Waterworks Co. v. Potter (1864), 3 H. & C. 300; Nuttall v. Bracewell (1866), 36 L. J. Ex. 1; Grand Junction Canal v. Shugar (1871), 24 L. T. 402; Pennington v. Brinsop Hall Coal Co. (1877), 41 J. P. 758; Orr Ewing v. Colquhoun (1877), 2 App. Cas. 839; Pennington v. Brinsop Hall Co. (1877), 5 Ch. D. 769; Angus v. Dalton & H. M. Works & Public Buildings Comrs. (1878), 40 L. T. 605; Sandwich v. G. N. Ry. (1878), 10 Ch. D. 707; Kensit v. G. E. Ry. (1883), 23 Ch. D. 566; Ormerod v. Todmorden Joint Stock Mill Co. (1883), 11 Q. B. D. 155; Withers v. Purchase (1889), 60 L. T. 819; Bradford Corp. v. Ferrand, [1902] 2 Ch. 655; McCartney v. Londonderry & Lough Swilly Ry., [1904] A. C. 301; Sharp v. Wilson, Rotheray (1905), 93 L. T. 155.

38. Whether proof of actual damage essential—Breach of contract.]—MARZETTI v. WILLIAMS, No. 21, *ante*.

39. ———.]—*Procuring breach of contract.]*—EXCHANGE TELEGRAPH Co. v. GREGORY & Co. No. 13, *ante*.

40. ———.]—A contract by B. to buy special goods from A. on the condition of not reselling, except to certain persons, at less than a

PART II. SECT. 4.

36 i. General rule—Presumption of damage—On injury to right.]—Pltf. were unable to prove any specific substantial damage.—*Held*: entitled to nominal damages at least.—BRIGHTON VILLAGE v. AUSTON (1892), 19 A. R. 305.—CAN.

36 ii. ———.]—Where there is invasion of right, the law infers damages, & the fact that pltf. has not shown what pecuniary damages were sustained is no answer to claim for damages.—RAINY RIVER Co. v. WATROUS ISLAND BOOM Co. (1914), 17 D. L. R. 850.—CAN.

38 i. Whether proof of actual damage essential—Breach of contract.]—In an action for breach of contract it is incumbent on pltf. to prove damages.—ROSS v. GARRISON (1843), 6 O. S. 626.—CAN.

38 ii. ———.]—In an action on a bond where pltf. fails to prove any actual damage, there may be judgment for nominal damages.—KENNIN v. MACDONALD (1892), 22 O. R. 484.—CAN.

38 iii. ———.]—CROWE v. COUCH

(1910), 8 E. L. R. 45.—CAN.

38 iv. ———.]—Where debts, counterclaimed for breach of contract but furnished no particulars & offered no proof of damage.—*Held*: they were entitled to damages.—BLUE v. MILLER (1915), 43 N. B. R. 307.—CAN.

38 v. ———.]—SINCLAIR v. WALKER, [1917] 2 W. W. R. 321.—CAN.

38 vi. ———.]—In an action brought for breach of covenant, pltf. giving no evidence of any actual damage sustained by him.—*Held*: he was entitled to damages sustained by nonperformance of the covenant.—CROMMELIN v. DONOGAL (MARQUIS) (1853), 3 I. C. L. R. 434; 5 Ir. Jur. 386.—IR.

38 vii. ———.]—In all cases where damages are claimed for breach of contract, if the breach of contract is proved, although the amount of damage suffered may not be proved, it is the duty of the ct. to give nominal damages.—RIDDIFORD v. MONRAD BROTHERS (1901), 22 N. Z. L. R. 143.—N.Z.

38 viii. ———.]—In an action brought not to establish a right nor in respect of an *injuria* involving *contumelia* or insult, but merely for the purpose of recovering damages for an *injuria*, pltf. must prove the actual damages sustained.—EDWARDS v. HYDE, [1903] T. S. 381.—S. AF.

38 ix. ———.]—When an action on contract is brought solely for damages & not to establish any right pltf. must prove that he has actually sustained damage & in the absence of such proof he will not be entitled to nominal damages.—STERNKAMP v. JURIAANSE, [1907] T. S. 980.—S. AF.

38 x. ———.]—Where pltf. fails to prove the actual extent of his loss, he can recover only either nominal damages, or otherwise the lowest amount indicated by the evidence.—EMSLIE v. AFRICAN MERCHANTS, LTD., [1908] E. D. L. 82.—S. AF.

38 xi. ———.]—A mere technical breach of contract where there is no evidence at all of any loss or damage whatever having been sustained will not entitle pltf. to nominal damages.—SOLOMON v. THE ALFRED LODGE, [1917] C. P. D. 177.—S. AF.

fixed minimum price is not such a contract as will render C., who induces or procures B. to commit a breach of it, liable to an action of tort at the instance of A. In cases where an interference with a contractual relation is actionable substantial damage must be proved.

It is indisputable, I think, that damage is the gist of actions such as the present; that in order to succeed & make a good case for either damages or an injunction, damage must be proved, not indeed, damage in detail or special damage in the narrow sense of that epithet, but actual damage (KENNEDY, L.J.).—*NATIONAL PHONOGRAPH CO., LTD. v. EDISON-BELL CONSOLIDATED PHONOGRAPH CO., LTD.*, [1908] 1 Ch. 335; 77 L. J. Ch. 218; 98 L. T. 291; 24 T. L. R. 201, C. A.

Annotations.—*Mentd.* British Cash & Parcel Conveyors v. Lamson Store Service Co., [1908] 1 K. B. 1008; *Stott v. Gamble*, [1916] 2 K. B. 504; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244.

41. ———.]—Damages are essential to the right of action which a covenantee has against one who induces his covenantor to break his contract. Where the breach which has been procured would in the ordinary course inflict damage on *pltf.*, *pltf.* may succeed without proof of particular damage.—*GOLDSOLL v. GOLDMAN*, [1914] 2 Ch. 603; 84 L. J. Ch. 63; 112 L. T. 21; 59 Sol. Jo. 43; *affd.* on other grounds, [1915] 1 Ch. 292, C. A.

Annotations.—*Mentd.* *Morris v. Saxelby*, [1915] 2 Ch. 57; *Attwood v. Lamont*, [1920] 3 K. B. 571.

See, generally, TRADE & TRADE UNIONS.

42. ——— Interference with right to water—**Temporal loss or damage.**—Where *pltf.* alleged in his declaration that he was possessed of a messuage & premises, & by reason thereof entitled to the use of a stream of water running through the premises for supplying the same with water; & that *deft.* erected a certain dam higher up the stream, & thereby prevented the water from running in its usual course, in its usual calm & smooth manner, & thereby the water ran in a different channel, & with greater violence, & injured the banks & premises of *pltf.*; the jury found that *pltf.*'s banks & premises were not injured by the dam erected by *deft.*; but added, that *deft.* had no right to stop the water in the summer-time; the judge ordered the verdict to be entered for *deft.*.—*Held*: the verdict was right, for flowing water is *publici juris*, & an individual can only acquire a right to it by appropriating so much of it as he requires for a beneficial purpose, & therefore, *pltf.* could not recover damages for the mere erection of a dam, but was bound to allege & prove that he had sustained an injury from the want of a sufficient quantity of water.

Generally speaking, there must be a temporal loss or damage accruing from the wrongful act of another, in order to entitle a party to maintain an action on the case (LITTLEDALE, J.).—*WILLIAMS v. MORLAND* (1824), 2 B. & C. 910; 4 Dow. & Ry. K. B. 583; 2 L. J. O. S. K. B. 191; 107 E. R. 620.

Annotations.—*Refd.* *Brunsdon v. Humphrey* (1884), 14 Q. B. D. 141. *Mentd.* *Mason v. Hill* (1833), 5 B. & Ad. 1; *Arkwright v. Gell* (1839), 5 M. & W. 203; *Chasemore v. Richards* (1859), 7 H. L. Cas. 349; *Kensit v. G. E. Ry.* (1883), 23 Ch. D. 566.

43. ——— Derogation of right if repeated.]—*Pltfs.*, in common with the other inhabitants of a particular district, enjoyed a customary right at

all times to have water from a certain spout in a highway in the district for domestic purposes. *Deft.*, a riparian owner on the stream whereby the spout was supplied with water, on various occasions prevented such large quantities of water from reaching the spout as to render what remained insufficient for the needs of the inhabitants. *Pltfs.* had not themselves ever suffered any actual personal damage or inconvenience.—*Held*: an action for diverting the water was maintainable without proof of any actual personal damage, inasmuch as the act of *deft.* might, if repeated often enough without interruption, furnish evidence in derogation of *pltfs.*' legal rights.—*HARROP v. HIRST* (1868), L. R. 4 Exch. 43; 38 L. J. Ex. 1; 19 L. T. 426; 33 J. P. 103; 17 W. R. 164.

Annotations.—*Refd.* *George v. Lysaght & Meade-King* (1883), 49 L. T. 49; *Goodhart v. Hyett* (1883), 25 Ch. D. 183; *Bower v. Sandford* (1889), 5 T. L. R. 570; *Brocklebank v. Thompson*, [1903] 2 Ch. 344; *McCartney v. Londonderry & Lough Swilly Ry.*, [1904] A. C. 301. *Mentd.* *Wilts & Berks Canal Navigation Co. v. Swindon Waterworks Co.* (1873), 29 L. T. 722; *Hammerton v. Dysart*, [1916] 1 A. C. 57.

44. ——— Obstruction of irrigation water.]—

Pltf. had immemorially enjoyed the benefit of irrigating certain meadows with the water of the Y., subject to the right of the occupier of a mill to detain the water for the use of his mill; & although the natural flow of the river was prevented by the exercise of the miller's right, the water came down at such times that *pltf.* was enabled to irrigate his meadows effectually. But, of late, *deft.* had, for the purpose of irrigating his own adjacent land, from time to time diverted the water after it had passed the mill, & before it reached *pltf.*'s meadows; & although it did not appear that the quantity of water which ultimately reached *pltf.*'s meadows was thereby sensibly diminished, yet the effect was that the water was detained by the process of irrigation, & did not arrive till so late in the day that *pltf.* was deprived of the power to use it fully.—*Held*: that this detention of the water by *deft.* was a use of it which was in its character necessarily injurious to the natural rights of *pltf.* as a riparian proprietor, & a ground of action. In such a case, it is not necessary to show actual damage to *pltf.*'s reversionary interest; it is enough to show an obstruction of his right, & such obstruction of his right being shown, the law will infer damage.—*SAMPSON v. HODDINOTT* (1857), 1 C. B. N. S. 590; 26 L. J. C. P. 148; 28 L. T. O. S. 304; 21 J. P. 375; 3 Jur. N. S. 243; 5 W. R. 230; 140 E. R. 242; *affd.*, 3 C. B. N. S. 596, Ex. Ch.

Annotations.—*Consd.* *Kensit v. G. E. Ry.* (1883), 23 Ch. D. 566. *Refd.* *Crossley v. Lightowler* (1866), L. R. 3 Eq. 279; *McCartney v. Londonderry & Lough Swilly Ry.*, [1904] A. C. 301. *Mentd.* *Stockport Waterworks Co. v. Potter* (1864), 3 H. & C. 300; *Roberts v. Richards* (1881), 50 L. J. Ch. 297; *Kensit v. G. E. Ry.* (1884), 27 Ch. D. 122; *Simpson v. Godmanchester Corpn.*, [1896] 1 Ch. 214; *Sharp v. Wilson, Rotheray* (1905), 93 L. T. 155.

See, further WATER & WATER COURSES.

45. ——— Invasion of right by fraud.]—

Declaration stated, that *pltf.*, being the inventor & manufacturer of metallic hones, used certain envelopes for the same, denoting them to be his; & that *defts.* wrongfully made other hones, wrapped them in envelopes resembling *pltf.*'s & sold them as his own, whereby *pltf.* was prevented from selling many of his hones, & they were depreciated in

42 i. ——— Interference with right to water.]—A dam erected by *deft.* across a stream from his land on to *pltf.*'s land obstructed the flow of a stream, but did no appreciable damage to *pltf.*.—*Held*: *pltf.* was not entitled to nominal damages.—*NAGLE v. MILLER* (1904), 29 V. L. R. 765.

—AUS.

42 ii. ———.]—*BROWN v. GUGY* (1864), C. R. 5 A. C. 40.—CAN.

42 iii. ———.]—Diversion of a natural stream from its natural channel in front of the land of a riparian proprietor is actionable at his instance

without proof of actual damage.—*SAUNDERS v. RICHARDS & Co.* (1904) 21 C. L. T. 510; 2 N. B. Eq. Rep 303.—CAN.

45 i. ——— Invasion of right by fraud.]—Where there is an invasion of a right perpetrated by fraud actual

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value & reputation, those of defts. being inferior :—**Held**: pltf. was entitled to some damages for the invasion of his right by the fraud of defts., though he did not prove that their honours were inferior, or that he had sustained any specific damage.—**BLOFELD v. PAYNE** (1833), 4 B. & Ad. 410; 1 Nev. & M. K. B. 353; 2 L. J. K. B. 68; 110 E. R. 509.

Annotations:—**Consd.** *Dent v. Turpin*, *Tucker v. Turpin* (1861), 2 John. & H. 139. **Refd.** *Pryce v. Belcher* (1846), 3 C. B. 58; *Rodgers v. Nowill* (1847), 5 C. B. 109; *Reddaway v. Bentham Hemp Spinning Co.*, [1892] 2 Q. B. 639; *Spalding v. Gamage* (1915), 84 L. J. Ch. 449. **Mentd.** *Sealey v. Fisher* (1841), 10 L. J. Ch. 274; *Crawshaw v. Thompson* (1842), 4 Man. & G. 357; *Burgess v. Burgess* (1853), 22 L. J. Ch. 675; *Dixon v. Fawcus* (1861), 7 Jur. N. S. 895; *Leather Cloth Co. v. Hirschfeld* (1865), L. R. 1 Eq. 299; *Singer Manufacturing Co. v. Loog* (1882), 8 App. Gas. 15.

46. — Nuisance.—A declaration in case stated that deft., being possessed of a messuage adjoining a garden of pltf., erected a cornice upon his messuage, projecting over the garden, by means whereof rainwater flowed from the cornice into the garden, & damaged the same, & pltf. had been incommoded in the possession & enjoyment of his garden :—**Held**: the erection of the cornice was a nuisance from which the law would infer injury to pltf.; & that he was entitled to maintain an action in respect thereof, without proof that rain had fallen between the period of the erection of the cornice & the commencement of the action.—**FAY v. PRENTICE** (1845), 1 C. B. 828, 14 L. J. C. P. 298; 5 L. T. O. S. 216; 9 Jur. 876; 135 E. R. 709.

Annotations:—**Refd.** *Brunsdon v. Humphrey* (1884), 14 Q. B. D. 141; *Lenmon v. Webb*, [1894] 3 Ch. 1.

47. — Disobedience to subpoena.—In an action against a witness for not obeying a subpoena, proof of actual damage having been sustained by pltf. through the witness's breach of duty is essential. The action will lie if the witness's evidence was material upon any of the issues even though pltf. had not a good cause of action.—**COULING v. COXE** (1848), 6 C. B. 703; 6 Dow. & L. 399; 12 L. T. O. S. 332; 136 E. R. 1424; *sub nom.* **COWLING v. COXE**, 18 L. J. C. P. 100; 13 Jur. 101. **Annotations**:—**Consd.** *Yeatman v. Dempsey* (1860), 7 C. B. N. S. 628; *Crews v. Field* (1896), 12 T. L. R. 405. **Mentd.** *Rutland v. Bagshaw* (1850), 14 Q. B. 869.

48. — ——In an action for damages for not appearing & giving evidence on subpoena pltf. must show that he has sustained some loss or damage by reason of deft.'s non-attendance.—**CREWE v. FIELD** (1896), 12 T. L. R. 405.

See, further, EVIDENCE.

49. — Pound breach.—An action for treble damages for pound breach or rescous of goods distrained for rent under 2 Will. & M. c. 5, s. 4, is maintainable by the landlord without proof of any special damage suffered by him.

In my judgment pltf. had a clear right not to have his pound invaded by defts. & could sue them for having invaded that right even although he proved no special damage, for he was entitled at any rate to nominal damages (**SMITH, L.J.**).—

damage must be proved in order to recover damages.—**RICHARDSON v. HATRICK & MERSON** (1908), 28 N. Z. L. R. 170.—N.Z.

46 i. — Nuisance.—In order to maintain an action for damage resulting from a nuisance, pltf. must prove some actual injury to himself.—**KALAIPOI (MAYOR) v. BESWICK** (1867), 1 C. A. 192.—N.Z.

51 i. Whether proof of actual pecuni-

ary loss essential.—Parties are entitled to nominal damages upon proof of a breach of duty without showing any actual damage.—**NERLICH v. MALLOY** (1879), 4 A. R. 430.—CAN.

51 ii. — ——Where defts. infringed pltf.'s legal right, & pltf. had given no evidence that he had sustained substantial damage :—**Held**: pltf. was entitled at least to a decree without damages & costs.—**KALIAPPA KAUNDAN v. VAYAPURI KAUNDAN**

(1898), 79 L. T. 233; 14 T. L. R. 572, C. A.

Annotation:—**Refd.** *Jones v. Biernstein*, [1899] 1 Q. B. 470.

50. — Claim for damages in equity.—Damages in equity for loss occasioned by pulling up a railway will be computed upon a general view of the whole case, & an estimate & allowance will be made of such a sum as may be considered a recompense for the loss sustained. Parties who make a claim for damages in equity must by evidence establish the facts on which they base their claim.—**MOLD v. WHEATCROFT** (1860), 30 L. J. Ch. 598.

51. Whether proof of actual pecuniary loss essential—Breach of duty infringing right.—A sheriff having a writ of *ca. sa* delivered to him unnecessarily delayed putting it into force :—**Held**: an action lay against him at the suit of the execution creditor though no actual pecuniary damage had arisen from the default.

When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount (**LORD DENMAN, C.J.**).—**CLIFTON v. HOOPER** (1844), 6 Q. B. 468; 14 L. J. Q. B. 1; 4 L. T. O. S. 92; 8 Jur. 958; 115 E. R. 175.

Annotations:—**Refd.** *Pryce v. Belcher* (1847), 4 C. B. 866; *Hobson v. Thellusson* (1867), 8 B. & S. 476.

52. — Wrongful detention of goods—Mere denial of right.—**WILLIAMS v. PEEL RIVER LAND & MINERAL CO., LTD.**, No. 23, *ante*.

53. — Deprivation of use of chattel.—Owing to a collision with a ship, the ship being in fault, a steam dredger was injured & the owners were deprived of the use of it for some weeks & the dredging works were delayed. The dredger belonged to trustees charged with the duty of maintaining a harbour & waterway, deriving their funds from rates & not entitled to distribute profits. The trustees having brought a collision suit in the Admty. against the shipowners :—**Held**: though the trustees were not out of pocket in any definite sum they were entitled to recover damages for the loss of the use of the dredger.—**No. 7 STEAM SAND PUMP DREDGER (OWNERS) v. GRETA HOLME (OWNERS), THE GRETA HOLME**, [1897] A. C. 596; 66 L. J. P. 166; 77 L. T. 231; 13 T. L. R. 552; 8 Asp. M. L. C. 317, H. L.; *revg.* S. C. *sub nom.* **THE EMERALD, THE GRETA HOLME**, [1896] P. 192, C. A.

Annotations:—**Appld.** *S.S. Mediana v. Lightship Comet*, *The Mediana*, [1900] A. C. 113. **Consd.** *The Bodlewell*, [1907] P. 286; *Mersey Docks & Harbour Board v. S.S. Marpessa*, *The Marpessa*, [1907] A. C. 241; *Admiralty Comrs. v. S.S. Valeria*, [1922] 2 A. G. 242. **Refd.** *The Kate* (1899), 80 L. T. 423; *The Astrakhan* (1910), 102 L. T. 539; *The Tugela* (1913), 30 T. L. R. 101. **Mentd.** *Jackson v. Watson*, [1909] 2 K. B. 193.

54. — ——A dock & harbour board were deprived of the services of a dredger owing to a collision with a steamship in fault. The dredger cost much to maintain, earned nothing, & was maintained out of the rates. In applying the principle of *The Greta Holme*, No. 53, *ante*, to the assessment of damages payable by the owner of the steamship :—**Held**: the loss sustained included the value of the work which would have

(1865), 2 Mad. 442.—IND.

51 iii. — ——In an action of damages, mill-owners failed to prove specific pecuniary damage but proved they were put to trouble & inconvenience before they could obtain fulfilment of the contract :—**Held**: they were entitled to moderate damages.—**WEBSTER & CO. v. CHAMOND IRON CO.** (1875), 2 R. (Ct. of Sess.) 752.—SCOT.

been done by the dredger if she had not been disabled, & a sum for the cost of the daily supplies requisite for the dredger when at work, but not a sum for owners' profit, since the board had not incurred the expense of hiring a dredger.—*MERSEY DOCKS & HARBOUR BOARD v. MARPESSA (OWNERS)*, [1907] A. C. 241; 97 L. T. 1; 23 T. L. R. 572; 51 Sol. Jo. 530; 10 Asp. M. L. C. 464, H. L.; *sub nom.* *THE MARPESSA*, 76 L. J. P. 128, H. L.; *affy.* S. C. *sub nom.* *THE MARPESSA*, [1906] P. 95, C. A.

Annotations :—*Apld.* *The Tugela* (1913), 30 T. L. R. 101. *Distd.* *Admiralty Comrs. v. S.S. Valeria*, [1922] 2 A. C. 242. *Refd.* *The Bodlowell*, [1907] P. 286; *The Kingsway*, [1918] P. 344; *Re Mersey Docks & Admiralty Comrs.*, [1920] 3 K. B. 223.

55. ———.]—*Pltfs.' dredger was sunk by defts.' steamship in the entrance to the Swansea Channel on Feb. 4, 1912. She was raised on Sept. 2, 1912, & was ready for use on Feb. 6, 1913. It was impossible, until after she had been raised, to dredge where she was sunk, & a bank was formed by the sand silting down on her. After she was raised pltfs. hired another dredger:—Held: pltfs. were entitled to damages, not merely for the period during which they had hired another dredger, but also for the period during which they had lost the use of their own dredger by reason of the fact that she was sunk.—THE TUGELA (1913), 30 T. L. R. 101.*

56. ———.]—*MEDIANA (OWNERS) v. COMET (OWNERS, ETC.)*, *THE MEDIANA*, No. 9, *ante*.

57. ———.]—*Warship.*—A Danish warship was just completing a long winter training cruise when she came into collision, in the Sound, with a British vessel, & in an action of damage by collision, brought by the Danish Govt. against the owners of the British vessel, the British vessel was found alone to blame. In ordinary course, the warship would have been docked & overhauled, & not put into commission until three months had elapsed, & would then have been used for a summer training cruise. Before the expiration of the three months the repairs necessitated by the collision were being executed, & the vessel ready to be put into commission. At the reference for the assessment of the damage sustained by the warship a claim of £1,500 for the loss of the use of the vessel was disallowed. On objection to the report:—*Held*: the principles laid down in *The Mediana*, No. 9, *ante*, with reference to damages for deprivation of the use of a chattel, were applicable to the case of a warship, & therefore, as by reason of the wrongful act of defts., the Danish Govt. had not for a period of 22 days, during which the repairs rendered necessary by the collision were being executed, had the vessel under their control for use if they wanted her, the registrar was directed to assess the damages on the basis of that portion of the three months, thereby reducing the amount claimable under the head of deprivation of the use of the vessel to something under £400.—*THE ASTRAKHAN*, [1910] P. 172; 79 L. J. P. 78;

102 L. T. 539; 26 T. L. R. 329; 11 Asp. M. L. C. 390.

58. ———.]—*Freight earning vessel.*—In 1917 a ship, which had been chartered by the Admty., was damaged owing to a collision with another ship, the latter being solely to blame, & was detained for a week for repairs. At the time of the collision the chartered ship was used as an ordinary trading vessel for freight. In assessing the damage caused by the detention of the ship for repairs:—*Held*: the measure of damages was the amount of freight which, but for the accident, the ship would have earned during the period of detention, plus working expenses, & was not the sum of the actual out-of-pocket expenses, including the cost of the hire of the ship, to which the Admty. were put during that period.—*ADMIRALTY COMRS. v. S.S. VALERIA*, [1922] 2 A. C. 242; 92 L. J. K. B. 42; 128 L. T. 97; 16 Asp. M. L. C. 25, H. L.

Annotation :—*Refd.* *Granby v. Bakewell* U. D. C. (1923), 87 J. P. 105.

See, further, SHIPPING & NAVIGATION.

Action on contract by executors or administrators—Damages to testator's personal estate.—*See EXECUTORS & ADMINISTRATORS.*

Action against sheriff.—*See SHERIFFS & BAILIFFS.*

Excessive distress by landlord.—*See DISTRESS.*

Action for public nuisance.—*See NUISANCE.*

Slander.—*See LIBEL & SLANDER.*

Breach of promise of marriage after death of promisor.—*See HUSBAND & WIFE; EXECUTORS & ADMINISTRATORS.*

Right of support to land—Action for interference with.—*See EASEMENTS & MINES, MINERALS & QUARRIES.*

Prospective & continuing damages.—*See Sect. 5, post.*

Injuria absque damno.—*See ACTION*, Vol. I., p. 29, Nos. 231, 232.

Damnun absque injuria.—*See ACTION*, Vol. I., pp. 29, 35, Nos. 233–274.

SECT. 5.—DAMAGES ASSESSED ONCE AND FOR ALL—PROSPECTIVE AND CONTINUING DAMAGE.

See R. S. C., Ord. 36, r. 58.

59. *General rule.*—If, after recovering damages in an action of assault, battery, & wounding, *pltf.* is put to great expense, in consequence of the injury he received, yet he cannot bring a second action to recover further compensation for the consequential damage he sustains; for it shall be intended that the jury considered all possible consequences on the trial of the first action.—*FITTER v. VEAL* (1701), 12 Mod. Rep. 542; 88 E. R. 1506; *sub nom.* *FETTER v. BEALE*, Holt, K. B. 12; 1 Salk. 11; *sub nom.* *FERRER v. BEALE*, 1 Ld. Raym. 692.

Annotations :—*Consd.* *Howell v. Young* (1825), 2 C. & P.

PART II. SECT. 5.

59 i. *General rule.*—In an action for injuries caused by negligence, *pltf.* is entitled to full compensation for all pecuniary loss, past & future.—*MCDONALD v. HOSKINS* (1892), 18 V. L. R. 417.—*AUS.*

59 ii. ———.]—*Pltf. was entitled to the lateral support of defts.' land, in which they made excavations, whereby pltf.'s land was damaged:—Held: no sum should be allowed for damages to arise in future.—SNARR v. GRANITE CURLING & SKATING CO.* (1882), 1 O. R. 102.—*CAN.*

59 iii. ———.]—In an action for

injuries to a wife, the husband may recover damages not only for the loss of his wife's services previous to the commencement of the action, but also prospective damages resulting from her injury.—*FOX v. ST. JOHN CORPN.* (1883), 23 N. B. R. 244.—*CAN.*

59 iv. ———.]—Damages that result from one & the same cause of action must be assessed & recovered once for all.—*RYAN v. CANADIAN PACIFIC RY. CO.*, [1919] 2 W. W. R. 368.—*CAN.*

59 v. ———.]—A single act amounting either to a delict or breach of contract

cannot be made the ground of two or more actions for the purpose of recovering damages arising within different periods, but the whole damage present & future must be recovered in one action.—*STEVENSON v. PONTIFFEX & WOOD* (1887), 15 R. (Ct. of Sess.) 125; 25 Sc. L. R. 120.—*SCOT.*

59 vi. ———.]—In an action brought to recover damages caused by a river, in consequence of works negligently erected by defts., the ct. gave *pltf.* the option of recovering damages for all injury, actual & prospective, or of recovering merely for damage actually suffered at the time of trial.—*DOMINGO*

Sect. 5.—Damages assessed once and for all—prospective and continuing damage.]

238; *Bonomi v. Backhouse* (1858), E. B. & E. 622; *Brunsdon v. Humphrey* (1884), 14 Q. B. D. 141. *Refd.* *Roswell v. Prior* (1701), 1 Ld. Raym. 713; *Whitehouse v. Fellowes* (1861), 10 C. B. N. S. 765; *Blyth v. Fladgate*, *Morgan v. Blyth*, *Smith v. Blyth* (1890), 63 L. T. 546.

60. —[In an action for permanently injuring the hand of an apprentice, whereby loss of service accrued, the master may recover for prospective damage, for the damage alone is not the cause of action, but the illegal act & the damage together, & the master could not bring a fresh action as often as fresh damage resulted.—*HODSOLL v. STALLEBRASS* (1840), 11 Ad. & El. 301; 9 C. & P. 63; 8 Dowl. 482; 3 Per. & Dav. 200; 9 L. J. Q. B. 132; 113 E. R. 429.

Annotations.—*Distd.* *Brunsdon v. Humphrey* (1884), 14 Q. B. D. 141. *Apld.* *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127. *Refd.* *Russell v. Shinn* (1861), 2 F. & R. 395; *Alton v. Mid. Ry.* (1865), 19 C. B. N. S. 213; *Osborn v. Gillett* (1873), L. R. 8 Exch. 88.

61. —[The test whether a previous action is a bar is not whether the damages sought to be recovered are different but whether the cause of action is the same (*BOVILL*, C.J.).—*GIBBS v. CRUIKSHANK* (1873), as reported in L. R. 8 C. P. 451.

Annotations.—*Refd.* *Smith v. Enright* (1893), 63 L. J. Q. B. 220. *Mentd.* *Dover v. Child* (1876), 34 L. T. 737.

62. —[Deft., a widow lady, entered into an agreement with plffs. to grant them a lease of certain premises in the city of London for the purpose of their business. Deft. afterwards found that she was only entitled to an undivided moiety of the premises in question, the other moiety being vested in her son, an infant, so that she was unable to execute a lease for the whole of the premises. Plffs. brought their action for specific performance, with compensation, & also claimed damages in respect of their liability to eviction.—*Held*: specific performance must be granted in respect of defts.'s undivided moiety, with an abatement of one-half of the rent, but that nothing could be awarded by way of damages, as those claimed were merely prospective.—*BURROW v. SCAMMELL* (1881), 19 Ch. D. 175; 51 L. J. Ch. 296; 45 L. T. 606; 30 W. R. 310.

Annotations.—*Mentd.* *Clayton v. Leech* (1889), 41 Ch. D. 103; *Hexter v. Pearce*, [1900] 1 Ch. 341.

63. —[Plt. sued deft. in the county ct. to recover damages for injury done to pltf.'s cab in a collision caused by the negligence of deft.'s servant, & obtained judgment. Afterwards pltf. sued deft. in the High Ct. to recover damages for personal injury which he had suffered in the same collision.—*Held*: the damage to the cab & the personal injury constituted two distinct causes of action, & therefore the judgment recovered in the county ct. was no bar to the subsequent action in the High Ct. & pltf. was entitled to recover.

The rule of the ancient common law is that where one is barred in any action real or personal by judgment, demurrer, confession or verdict, he is barred as to that or the like action of the like nature for the same thing for ever. The principle is frequently stated in the form of another legal proverb, *Nebo debet bis vexari pro eadem causa*. It is a well settled rule of law that damages resulting from one & the same cause of action must be assessed & recovered once for all (*BOWEN*, L.J.).—*BRUNSDON v. HUMPHREY* (1884), 14 Q. B. D. 141;

53 L. J. Q. B. 476; 51 L. T. 529; 49 J. P. 4; 32 W. R. 944, C. A.

Annotations.—*Distd.* *Macdougall v. Knight* (1890), 25 Q. B. D. 1. *Apld.* *Furness, Withy v. Hall* (1909), 25 T. L. R. 233. *Consd.* *Wilson v. United Counties Bank*, [1920] A. C. 102. *Refd.* *Serrao v. Noel* (1885), 15 Q. B. D. 549; *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; *London v. London Road Car Co.* (1888), 4 T. L. R. 448; *Mid. Ry. v. Martin* (1893), 62 L. J. Q. B. 517; *James v. Evans* (1897), 77 L. T. 78; *Rose v. Buckett* (1901), 84 L. T. 670; *Isaacs v. Salbstein*, [1916] 2 K. B. 139; *Goldrei Foucard v. Sinclair & Russian Chamber of Commerce in London*, [1918] 1 K. B. 180. *Mentd.* *Edmonds v. Robinson* (1885), 29 Ch. D. 170; *Ord v. Ord*, [1923] 2 K. B. 432.

64. —[When damage is caused to land by the removal of the minerals under it & the consequent subsidence of the surface, the owner has a cause of action whenever, & as often as, such damage takes place. Resp. was the owner of land, & in 1867 & 1868 appts. worked out the coal under the land without leaving proper support, in consequence of which the surface subsided & some cottages belonging to resp. were injured. The appts. made compensation for the injury, & did not work the minerals after 1868. In 1882 a further subsidence occurred from the combined effect of the previous workings of appts. & workings under the adjoining land. Resp. brought an action to recover compensation for the injury he had sustained.—*Held*: a new cause of action arose in respect of the second subsidence. It is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must if he sues in respect of it do so once for all (*LORD BRAMWELL*).

No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once & for ever (*LORD HALSHURY*, C.J.).—*DARLEY MAIN COLLIERY Co. v. MITCHELL* (1886), 11 App. Cas. 127; 55 L. J. Q. B. 529; 51 L. T. 882; 51 J. P. 148; 2 T. L. R. 301, II. L.; *affg.* S. C. *sub nom.* *MITCHELL v. DARLEY MAIN COLLIERY Co.* (1884), 14 Q. B. D. 125, C. A.

Annotations.—*Apld.* *Brunsdon v. Humphrey* (1884), 14 Q. B. D. 141. *Fold.* *Crumble v. Wallend L. B.*, [1891] 1 Q. B. 503. *Consd.* *Greenwell v. Low Beechburu Coal Co.*, [1897] 2 Q. B. 165. *Refd.* *Serrao v. Noel* (1885), 15 Q. B. D. 549; A.-G. v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301; *Jordeson v. Sutton Southcoates & Drypool Gas Co.* (1898), 67 L. J. Ch. 666; *Hall v. Norfolk*, [1900] 2 Ch. 493; *Markey v. Tolworth Joint Hospital District Board* (1900), 69 L. J. Q. B. 738; *Carcy v. Bermondsey B. C.* (1903), 2 L. G. R. 219; *Harrington v. Derby Corpn.*, [1905] 1 Ch. 205; *West Leigh Colliery Co. v. Tunncliffe & Hampson*, [1908] A. C. 27; *Manley v. Burn*, [1916] 2 K. B. 121; *Nash v. Itchford R. C.*, [1917] 1 K. B. 384; *Boynton v. Ancholme Drainage & Navigation Comrs.*, [1921] 2 K. B. 213; *Kennard v. Cory* (1922), 91 L. J. Ch. 452.

65. —[In action in detinue in the county ct. pltf. by mistake claimed too small a sum. Deft. paid into ct. the amount claimed without denial of liability, & it was taken out by pltf. Upon discovering his mistake pltf. asked leave to amend his particulars, which was refused & judgment was given in the action for deft. Pltf. then began a new action for the larger amount giving credit to deft. for the sum previously paid into ct.—*Held*: the matter was *res judicata* & the action was not maintainable.

I think the ordinary law on this subject is contained in the maxim *Nemo debet bis vexari* (*DARLING*, T.).—*SANDERS v. HAMILTON* (1907), 96 L. T. 679; 23 T. L. R. 389, D. C.

66. —[H. & Co. sent a vessel to plffs. to be overhauled. As the vessel's refrigerating

v. COLONIAL GOVERNMENT (1905), 22 S. C. 101.—S. AF.

1. Separate causes of action—*Not withstanding injunction*.—[Pltf. re-

covered damages for breach of contract & obtained an injunction against further breaches. Deft. again made default & pltf. brought a further action for damages.—*Held*: pltf. was en-

titled to proceed for the recovery of damages in respect of the new breach.—*ANDERSON v. MILL* (1912), 14 W. A. L. R. 184.—AUS.

machinery was out of order pl'tfs. employed defts. to do the necessary work upon it. Under their contract with H. & Co. pl'tfs. were liable to a penalty in the event of the work not being completed within a specified time. Owing to an accident, due to the negligence of def't.'s workmen, the work was not completed within the time specified. In 1906 defts. sued pl'tfs. for work done & materials supplied in respect of the refrigerating machinery of the vessel in question, & pl'tfs. in turn sued H. & Co. for the balance of their account for work done. H. & Co. admitted the claim for work done but counterclaimed from pl'tfs. £618 for penalties for the work not being completed within the specified time. Pl'tfs. in their action with defts. counterclaimed the sum of £618 for penalties alleged to be due to H. & Co. At the trial of these actions judgment was given for H. & Co. for £500, & for pl'tfs. against defts. for the same amount. In their action against H. & Co. pl'tfs. incurred costs to the amount of £525 6s. 11d., but pl'tfs. did not put forward any claim in their action in 1906 with defts. in respect of these costs. Pl'tfs. now sought to recover the amount of these costs from defts.:—*Held*: the action failed inasmuch as the matter was *res judicata*.—*FURNESS, WITHEY & CO., LTD. v. HALL (J. & E.), LTD. (1909), 25 T. L. R. 233.*

67. Separate causes of action—Arising from same tort.—*BRUNSDEN v. HUMPHREY, No. 63, ante.*

68. Cause of action independent of damage—Whether prospective damage recoverable—Breach of contract of service—Term not expired.—Pl'tf. declared for procuring his apprentice to depart from his service, & for the loss of his service, for the whole residue of the term of his apprenticeship, & the jury assessed damages generally, judgment was arrested, because it appeared that the term was not expired.—*HAMBLETON v. VEERE (1670), 2 Saund. 169; 85 E. R. 916.*

Annotations:—Refd. Acton v. Eels (1696), 2 Salk. 662; Hodson v. Stallebrass (1840), 11 Ad. & El. 301; Griffiths v. Lewis (1846), 8 Q. B. 841.

69. — — — — —.]—Where one party contracts to serve another for a period of five years at a guaranteed salary *per annum*, & at the expiration of one year sues for damages in respect of non-payment for such year, confining his declaration to the non-payment for such year, he is not precluded at the expiration of the term from suing for damages in respect of non-payment during the subsequent years, the pleadings in the former action not showing that the contract was put an end to, or that he was discharged from his employment.—*CLOSSMAN v. LACOSTE (1854), 23 L. T. O. S. 91; 2 W. R. 455.*

70. — — — — —.]—When an apprentice has absented himself, the fact that the master declined to have any trouble taken to find him, & described him as worthless, though it will not sustain a plea of leave & licence, may be material in mitigation of damages, in an action by the master on the deed of apprenticeship against

the father, & the jury can only give the real value of his services up to the time of action.

Pl'tf. cannot recover damages up to the end of the term, but only for the period from the absenting to the bringing of the action. But if pl'tf. afterwards assented to the absence, you can give no damages from the time of such assent, & in any view you may consider what was the value of the apprentice's services, which might be the difference between his earnings & his keep (*BYLES, J.*).—*RUSSELL v. SHINN (1861), 2 F. & F. 395, N. P.*

71. — — — — —.]—An action was brought by the master against the father of an apprentice on an indenture of apprenticeship to service the master for a period of five years from May 1, 1860, & it was alleged as a breach of covenant that the apprentice unlawfully absented himself from his master's service. It was proved that def't. took his son away from pl'tf. on Jan. 18, 1862, & the writ in the action issued on Feb. 10, 1863:—*Held*: pl'tf. was entitled to recover damages for the absence of his apprentice from Jan. 18, to Feb. 10, & was not entitled to prospective damages for the whole term of the apprenticeship.—*LEWIS v. PEACHEY (1862), 1 H. & C. 518; 31 L. J. Ex. 496; 27 J. P. 40; 10 W. R. 797; 158 E. R. 989.*

72. — — — — — **Loss of service of apprentice—Through injury.**—*HODSOLL v. STALLEBRASS, No. 60, ante.*

73. — — — — — **Compulsory entry on land subject to compensation.**—Where a person is authorised to enter another person's land on the terms of paying compensation for all damage done, such compensation may be fixed in an action on the footing of paying once for all, & so taking away all right of action for subsequent damage.—*GREAT LAXEY MINING CO. v. CLAGUE (1878), 4 App. Cas. 115; 27 W. R. 417, P. C.*

See, further, COMPULSORY PURCHASE OF LAND & COMPENSATION, Vol. XI., pp. 148–150, Nos. 319–327.

74. — — — — — **Repudiation of contract.**—Prospective damages are properly awarded for the breach of an annual contract which provides that the purchaser shall ultimately buy all the existing material in the possession of the vendor.—*EMERY (GEORGE D.) CO. v. WELLS, [1906] A. C. 515; 75 L. J. P. C. 104; 95 L. T. 589, P. C.*

Annotation:—Refd. Re Rubel Bronze & Metal Co. & Vos, [1918] 1 K. B. 315.

75. — — — — —.]—A coal co. contracted to supply a steel co. from designated mines with "all the coal that the steel co. may require for use in its own works as hereinafter described. All coal furnished shall be reasonably free from stone & shale & shall be supplied from such seams then being worked by the coal co. as the steel co. may designate. The steel co. agreed, so long as the coal co. should be willing & ready to supply it with coal, to purchase all the coal it required, to the amount agreed, from the coal co." The steel

671. — — — — — **Arising from same tort.**—A party cannot split up his claim for damages & proceed for part of a trespass at one time, & part at another.—*LAWTON v. ADAMS (1862), 5 All. 274.—CAN.*

g. Continuing damage.—In an action by lessor against lessee on a covenant to repair fences, on or before a certain day:—*Held*: not being a continuing covenant damages must be assessed once for all.—*COLE v. BUCKLE (1868), 18 C. P. 286.—CAN.*

h. — — — — —.]—In an action for breach of contract entered into by a railway co. to run trains from one

part of a city to another:—*Held*: if the railway co. admitted they were never again going to run trains between the two parts of the city damages should be assessed once for all, which might be done either by fixing one solid sum, or by directing a yearly payment.—*ST. THOMAS CITY v. CREDIT VALLEY RY. CO. (1888), 15 O. R. 673.—CAN.*

k. — — — — —.]—Where a watercourse has been diverted by a railway co. in constructing their line, the landowner injuriously affected is entitled to damages as for a permanent injury.—*ARTHUR v. GRAND TRUNK RY. CO. (1894), 22 A. R. 89.—CAN.*

l. — — — — —.]—Pl'tfs. sought damages for fraudulent representation whereby they were induced to lease def't.'s farm at a very high rental:—*Held*: although the lease had still a year to run after the commencement of the action, pl'tfs. could recover all their damages in this action, there being only one contract, & no right to bring a second action under it.—*JOHNSTONE v. HALL (1894), 10 Man. L. R. 161.—CAN.*

m. — — — — —.]—In an action by the owner of property adjoining a street railway for damages caused by vibration:—*Held*: damages should be assessed once for all, for all injuries, past, present & future.—*GABEAU v.*

Sect. 5.—Damages assessed once and for all—prospective and continuing damage. Sects. 6, 7 & 8.]

co. having rejected some of the coal which, though coming from the designated seams, was not suitable for the steel co.'s purposes:—*Held*: the steel co. was justified in such rejection, & the coal co. was not justified on the ground of such rejection in repudiating the contract, but that the steel company was not entitled both to specific performance of the contract & to damages for the loss of it, the contract not being one of which a ct. of equity would decree the specific performance. The steel co., however, was entitled, in consequence of the coal co.'s repudiation of the contract, to treat the contract as at an end & to recover damages for the loss of it, in addition to damages in respect of the breaches thereof.—*DOMINION COAL CO., LTD. v. DOMINION IRON & STEEL CO., LTD., & NATIONAL TRUST CO., LTD.*, [1909] A. C. 293; 78 L. J. P. C. 115; 100 L. T. 245; 25 T. L. R. 309, P. C.

76. Damages caused the gist of the action—Continuing damage—Whether each new damage gives rise to fresh cause of action—Obstruction of light.]—A reversioner recovered in an action for obstructing an ancient light, to the injury of his reversionary interest. The obstruction was not removed:—*Held*: he might maintain a second action for the continuance of the injury to his reversionary interest, &, on issue taken, whether this was the same identical grievance for which he had previously recovered, the reversioner was entitled to a verdict.—*SHADWELL v. HUTCHINSON* (1831), 4 C. & P. 334; 2 B. & Ad. 97; 9 L. J. O. S. K. B. 142; 109 E. R. 1079.

Annotations:—*Mentd.* *Baxter v. Taylor* (1832), 1 Nev. & M. K. B. 11; *Battishall v. Reed* (1856), 18 C. B. 696; *Johnstone v. Hall* (1856), 20 J. P. 579; *Metropolitan Assoc. for Improving the Dwellings of the Industrious Classes v. Petch* (1858), 5 C. B. N. S. 504.

77. ——— Subsidence.]—A declaration stated, that plffs. were seised in fee of certain land & houses which were contiguous to certain other land, & plffs. were entitled to the support of their land & houses by the land to which the same were so contiguous, & by the strata under the same, & also by the strata of minerals under plffs. land; & deft. wrongfully, & without leaving any proper or sufficient pillars or supports, worked certain coal mines under the land & houses of plffs., & under the land so contiguous to the same; by reason whereof, the soil & surface of plffs.' land sunk in, & the houses became ruinous. On demurrer:—*Held*: the cause of action was not the damage done to plffs.' land & houses by improperly working the mines, but the injury to plffs.' right to have their land & houses supported by the contiguous land & strata of coal; &, therefore, when any part of the necessary support was removed, although no actual damage, there was a complete cause of action for which plffs. might have recovered prospective damage, & no new cause of action arose from the subsequent

damage.—*NICKLIN v. WILLIAMS* (1854), 10 Exch. 259; 23 L. J. Ex. 335; 24 L. T. O. S. 61; 2 C. L. R. 1304; 156 E. R. 440.

Annotations:—*Apprvd.* *Backhouse v. Bonomi* (1861), 9 H. L. Cas. 503. *Consd.* *Lamb v. Walker* (1878), 3 Q. B. D. 389; *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127. *Refd.* *Whitehouse v. Fellowes* (1861), 10 C. B. N. S. 765.

78. ——— ——— ———.]—If by the act of A. an injury is occasioned to the foundations of the house of B., of which B. has not at the time any knowledge, but which afterwards exhibits itself by creating actual mischief to B.'s house, B. is not prevented by the Stat. Limitations from maintaining an action for damages, though more than six years have elapsed since the doing of the act which was in reality, though unknown at the time, the origin of the mischief, for the cause of action really accrued when the actual damage first exhibited itself.—*BACKHOUSE v. BONOMI* (1861), 9 H. L. Cas. 503; 34 L. J. Q. B. 181; 4 L. T. 754; 7 Jur. N. S. 809; 9 W. R. 769; 11 E. R. 825, H. L.; *affg.* S. C. *sub nom.* *BONOMI v. BACKHOUSE* (1859), E. B. & E. 646, Ex. Ch.

Annotations:—*Consd.* *Whitehouse v. Fellowes* (1861), 10 C. B. N. S. 765. *Distd.* *Spoor v. Green* (1874), L. R. 9 Exch. 99. *Consd.* *Lamb v. Walker* (1878), 3 Q. B. D. 389; *Darley Main Colliery Co. v. Mitchell* (1886), 11 App. Cas. 127; *Greenwell v. Low Beechburn Coal Co.*, [1897] 2 Q. B. 165; *Hall v. Norfolk*, [1900] 2 Ch. 493; *Hague v. Doncaster R. D. C.* (1908), 73 J. P. 69. *Appl.* *Westleigh Colliery Co. v. Tunncliffe & Hampson*, [1908] A. C. 27. *Refd.* *Hunt v. Peake* (1860), John. 705; *Rowbotham v. Wilson* (1860), 8 H. L. Cas. 348; *Todd v. Flight* (1860), 9 C. B. N. S. 377; *Croft v. L. & N. W. Ry.* (1863), 3 B. & S. 436; *Fletcher v. Rylands* (1865), 3 H. & C. 774; *Smith v. Thackerah* (1866), L. R. 1 C. P. 564; *Eadon v. Jeffcock* (1872), L. R. 7 Exch. 379; *Bower v. Peate* (1876), 1 Q. B. D. 321; *Birmingham Corp'n. v. Allen* (1877), 6 Ch. D. 284; *Echl. Comrs. for England v. N. E. Ry.* (1877), 4 Ch. D. 845; *Colley v. L. & N. W. Ry.* (1880), 49 L. J. Q. B. 575; *Dalton v. Angus, Works & Public Buildings Comrs.* v. *Angus* (1881), 6 App. Cas. 740; *Bell v. Love* (1883), 10 Q. B. D. 547; *Bean v. Wade* (1885), Cab. & El. 519; *Crumble v. Wallend L. B.* (1890), 60 L. J. Q. B. 392; *A.-G. v. Conduit Colliery Co.*, [1895] 1 Q. B. 301; *Harrington v. Derby Corp'n.*, [1905] 1 Ch. 205; *Nash v. Rochford R. C.*, [1917] 1 K. B. 384. *Mentd.* *Metropolitan Board of Works v. Met. Ry.* (1868), L. R. 3 C. P. 612; *Mason v. Shrewsbury & Hereford Ry.* (1871), 25 L. T. 239; *Edinburgh & District Water Trustees v. Clippens Oil Co.* (1902), 87 L. T. 275; *Aynsley v. Bedlington Coal Co.* (1918), 87 L. J. K. B. 1031; *Davies v. Powell Duffryn Steam Coal Co.* (1920), 36 T. L. R. 358.

79. ——— ——— ———.]—*SPOOR v. GREEN* (1874), L. R. 9 Exch. 99; 43 L. J. Ex. 57; 30 L. T. 393; 22 W. R. 547.

Annotation:—*Refd.* *Turner v. Moon*, [1901] 2 Ch. 825.

80. ——— ——— ———.]—Where injury has been occasioned to land & buildings by mining operations under the land of an adjoining owner, plff. is entitled to recover, in an action founded upon such injury, compensation, not only for the damage that has actually occurred at the time of action brought, but also for the prospective damage resulting from deft.'s act. As the cause of action was complete at the moment that the first damage accrued to him, plff. must recover once for all in one & the same action for all damage past, present & future, resulting from that one cause of action, for the reason that no occurrence of damage

MONTREAL STREET RY. CO. (1901), 31 S. C. R. 463.—*CAN.*

n. ———.]—The permanent character of damages cannot in all cases be assumed from the manner in which the works may have been constructed, &, where the nuisance might, at any time be abated by the improvement of the system of operation of machinery, etc., or the discontinuance of the negligent acts complained of, prospective damages ought not to be allowed, nor could the assessment, in a lump sum, for damages past, present & future, in order to prevent successive litigation, be justified upon the grounds

of equity or public interest.—*MONTEAL STREET RY. CO. v. BOUDREAU* (1905), 36 S. C. R. 329.—*CAN.*

o. ———.]—*SUNDY v. DOMINION NATURAL GAS CO.* (1912), 23 O. W. R. 228; 4 O. W. N. 167; 6 D. L. R. 863.—*CAN.*

p. ———.]—By a decree plff. was declared to have an easement of support on a wall on deft.'s land, which had been removed & had never since been restored:—*Held*: plff.'s damage had been assessed once for all, & the subsequent continuing loss of support did not create a further liability.—*NUGENT v. KEADY URBAN*

DISTRICT COUNCIL (1911), 46 I. L. T. 221.—*IR.*

q. ———.]—Where there are two actions both for damages & are framed in contract, for substantially the same cause of action, although the special damage complained of is not identical, plff. cannot recover in the second action.—*GARDINER v. MATHEWSON* (1854), 6 Ir. Jur. 147.—*IR.*

r. ———.]—A plff. having recovered damages is not entitled to institute a second action for damage to the same corpus of his property caused by the same act of negligence.—*DE WET v. PAYNTER*, [1921] C. P. D. 676.—*S. AF.*

subsequently, as the result of the original act of deft., would give a fresh cause of action.—**LAMB v. WALKER** (1878), 3 Q. B. D. 389; 47 L. J. Q. B. 451; 38 L. T. 643; 42 J. P. 532; 26 W. R. 775, D. C.

Annotations.—**N.F. Darley Main Colliery Co. v. Mitchell** (1886), 11 App. Cas. 127. **Refd.** **Brunsdon v. Humphrey** (1884), 53 L. J. Q. B. 476; **Greenwell v. Low Beechburn Coal Co.**, [1897] 2 Q. B. 165; **West Leigh Colliery Co. v. Tunncliffe & Hampson**, [1908] A. C. 27.

81. ————]—**DARLEY MAIN COLLIERY Co. v. MITCHELL**, No. 64, *ante*.

82. ————]—In consequence of an excavation carelessly made in a street by the local authority continuous & progressively increasing injury was caused by subsidence to some houses in the street belonging to pltf. The injury began more than six months after the action was brought:—**Held**: there was a fresh cause of action arising from the increase of injury within the six months before action, & consequently pltf.'s right was not barred by Public Health Act, 1875 (c. 55), s. 264.—**CRUMBIE v. WALLSEND LOCAL BOARD**, [1891] 1 Q. B. 503; 60 L. J. Q. B. 392; 64 L. T. 490; 55 J. P. 421; 7 T. L. R. 229, C. A.

Annotation.—**Mentd.** **Markey v. Tolworth Joint Hospital District Board** (1900), 69 L. J. Q. B. 738.

See, further, EASEMENTS & PROFITS A PRENDRE.

83. ————]—**Prospective damage—Whether recoverable.**—**NICKLIN v. WILLIAMS**, No. 77, *ante*.

84. ————]—**LAMB v. WALKER**, No. 80, *ante*.

85. ————]—In assessing the damage recoverable by a surface owner for subsidence owing to the working of minerals under or adjoining his property the depreciation in the market value of the property attributable to the risk of future subsidence must not be taken into account. To recover damages the surface owner must wait until the damage or injury caused by subsidence has happened.—**WEST LEIGH COLLIERY Co., LTD. v. TUNNICLIFFE & HAMPSON, LTD.**, [1908] A. C. 27; 77 L. J. Ch. 102; 98 L. T. 4; 24 T. L. R. 146; *sub nom.* **TUNNICLIFFE & HAMPSON, LTD. v. WEST LEIGH COLLIERY Co., LTD.**, 52 Sol. Jo. 93, H. L.; *revers.* S. C. *sub nom.* **TUNNICLIFFE & HAMPSON, LTD. v. WEST LEIGH COLLIERY Co., LTD.**, [1906] 2 Ch. 22, C. A.

Annotation.—**Refd.** **Wednesbury Corp. v. Lodge Holes Colliery Co.**, [1907] 1 K. B. 78.

86. ————]—**In respect of what injury damages assessable—Not for injury after action brought.**—Damages cannot be given for an injury done after the commencement of the action.—**BRASFIELD v. LEE** (1697), 1 Ld. Raym. 329; 91 E. R. 1115.

Annotation.—**Refd.** **Smalley v. Kerfoot** (1738), Andr. 242.

87. ————]—Damages cannot be recovered in an action for any matter which occurred after the commencement of the action.—**BAKER v. BACHE** (1725), 2 Ld. Raym. 1382; 92 E. R. 400.

88. ————]—**To what date damages assessable—In tort.**—Pltf. who had obtained damages in the county ct. for a misrepresentation under which he had been induced to enter into a contract, brought an action in the High Ct. for further damages accrued since judgment in the county ct.:—**Held**: a tort not being a continuing cause of action, no further damages could be obtained.—**CLARKE v. YORKE** (1882), 52 L. J. Ch. 32; 47 L. T. 381; 31 W. R. 62.

89. ————]—**In continuing causes of action—To**

date of assessment.—Formerly the damages in a common law action were only damages down to the date of the writ, but under the existing rules, Ord. 36, r. 58, it is provided that in respect of any continuing cause of action they shall be assessed down to the time of assessment (**CHITTY, J.**).—**JONES v. SIMES** (1890), 43 Ch. D. 607; 59 L. J. Ch. 351; 62 L. T. 447.

Annotation.—**Mentd.** **Peebles v. Oswaldtwistle U. D. C.**, [1896] 2 Q. B. 159.

90. ————]—A continuing cause of action within the meaning of R. S. C., Ord. 36, r. 58, is a cause of action arising from the repetition of acts or omissions similar to those in respect of which the action is brought.

Pltfs. brought an action against defts. for permitting sewage to fall into & pollute a stream running through pltfs.' land, & obtained judgment for a perpetual injunction & for damages. Defts. continued to pollute the stream, & three years after the judgment the Chief Clerk assessed the damages sustained by pltfs., carrying the assessment down to the date of his certificate:—**Held**: there was a continuing cause of action, within the meaning of R. S. C., Ord. 31, r. 58, & the damages were rightly assessed down to the time of the assessment.—**HOLE v. CHARD UNION**, [1894] 1 Ch. 293; 63 L. J. Ch. 409; 70 L. T. 52; 38 Sol. Jo. 113; 7 R. 84, C. A.

Annotation.—**Refd.** **Granby v. Bakewell U. D. C.** (1923), 87 J. P. 105.

91. ————]—Agreement provided that the lessor should execute certain work described in vague & general language, upon the premises to be demised by a fixed date, & the payment of a sum of Rs. 150 per day on non-completion by that date was stipulated for. In an action by the lessee against the lessor for damages for not completing the work by the date fixed, or at all:—**Held**: (1) the breach was a continuing breach up to the institution of the action; (2) the sum stipulated for was liquidated damages & not a penalty; (3) it being admitted that the agreement was in fact abandoned & would never be carried out, the ct. had jurisdiction to award damages for breach of the agreement down to the date of the judgment.—**DE SOYSA v. DE PRESS POL**, [1912] A. C. 194; 81 L. J. P. C. 126; 105 L. T. 642, P. C.

Continuing nuisances.—*See* NUISANCE.

Continuing trespass.—*See* TRESPASS.

Obstruction etc., of watercourses.—*See* WATER & WATERCOURSES.

SECT. 6.—DIRECTNESS AND REMOTENESS.

See Part III., *post*.

SECT. 7.—AGGRAVATION AND MITIGATION.

See Part IV., *post*.

SECT. 8.—WHERE ASCERTAINMENT DIFFICULT OR IMPOSSIBLE.

92. ————]—**Ascertainment impossible—Nominal damages.**—If pltf. has evidently sustained some damages, & the jury, being unable to ascertain the

PART II. SECT. 8.

92 i. ————]—**Ascertainment impossible—Nominal damages.**—Where the evidence in an action for breach of contract is insufficient to enable the trial judge to assess damages, such damages

can be no more than nominal.—**WILLIAMS v. STEPHENSON** (1903), 33 S. C. R. 323.—**CAN.**

92 ii. ————]—Where it is impossible to ascertain damages with reasonable certainty they should be

assessed at a nominal amount.—**MCLAREN v. JENNEN, MCLAREN v. ELLIOT** (1906), 4 W. L. R. 162.—**CAN.**

92 iii. ————]—**JOHNSON v. ROOPE** (1914), 14 E. L. R. 374.—**CAN.**

92 iv. ————]—Where the

Sect. 8.—Where ascertainment difficult or impossible.
Sect. 9. Part III. Sect. 1.]

amount, find a verdict for deft., the ct. will permit pltf. to enter a verdict for nominal damages.—*FEIZE v. THOMPSON* (1808), 1 Taunt. 121; 127 E. R. 778.

*Annotations:—***Refd.** *Bernstein v. Bernstein* (1893), 69 L. T. 513. **Mentd.** *Morgan v. Oswald* (1812), 3 Taunt. 554.

93. — Failure by plaintiff to prove quantum.]—*Assumpsit* for goods sold. If deft. say that he owes the debt, & that pltf. has applied to him to pay him, & that he will do so as soon as he can, but does not mention any sum, on evidence of this pltf. is entitled to a verdict, with nominal damages.

As no evidence is given of the amount of the debt, the jury cannot know how much to find a verdict for; but as deft. admits something to be due, pltf. is entitled to nominal damages (*ABBOTT, C.J.*).—*DIXON v. DEVERIDGE* (1825), 2 C. & P. 109, N. P.

*Annotation:—***Mentd.** *Cheslyn v. Dalby* (1836), 2 Y. & C. Ex. 170.

94. — — — — —.]—In trespass for breaking & entering the pltf.'s close, pltf. relied upon the bare possession, though it appeared that he had originally become possessed as tenant to one W. under a written agreement. Deft. proved, that, five days after the commencement of the trespass, he obtained a lease of the close in question from W., which he produced. The judge told the jury, that, in the absence of proof of the *quantum* of pltf.'s interest in the premises, by the production of the written agreement, he was only entitled to nominal damages.—**Held:** 'here was no misdirection.—*TWYMAN v. KNOWLES* (1853), 13 C. B. 222; 22 L. J. C. P. 143; 17 Jur. 238; 138 E. R. 1183.

*Annotation:—***Apld.** *Rust v. Victoria Graving Dock Co. & London & St. Katharine Dock Co.* (1887), 36 Ch. D. 113.

95. — Continuous damage—Right to injunction.]—Pltf. was the owner & occupier of a dwelling-house & park which adjoined defts.' gasworks. The house was situated at a distance of between 400 & 500 yards from the gasworks. Immediately adjoining defts.' premises was a plantation of trees 16 yards in width & 75 yards in length which had been planted by pltf. to screen off the gasworks. The fumes & smoke from the gasworks were carried by the prevailing wind across the plantation for a distance of 100 to 200 yards on to pltf.'s premises & had destroyed & injuriously affected them to such an extent that the tops of some of the trees were dying whilst the others were dead. There was no house on pltf.'s property within the affected area. In an action brought by pltf. for an injunction to restrain defts. from carrying on their works so as to cause a nuisance or injury to pltf. or his property.—**Held:** the fumes & smoke discharged by defts.' gasworks over pltf.'s premises caused a serious, growing & permanent injury to the pltf.'s property; the injury being of a continuous nature it was impossible to measure the damage thereby occasioned with any certainty; & pltf. was entitled to the injunction he asked.—*WOOD v. CONWAY CORPN.*, [1914] 2 Ch. 47; 83 L. J. Ch. 498; 110 L. T. 917; 78 J. P. 249; 12 L. G. R. 571, C. A.

96. — — — — —.]—Damage which it is impossible to measure will be deemed irreparable.—*LONDON & NORTH WESTERN RY. Co. v. LANCASHIRE & YORKSHIRE RY. Co.* (1867), L. R. 4 Eq. 174; 36 L. J. Ch. 479; 17 L. T. 42; 15 W. R. 810.

97. Ascertainment difficult—No ground for refusal to award.]—Resp., having let certain fishing stations to applt., erected a dock, by which the fishing was injured. Applt. claimed a deduction from the rent, on account of damage, which was refused. The question came before the Ct. of Session, & the majority of judges were of opinion that some damage had been sustained by applt., but the ct. pronounced against his claim, some of those judges who admitted that he had suffered damage being against him, on the ground that the degree of injury could not be exactly ascertained.—**Held:** this judgment was erroneous, on the principle that where damage was admitted some compensation was due, & the cause was remitted, with instructions to ascertain damage in some way or other.—*HALL v. ROSS* (1813), 1 Dow. 201; 3 E. R. 672, H. L.

98. — — — — —.]—Deft., who was an actor & a theatrical manager, published in a newspaper an offer to the following effect: That any lady in the United Kingdom who wished to become an actress might fill in & send to the newspaper an application form together with her photograph & the sum of 1s.; that the United Kingdom had been divided into ten districts; that the photographs of the candidates living in each district were to be given on applcn. to the readers of the paper in the district, who were to vote for those whom they considered to be the most beautiful; that from five ladies in each district who had received the greatest number of votes deft. would himself select twelve, & that to the first four of these twelve he would give a three years' engagement each at £5 a week, to the second four a three years' engagement each at £4 a week, & to the remaining four a three years' engagement each at £3 a week. Pltf. accepted the offer by filling in & sending the applcn. form to the newspaper together with her photograph & the sum of 1s. By the votes of the readers in her district she had been placed at the head of the poll in her division. Deft. failed to give pltf. a reasonable opportunity of appearing before him as one of the fifty candidates from whom deft. was to select the twelve to whom the engagements were to be given. Pltf. having brought an action against deft. to recover damages for breach of contract in depriving her of the chance of selection for one of the engagements, the jury awarded her substantial damages.—**Held:** (1) there being a contract which gave pltf. a chance of obtaining one of the engagements offered by deft. & there being a breach of that contract on the part of deft., it was impossible to say that the damages flowing from such a breach were not in the contemplation of the parties to the contract, & therefore the damage alleged by pltf. was not too remote; (2) the mere fact that it was impossible to assess the damages with certainty & precision did not relieve deft. from paying any damages at all in respect of his breach of contract, & it was for the jury to assess the damages.—*CHAPLIN v. HICKS*, [1911] 2 K. B. 786; 80 L. J. K. B. 1292; 105 L. T. 285; 27 T. L. R. 458; 55 Sol. Jo. 580, C. A.

*Annotations:—***As to** (1) **Refd.** *Johnston v. Braham & Campbell*, [1916] 2 K. B. 529. **As to** (2) **Refd.** *Selby v. Whitbread*, [1917] 1 K. B. 736; *Turpin v. Victoria Palace*, [1918] 2 K. B. 539; *Barnett v. Cohen*, [1921] 2 K. B. 461; *Ruffy Arnell & Baumann Aviation Co. v. R.* (1921), 126 L. T. 573.

99. — — — — —.]—The difficulty of assessing damages is no reason for the ct. not granting them.—*BOVET v. WALTER* (1917), 62 Sol. Jo. 104.

amount of damage cannot be definitely ascertained or proved, the ct. will award pltf. a small or trifling sum.— [1917] C. P. D. 177.—**S. AF.**
SOLOMON v. THE ALFRED LODGE,

100. — No ground for award of nominal damages only.]—In an action to restrain the issue of threats by a patentee an injunction was granted & an inquiry ordered as to damages caused to pltf. In his statement of claim pltf. complained of threats commencing in May 1886, & no evidence was given of any other threats at the trial. On the inquiry before the chief clerk, evidence was admitted of threats of earlier date. Shorthand notes of all the proceedings before the chief clerk were taken. The chief clerk substantially attributed to defts.' threats the whole of the falling off which he found to have taken place in pltf.'s trade, though pltf. had been obliged to take liquidation proceedings about that time. He

admitted evidence of the communication of defts.' threats to third persons, & found £1,348 as damages :—*Held* : it was not clearly shown that all the falling off in pltf.'s trade was due to defts.' threats, but some damage had been inflicted, & the difficulty of assessing it was no ground for giving only a nominal sum.—*UNGAR v. SUGG* (1891), 8 R. P. C. 385; *affd.* (1892), 9 R. P. C. 114, C. A.

Annotation :—*Refd.* *Johnston v. Edge* (1891), 36 Sol. Jo. 110.

SECT. 9.—INTEREST AS DAMAGES.

See MONEY & MONEY-LENDING.

Part III.—Directness and Remoteness.

SECT. 1.—IN GENERAL.

Measure of damages.]—*See, generally*, Part V., *post*.

101. Damages must not be too remote—Natural consequences of wrongful act—Contemplation of parties.]—(1) The damages recoverable for a breach of contract are such as may fairly & reasonably be considered as arising naturally, *i.e.* according to the usual course of things, from the breach of the contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

(2) Where a contract is made under special circumstances which are communicated by one of the contracting parties to the other, the damages resulting from a breach of the contract, which the parties would reasonably be supposed to have contemplated, are the amount of injury which would ordinarily follow from such a breach of contract under the special circumstances. But if the special circumstances are unknown to the party breaking the contract, he, at the most, can only be held to have contemplated the amount of injury which would arise generally, & in the great multitude of cases, not affected by any special circumstances, from such a breach of contract.

(3) A miller had employed a carrier to convey a broken shaft belonging to his mill, to be delivered to an engineer, & the carrier was guilty of an unreasonable delay in delivering it, the engineer being thereby prevented from making a new shaft from the model of the old one, & the mill remaining idle for a considerable time. In an action against the carrier for the delay :—*Held* : the jury, in estimating the damages, were not justified in taking into consideration the loss of profits by reason of the stoppage of the mill.

(4) The omission of the judge to direct the jury

as to any established rules of measuring the damages applicable to the particular case is a ground of new trial.

(5) We deem it to be expedient & necessary to state explicitly the rule which the judge at the next trial ought, in our opinion, to direct the jury to be governed by when they estimate the damages. It is, indeed, of the last importance that we should do this, for if the jury are left without any definite rule to guide them it will, in such cases as these, manifestly lead to the greatest injustice (*ALDERSON, B.*)—*HADLEY v. BAXENDALE* (1854), 9 Exch. 341; 23 L. J. Ex. 179; 23 L. T. O. S. 69; 18 Jur. 358; 2 W. R. 302; 2 C. L. R. 517; 156 E. R. 145.

Annotations :—*As to* (1) *Fold*. *Herring v. Tomlin* (1854), 23 L. T. O. S. 92. *Apd.* *Portman v. Middleton* (1858), 4 C. B. N. S. 322; *Smeed v. Foord* (1859), 1 K. & L. 602; *Richardson v. Dunn* (1860), 8 C. B. N. S. 655. *Consd.* *Gee v. L. & Y. Ry.* (1860), 6 H. & N. 211; *Wilson v. L. & Y. Ry.* (1861), 9 C. B. N. S. 632; *Borries v. Hutchinson* (1865), 18 C. B. N. S. 445. *Apd.* *Williams v. Reynolds* (1865), 6 B. & S. 495; *Knowles v. Nunn* (1866), 14 L. T. 592; *Wilson v. Newport Dock Co.* (1866), L. R. 1 Exch. 177. *Consd.* *Woodger v. G. W. Ry.* (1867), L. R. 2 C. P. 318. *Expld.* *Cory v. Thames Ironworks Co.* (1868), L. R. 3 Q. B. 181. *Consd.* *Engell v. Fitch* (1869), 47 Q. B. 659; *Bradshaw v. L. & Y. Ry.* (1875), L. R. 10 C. P. 189. *Apd.* *Smith v. Green* (1875), 1 C. P. D. 92; *Wilson v. General Iron Screw Colliery Co.* (1877), 47 L. J. Q. B. 239. *Consd.* *McMahon v. Field* (1881), 7 Q. B. D. 591. *Apd.* *Baldwin v. L. C. & D. Ry.* (1882), *De Colyar's County Court Cases* 224; *The Notting Hill* (1884), 9 P. D. 105. *Fold*. *De Mattos v. Great Eastern S.S. Co.* (1885), 1 T. R. H. 283. *Apd.* *Rodocanachi v. Milburn* (1886), 17 Q. B. D. 316; *Hammond v. Bussey* (1887), 20 Q. B. D. 79. The rule, though frequently commented upon, has been over & over again adopted by the *cts.*, & must now be considered to be the law on the subject (*LORD ESTER, M.R.*). *Consd.* *The Argentine* (1888), 13 P. D. 191; *Welch, Perrin v. Anderson* (1891), 61 L. J. Q. B. 167; *Lepla v. Rogers*, [1893] 1 Q. B. 31; *Marsh v. Joseph*, [1897] 1 Ch. 213; *South African Territories v. Wallington*, [1897] 1 Q. B. 692. *Apd.* *Agius v. Great Western Colliery Co.*, [1899] 1 Q. B. 413. *Consd.* *Hostock v. Nicholson*, [1904] 1 K. B. 725; *The Cairnbahn* (No. 2) (1913), 29 T. L. R. 559. *Apd.* *Cointat v. Myham*,

100 i. Ascertainment difficult—No ground for award of nominal damages only.]—Difficulty in ascertaining the amount of the loss is no reason for not giving substantial damages.—*WOOD v. GRAND VALLEY RY. CO.* (1913), 30 O. L. R. 44.—*CAN.*

PART III. SECT. 1.

101 i. Damages must not be too remote—Natural consequence of wrongful act—Contemplation of parties.]—Where seed is delivered by one person to another without any warranty, damages arising from other innocuous seed having been mixed therewith, & on harvesting having become scattered

on the ground & coming up the following year on the land are too remote.—*STEWART v. SCULTHORP* (1894), 25 O. R. 544.—*CAN.*

101 ii. — — — — —.]—In an action claiming from gas contractors the return of a deposit made as guarantee for fulfilment of their contract with a city corp. :—*Held* : prospective damages which might result from the occupation of city streets by pipes actually laid & abandoned are too remote & uncertain.—*FINNIE v. MONTEAL CITY* (1902), 32 S. C. R. 335.—*CAN.*

101 iii. — — — — —.]—Injury to the use of a bleaching green, washing

house, & laundry, by the smoke & ashes of an engine is not a relevant claim for surface damage; caused by working minerals.—*OSWALD v. GORDON* (1853), 16 Durl. (Ct. of Sess.) 70; 26 Sc. Jur. 45.—*SCOT.*

101 iv. — — — — —.]—In an action for damages against defender for taking decree in absence against pursuer in breach of an agreement not to do so :—*Held* : the jury were entitled to take into account damage resulting from the decree in a "Black List" that being proved to be the natural & invariable consequence of a decree in absence being taken.—*GIBSON & Co. v. ANDERSON & Co.* (1897), 24 R. (Ct. of Sess.) 556.—*SCOT.*

Sect. 1.—In general. Sect. 2: Sub-sect. 1.]

[1913] 2 K. B. 220; Mitsui v. Watts, [1916] 2 K. B. 828. **Consid.** Turpin v. Victoria Palace, [1918] 2 K. B. 539. **Appl.** Pinnock v. Lewis & Peat, [1923] 1 K. B. 690. **Reid.** Fletcher v. Tayleur (1855), 17 C. B. 21; Randall v. Raper (1858), E. B. & E. 84; Broom v. Hall (1859), 7 C. B. N. S. 503; Allsop v. Allsop (1860), 5 H. & N. 534; Cale. Ry. v. Colt (1860), 3 L. T. 252; Prior v. Wilson (1860), 1 L. T. 549; Anderson v. N. E. Ry. (1861), 4 L. T. 216; Henderson v. N. E. Ry. (1861), 9 W. R. 519; Boyd v. Fitt (1864), 11 L. T. 280; O'Hanlan v. G. W. Ry. (1865), 6 B. & S. 484; Phelps v. L. & N. W. Ry. (1865), 13 W. R. 782; Mullett v. Mason (1866), Har. & Ruth. 779; Godwin v. Francis (1870), 39 L. J. C. P. 121; Prehn v. Royal Bank, Liverpool (1870), L. R. 5 Exch. 92; Larios v. Bonany Y. Gurety (1873), L. R. 5 P. C. 346; Bain v. Fothergill (1874), L. R. 7 H. L. 158; Baxendale v. L. C. & D. Ry. (1874), L. R. 10 Exch. 35; Elbinger Akt. v. Armstrong (1874), L. R. 9 Q. B. 473; Sawdon v. Andrew (1874), 30 L. T. 23; Hobbs v. L. & S. W. Ry. (1875), L. R. 10 Q. B. 111; The Parana (1877), 2 P. D. 118; Lilley v. Doubleday (1881), 7 Q. B. D. 510; Williams v. Peel River Land & Mineral Co. (1886), 55 L. T. 689; White v. Peto (1888), 58 L. T. 710; Marcus v. Myers & Davis (1895), 11 T. L. R. 327; Prince of Wales Dry Dock Co., Swansea v. Fownes Forge & Engineering Co. (1904), 90 L. T. 527; Furness, Withy v. Hall (1909), 25 T. L. R. 233; Jackson v. Watson, [1909] 2 K. B. 193; Sapwell v. Bass, [1910] 2 K. B. 486; Clare v. Dobson, [1911] 1 K. B. 35; Hoole U. D. C. v. Fidelity & Deposit Co. of Maryland (1916), 115 L. T. 24; Quirk v. Thomas, [1916] 1 K. B. 516; Watts, Watts v. Mitsui, [1917] A. C. 227; British Automatic Co. v. Haynes, [1921] 1 K. B. 377; Monte Video Gas & Dry Dock Co. v. Clan Line Steamers (1921), 37 T. L. R. 866. **As to (2) Distd.** Collard v. S. E. Ry. (1861), 7 H. & N. 79. **Consid.** Horne v. Mid. Ry. (1873), L. R. 8 C. P. 131. **Appl.** Sanders v. Stuart (1876), 1 C. P. D. 326; Barratt v. L. B. & S. C. Ry. (1877), De Colyar's County Court Cases 195. **Consid.** Thol v. Henderson (1881), 8 Q. B. D. 457; Smith v. Day (1882), 21 Ch. D. 421. **Distd.** De Mattos v. Great Eastern S.S. Co. (1885), 1 T. L. R. 283. **Appl.** Grébert-Borgnis v. Nugent (1885), 15 Q. B. D. 85. **Consid.** Skinner v. City of London Marine Insee. Corp'n. (1885), 14 Q. B. D. 882. **Appl.** Couper v. Richards (1887), 3 T. L. R. 739; Ebbetts v. Conquest. [1895] 2 Ch. 377. **Reid.** Simons v. Patchett (1857), 26 L. J. Q. B. 195; British Columbia Saw-Mill Co. v. Nettleship (1868), L. R. 3 C. P. 499; Finlay v. Chirney (1888), 20 Q. B. D. 494; Armstrong v. Allan (1892), 67 L. T. 738. **As to (3) Föld.** Le Peintur v. S. E. Ry. (1860), 2 L. T. 170. **Distd.** Phillips v. L. & S. W. Ry. (1879), 5 C. P. D. 280. **Reid.** Mann v. General Steam Navigation Co. (1856), 26 L. T. O. S. 247; De Mattos v. Gibson (1860), 1 John. & H. 79.

102. —[Where special damage is necessary to sustain an action for slander, it is not sufficient to prove a more wrongful act of a third person induced by the slander, such as that he dismissed pltf. from his employ before the end of the term for which they had contracted; but the special damage must be a legal & natural consequence of the slander.—*VICARS v. WILCOCKS* (1806), 8 East, 1; 103 E. R. 244.

Annotations:—**Consid.** Powell v. Salisbury (1828), 2 Y. & J. 391; Knight v. Gibbs (1834), 1 Ad. & El. 43. **Distd.** Lumley v. Gye (1853), 2 E. & B. 216. **Consid.** Lynch v. Knight (1861), 9 H. L. Cas. 577; Bowen v. Hall (1881),

104 i. —[Whether in respect of contract or tort.]—Though the rule is the same in actions on contract as in tort, viz., that the damages which pltf. is entitled to must result directly from the wrongful act of deft., & that no claim can be made to damages which are only too remotely connected with it, there may be differences in the application to actions in tort of this basic principle which is common to both kinds of actions.—*KARIBASAVANA GOWD v. VERABHADRAPPA* (1913), 1 L. R. 36 Mad. 580.—**IND.**

105 i. **Damages must not be speculative or uncertain.**—[Where the owner of a mill, who was also the owner of a lot adjoining it, which was used as the principal means of communication between the mill & a public highway, & across which lot a railway co. had erected a trestle bridge, sought compensation for the loss of local custom to & from the mill, not arising from the construction of the railway, but from a subsequent user of it:—*Held:* the damages were too remote & speculative

to be allowed.—*ST. CATHERINES RY. Co. v. NORRIS* (1889), 17 O. R. 667.—**CAN.**

105 ii. —[Where a judge, in charging the jury, told them that if they thought scars on pltf.'s face, caused by the bite of a dog, were likely to be permanent, & that such lasting disfigurement might affect her prospects of making a good marriage, they might consider such possible loss of marriage in assessing the damages:—*Held:* such damages were too speculative & remote.—*PRICE v. WRIGHT* (1899), 35 N. B. R. 26.—**CAN.**

105 iii. —[In a claim for damages sustained by subscribers through a co.'s failure to supply them with books during the residue of a term in accordance with contract:—*Held:* only nominal damages were recoverable, for beyond this the damages were of too speculative or conjectural a nature to be maintained.—*RE PUBLISHERS' SYNDICATE* (1904), 24

6 Q. B. D. 333. **Reid.** Green v. Button (1835), 2 Cr. M. & R. 707; Gillett v. Bullivant (1846), 7 L. T. O. E. 490; Keene v. Dilko (1849), 4 Exch. 388; Barnett v. Allen (1858), 1 F. & F. 125; Walker v. Gos (1859), 4 H. & N. 350; Richardson v. Dunn (1860), 8 C. B. N. S. 655; Rogers v. Rajendro Dutt (1860), 13 Moo. P. C. C. 209; Hoey v. Felton (1861), 11 C. B. N. S. 142; Wilson v. Newport Dock Co. (1866), L. R. 1 Exch. 177; Ellis v. Loftus Iron Co. (1874), L. R. 10 C. P. 10; Chamberlain v. Boyd (1883), 11 Q. B. D. 407; Lepia v. Rogers, [1893] 1 Q. B. 31; Bostock v. Nicholson, [1904] 1 K. B. 725; Weld-Blundell v. Stephens, [1920] A. C. 956. **Mentd.** Martyn v. Gray (1863), 14 C. B. N. S. 824.

103. —[Pltf. declared in case against deft. for not repairing his fences *per quod* pltf.'s horses escaped into deft.'s close, & were there killed by the falling of a haystack:—*Held:* the damage was not too remote, & the action was maintainable.—*POWELL v. SALISBURY* (1828), 2 Y. & J. 391; 148 E. R. 970.

Annotations:—**Reid.** Wilson v. Newport Dock Co. (1866), L. R. 1 Exch. 177; Lawrence v. Jenkins (1873), L. R. 8 Q. B. 274; Halestrap v. Gregory (1895), 64 L. J. Q. B. 415.

104. —[Whether in respect of contract or tort.]—(1) Where, by reason of delay caused by collision, a cargo owner has sustained damage from loss of market, such damage is too remote to be recovered by him in an action of tort against the shipowner.

(2) The rule as to remoteness of damage is the same whether the damage is claimed in respect of contract or of tort.—*THE NOTTING HILL*, (1884), 9 P. D. 105; 53 L. J. P. 56; 51 L. T. 66; 32 W. R. 764; 5 Asp. M. L. C. 241, C. A.

Annotations:—*As to (1) Distd.* Smith, Edwards v. Tregarthen (1887), 56 L. J. Q. B. 437. **Consid.** The Argentine (1888), 13 P. D. 191; Victorian Rys. Comrs. v. Coultas (1888), 13 App. Cas. 222. **Distd.** Anglo-Argentine Live Stock & Produce Agency v. Temperley Shipping Co., [1899] 2 Q. B. 403; Sargant v. East Asiatic Co. (1915), 85 L. J. K. B. 277. **Consid.** Monte Video Gas & Dry Dock Co. v. Clan Line Steamers (1921), 37 T. L. R. 866. *As to (2) Consd.* H.M.S. London, [1914] P. 72. **Reid.** Addis v. Gramophone Co., [1909] A. C. 488.

105. **Damages must not be speculative or uncertain.**—[Where, on account of defects in the ship, the voyage had been protracted, & in the meantime the market price of the goods shipped had fallen:—*Held:* the consignee could not recover damages for the loss of market.

It seems to me that to give these damages would be to give speculative damages, to give damages when we cannot be certain that pltf. would not have suffered just as much if the goods had arrived in time. According to the principles on which the cts. have acted in all such speculative & uncertain cases damages ought not to be recovered (MELLISH, L.J.).—*THE PARANA* (1877), 2 P. D. 118; 36 L. T. 388; 25 W. R. 596; 2

C. L. T. 122; 7 O. L. R. 223.—**CAN.**

105 iv. —[Where a heifer was thoroughbred & registered & its owner intended to breed it to a certain thoroughbred registered bull & it was covered by a crossbred bull at large:—*Held:* damage by reason of the possible influence upon the strain of subsequent offspring too remote & uncertain to be considered.—*MCLEAN v. BRETT*, [1919] 3 W. W. R. 521.—**CAN.**

105 v. —[It is necessary that the loss in respect of which compensation is asked for should be the direct, & not a remote & more or less speculative, consequence of the act for which compensation is sought.—*CONNELL v. HIMALAYA BANK* (1895), 1 L. R. 18 All. 12.—**IND.**

105 vi. —[In an action brought against defts. as sureties for damages by reason of the failure in performance of certain repairs to a vessel, an item in the claim represented the loss of seals, which it was claimed the vessel might have secured had she been finished in time to permit of her

Asp. M. L. C. 399, C. A.; *reusg.* (1876), 1 P. D. 452.

Annotations.—**Fold.** The Notting Hill (1884), 9 P. D. 105. **Distd.** Smith, Edwards v. Tregarthen (1887), 56 L. J. Q. B. 437. **Consd.** The Argentino (1888), 13 P. D. 191. **Expld.** Dunn v. Bucknall, Dunn v. Donald Currie, [1902] 2 K. B. 614. **Distd.** Sargent v. East Asiatic Co. (1915), 85 L. J. K. B. 277. **Consd.** Monte Video Gas & Dry Dock Co. v. Clan Line Steamers (1921), 37 T. L. R. 866. **Refd.** The Star of India (1876), 1 P. D. 466; The Thyatira (1883), 8 P. D. 155; Rodocanachi v. Milburn (1886), 18 Q. B. D. 67; Duckham v. G. W. Ry. (1899), 80 L. T. 774.

106. Remoteness a question for court.]—

(1) Something has been said about the question of remoteness being left to the jury to determine, but this cannot be, for if it were a question to be settled by the jury it could never arise as a question for the ct. as it has done in very many cases (BLACKBURN, J.).

(2) On a breach of a contract the party committing the breach must be liable for the proximate, probable & likely consequences, that is, such as may be taken to have been fairly in the contemplation of the parties when the contract was entered into (ARCHIBALD, J.).—HOBBS v. LONDON & SOUTH WESTERN RY. Co. (1875), L. R. 10 Q. B. 111; 44 L. J. Q. B. 49; 32 L. T. 252; 39 J. P. 693; 23 W. R. 520.

Annotations.—As to (1) **Refd.** McMahon v. Field (1881), 7 Q. B. D. 591; Goldman v. Hill (1918), 34 T. L. R. 486. As to (2) **Refd.** Lilley v. Doubleday (1881), 7 Q. B. D. 510. **Generally Refd.** Le Blanche v. L. & N. W. Ry. (1876), 1 C. P. D. 286; Ruffy-Arnell, etc. Co. v. R., [1922] 1 K. B. 599.

107. —.]—McMAHON v. FIELD, No. 134, *post*.

SECT. 2.—IMMEDIATE OR PROXIMATE CAUSE.

SUB-SECT. 1.—IN GENERAL.

108. Damages must be natural or immediate consequence of breach.]—HADLEY v. BAXENDALE, No. 101, *ante*.

109. —.]—Defts. having contracted with pltf. to receive his ship into their dock at a specified time, & having given him notice that they could then receive her, she was brought to the dock in ballast upon a stormy day, under the charge of her captain & a pilot. Owing to the breaking of one of the chains of the dock-gates, defts. were unable to let her in. The captain, after consultation with the pilot as to the best course to be pursued, anchored the ship outside the gates. At the turn of the tide she grounded on a sandbank & broke her back. Pltf. brought an action against defts. for the damage done to the ship.

If there was any place of safety to which the vessel might have been taken we think pltf. is not entitled to recover (POLLOCK, C.B.).

The question of damages is of constant occurrence; it occurs in almost every action of contract, except contracts for the payment of a certain fixed sum of money, & necessarily in every action for a wrong. Ordinary cases on contracts are actions for the non-delivery or non-acceptance of goods agreed to be sold, on agreements for the sale of land, for breaches of promise to marry, for non-acceptance or non-delivery of stock or shares; & an infinite variety of others might be named. So also, in actions for wrongs, it occurs every day; for instance, in actions for injuries sustained by accidents on railways & by collision, which now constitute a very considerable number of the causes tried at *Nisi Prius*; in actions for libel & slander, for assault & false imprisonment, & in numberless other cases. In some instances the

measure of damages is fixed & ascertained by long-established usage; for instance, for the non-delivery of goods which are the subject of common sale in the market, I apprehend that a Judge is bound to tell the jury that the measure of damages is the difference between the contract price & the market price; & that, if he does not, his summing up would be liable to objection. & there are other cases in which the like long usage has fixed the measure of damages. So also in some cases the matter of damages has been the subject of decision in the superior cts.; & I apprehend that when this has been so, the decision is a binding authority upon the same & other cts. in like manner & to the same extent as other decisions. The rule is, that the damage must be proximate (not immediate), & fairly & reasonably connected with the breach of contract or wrong (MARTIN, B.).—WILSON v. NEWPORT DOCK Co. (1866), L. R. 1 Exch. 177; 4 H. & C. 232; 35 L. J. Ex. 97; 14 L. T. 230; 12 Jur. N. S. 233; 14 W. R. 558; 2 Mar. L. C. 313.

Annotations.—**Refd.** Barratt v. L. B. & S. C. Ry. (1877), De Colyar's County Court Cases 195; The San Onofre, [1922] P. 243.

110. —.]—One who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows or has reasonable means of knowing that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person (BOVILL, C.J.).—SHARP v. POWELL (1872), L. R. 7 C. P. 253; 41 L. J. C. P. 95; 26 L. T. 436; 20 W. R. 584.

Annotations.—**Consd.** Clark v. Chambers (1878), 3 Q. B. D. 327. **Appld.** Clinton v. Lyons, [1912] 3 K. B. 198. **Refd.** Hardaker v. Idle District Council, [1896] 1 Q. B. 335; Cory v. Franco, Fenwick, [1911] 1 K. B. 114; Weld-Blundell v. Stephens, [1920] A. C. 956; Re Polemis & Furness, Withy, [1921] 3 K. B. 560.

111. —.]—THE ARGENTINO, No. 26, *ante*.

112. —.]—COBB v. GREAT WESTERN RY. Co., No. 172, *post*.

113. —.]—*Semle*: loss or damage which is clearly the direct & immediate consequence of a wrongful act is always proximate, & it is not necessary to inquire whether it also flows from the act directly & naturally, or in the usual or ordinary course of things.—H.M.S. LONDON, [1914] P. 72; 83 L. J. P. 74; 109 L. T. 960; 30 T. L. R. 196; 12 Asp. M. L. C. 405.

Annotations.—**Refd.** The Amerika, [1914] P. 167; The Charles Le Borgne (1918), [1920] P. 15 n. 1; The Kafuo (1919), 123 L. T. 559; Re Polemis & Furness Withy, [1921] 3 K. B. 560.

114. — **Exception in case of master & servant.**]—A declaration, by the lessee of a theatre, charged in the first & second counts that W. had contracted with pltf. to sing at his theatre, & not elsewhere, during a certain term, without pltf.'s consent, & that deft. had during the term maliciously enticed & procured W. to depart from her contract against the will of pltf., whereby W. refused to sing for pltf. at his theatre during the whole of the term. The third count alleged that W. had been hired by pltf. as his dramatic artiste, for a certain term, & that deft. had maliciously enticed & procured her to depart from her employment during the term. All the counts alleged special damage. On demurrer:—**Held**: the action was maintainable at common law, as maliciously procuring W. to break her contract was a wrongful act from which damage accrued

prosecuting the sealing voyage:— & being entirely of a speculative
Held: the damages were too remote, character, could not be entertained.—

RORKE v. MADDOCK (1860), 4 Nfld. L. R. 511.—**NFLD.**

Sect. 2.—Immediate or proximate cause: Sub-sects. 1 & 2.]

to pltf.; the rule of law giving a remedy for enticing away servants, was not confined to menial servants, or to such as fall within the Statute of Labourers, but extended to all cases where there was an unlawful or malicious enticing away of a person employed to give his exclusive personal service for a given time under the direction of an employer who is injured by the wrongful act; & the action for maliciously persuading a servant to quit his service was maintainable wherever there was at the time of the persuading a binding contract of hiring & service existing between the parties, whether the service be then actually subsisting or not.—*LUMLEY v. GYE* (1853), 2 E. & B. 216; 22 L. J. Q. B. 463; 17 Jur. 827; 1 W. R. 432; 118 E. R. 749.

Annotations:—*Consd.* *Lynch v. Knight* (1861), 5 L. T. 291; *Bowen v. Hall* (1881), 6 Q. B. D. 333; *De Francesco v. Barnum* (1890), 63 L. T. 514; *Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leatham*, [1901] A. C. 495; *Pratt v. British Medical Assn.*, [1919] 1 K. B. 244; *Sain v. Butt*, [1920] 3 K. B. 497; *Ware & De Preville v. Motor Trade Assn.*, [1921] 3 K. B. 40. **Refd.** *Rogers v. Rajendro Dutt* (1860), 13 Moo. P. C. C. 209; *Evans v. Walton* (1867), 36 L. J. C. P. 307; *Cattle v. Stockton Waterworks Co.* (1875), L. R. 10 Q. B. 453; *Mogul S.S. Co. v. McGregor Gow* (1889), 23 Q. B. D. 598; *Temperton v. Russell*, [1893] 1 Q. B. 715; *Exchange Telegraph Co. v. Gregory* (1895), 73 L. T. 120; *Lyons v. Wilkins*, [1899] 1 Ch. 255; *Read v. Friendly Soc. of Operative Stonemasons of England Ireland, & Wales*, [1902] 2 K. B. 732; *South Wales Miners Federation v. Glamorgan Coal Co.*, [1905] A. C. 239; *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.*, [1908] 1 Ch. 335; *Conway v. Wade*, [1909] A. C. 506; *Larkin v. Long*, [1915] A. C. 814; *Long v. Smithson* (1918), 88 L. J. K. B. 223; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Davies v. Thomas*, [1920] 2 Ch. 189; *Weld-Blundell v. Stephens*, [1920] A. C. 956; *Wolstenholme v. Arliss*, [1920] 2 Ch. 46; *White v. Riley*, [1921] 1 Ch. 1; *Jasperson v. Dominion Tobacco Co.*, [1923] A. C. 709. **Mentd.** *Miller v. David* (1874), 22 W. R. 332; *Alderson v. Maddison* (1881), 7 Q. B. D. 174; *Charnock v. Court* (1899), 68 L. J. Ch. 550; *Stott v. Gamble*, [1916] 2 K. B. 504; *McColl v. Canadian Pacific Ry.*, [1923] A. C. 126.

See, generally, MASTER & SERVANT.

SUB-SECT. 2.—BREACH OF CONTRACT.

Measure of damages.]—*See, generally, Part V., post.*

115. General rule.]—Where, on the sale of a chattel, the buyer intends it for a special purpose, but the seller supposes it is for another & more obvious purpose, the buyer can recover, as damages for the non-delivery according to the contract, the loss of profit which might have been made from the purpose supposed by the seller, provided the buyer has actually sustained damages to that or a greater amount.

The measure of damages when a party has not fulfilled his contract is what might be reasonably expected in the ordinary course of things to flow from the non-fulfilment of the contract, not more

than that, but what might be reasonably expected to flow from the non-fulfilment of the contract in the ordinary state of things, & to be the natural consequences of it (*BLACKBURN, J.*).—*CORY v. THAMES IRONWORKS Co.* (1868), L. R. 3 Q. B. 181; 37 L. J. Q. B. 68; 17 L. T. 495; 10 W. R. 456.

Annotations:—*Consd.* *Montevideo Gas & Drydock Co. v. Clan Line Steamers* (1921), 37 T. L. R. 544. **Refd.** *Re Trent & Humber Co., Ex p. Cambrian Steam Packet Co.* (1868), L. R. 6 Eq. 396; *Elbinger Act. v. Armstrong* (1874), L. R. 9 Q. B. 473; *Barratt v. L. B. & S. C. Ry.* (1877), De Colyar's County Court Cases 195; *Bostock v. Nicholson*, [1904] 1 K. B. 725; *Payzu v. Saunders*, [1919] 2 K. B. 581. **Mentd.** *British Columbia Saw Mill Co. v. Nettleship* (1868), L. R. 3 C. P. 499.

116. —.]—The general principle is that pltf. is entitled to any damages which in the opinion of the jury were the natural consequences of the breach of contract. No damages for general loss of business were given, but they thought that in such a trade as pltf.'s, on the happening of such an occurrence—namely, their having sent out to various customers beer which had to be destroyed to advertise so as to minimise any possible loss of business was a reasonable step, the cost of which having been *bona fide* incurred by pltf's. with that object, they were entitled to recover from defts. (*LORD ALVERSTONE, C.J.*).—*HOLDEN, LTD. v. BOSTOCK & Co., LTD.* (1902), 50 W. R. 323; 18 T. L. R. 317; 46 Sol. Jo. 265, C. A.

Annotation:—*Consd.* *Cointat v. Myham*, [1913] 2 K. B. 220.

117. Contract of carriage—Delay in delivery of shaft—Consequent loss by stoppage of mill.]—*HADLEY v. BAXENDALE*, No. 101, *ante*.

118. — Delay in delivery of goods.]—Pltf's. delivered to defts. who were carriers, ten tons of cotton to be carried from L. to O. In the usual course the cotton should have been received on the following day, but it did not in fact arrive till four days afterwards. In consequence of the delay a new mill of pltf's. was stopped for want of cotton to go on with. At the time of the delivery of the cotton to defts. nothing was said as to the particular inconvenience likely to result from the delay in forwarding it. But on the day before it was delivered to defts., & repeatedly on each succeeding day until it arrived at O. one of pltf's. called to inquire about it, & on each occasion told the manager of the goods department at the O. station, that the mill was at a stand, solely on account of the non-delivery of the cotton. In an action against defts. for neglect in delivering the cotton, pltf's. proved that during the time the mill was at a stand they had paid in wages £7 & that the profit which would have been made if the mill had been at work was £7 10s.—**Held:** pltf's. were not entitled to the amount of wages paid & of the profits lost as legal damages, inasmuch as it assumed that the stoppage of the mill arose entirely from the non-delivery of the cotton, when in fact it arose partly from that & partly from pltf's. having no cotton to go on with.—*GEE v. LANCASHIRE & YORKSHIRE RY. Co.* (1860), 6

PART III. SECT. 2, SUB-SECT. 2.

115 i. General rule.]—Pltf., a banker, wrote to defts., safe-makers, asking whether No. 67 would furnish a fair protection against burglars, & defts. answered, "No. 67 door gives both fire & burglar proof protection." Pltf. purchased a No. 67 door, which was blown open by burglars. It was found that the centre layer of the three layers making up the door, represented to be hardened drill proof plate, was not so, & was easily perforated by a hand drill.—**Held:** the loss of the money contained in the vault was not a natural consequence of the defects, in the vault door.—*DENISON v. TAYLOR*

(1903), 23 C. L. T. 261; 6 O. L. R. 93.—**CAN.**

115 ii. —.]—Deft., under an agreement in writing, undertook to act as agent in G. for pltf's., dealers in D. Part of the agreement was, that deft. should open a cash account at a bank in G., to the amount of £500, to be used at any time in honouring & retiring cash orders of pltf's. It was also agreed that no cash order would be drawn by pltf's. "without deft. having in his hands the full amount of such orders previous to his being required to pay same." While deft. had cash in bank, & goods in hand, amounting

to more than the £500, upon the day on which a cash order for £250 fell due in G., deft. left that city, & the order was returned, dishonoured, to D. It having been proved that in consequence of the cash order having been dishonoured, pltf's. trade in G. was suspended, that their D. business was seriously impaired, & that they had lost the agency of an Australian firm; the jury gave damages for loss upon each of those heads.—**Held:** no portion of the damages was too remote, as the losses flowed naturally from the default of deft.—*BOYD v. FITT* (1862), 14 I. C. L. R. 43; 8 Ir. Jur. 51.—**IR.**

H. & N. 211; 30 L. J. Ex. 11; 3 L. T. 328; 6 Jur. N. S. 1118; 9 W. R. 103; 158 E. R. 87.

Annotations.—*Consd.* Hobbs v. L. & S. W. Ry. (1875). L. R. 10 Q. B. 111. *Refd.* Boyd v. Fitt (1864), 11 L. T. 280; Wilson v. Newport Dock Co. (1866), L. R. 1 Exch. 177. *Mentd.* Collard v. S. E. Ry. (1861), 7 H. & N. 79; Schröder v. Ward (1863), 1 New. Rep. 325; O'Hanlan v. G. W. Ry. (1865), 6 B. & S. 484.

119. — Failure to appoint place of delivery—Consequent damage to horses by cold.—It was agreed between pltf. & deft. that pltf. should carry timber for deft. to deft.'s home & deliver it at the place appointed by deft.

Pltf. declared that he carried the timber but that through the neglect of the deft. to appoint the place of delivery his horses caught cold & died:—*Held*: this was not damage for which deft. was answerable.—*VERTUE v. BIRD* (1877), 1 Vent 310; 3 Keb. 706; 86 E. R. 200; *sub nom.* *VIRTUE v. BIRDE*, 2 Lev. 196.

Annotation.—*Refd.* Iveson v. Moor (1698), Comb. 480.

120. — Refusal to carry coals—Loss of customers.—The loss of customers was not a remote, but a direct & immediate consequence of the act of the company refusing to carry the coals (*LORD CHELMSFORD*).—*LANCASHIRE & YORKSHIRE RY. CO. v. GIDLOW* (1875), L. R. 7 H. L. 517; 45 L. J. Q. B. 625; 32 L. T. 573; 24 W. R. 144, H. L.

Annotations.—*Mentd.* Dunkirk Colliery Co. v. M. S. & L. Ry. (1876), 2 Ry. & Can. Tr. Cas. 402; Evershed v. L. & N. W. Ry. (1877), 2 Q. B. D. 254; Chatterley Iron Co. v. North Staffordshire Ry. (1878), 3 Ry. & Can. Tr. Cas. 238; L. & N. W. Ry. v. Evershed (1878), 3 App. Cas. 1029; Isle of Wight (Newport Junction) Ry. v. Isle of Wight Ry. (1882), 4 Ry. & Can. Tr. Cas. 128; Murray v. G. & S. W. Ry. (1883), 4 Ry. & Can. Tr. Cas. 456; Berry v. L. C. & D. Ry. (1884), 4 Ry. & Can. Tr. Cas. 310; Hall v. L. B. & S. C. Ry. (1886), 5 Ry. & Can. Tr. Cas. 28; Crossfield v. Manchester Ship Canal Co. (1903), 10 T. L. R. 398; Maskell v. Horner, [1915] 3 K. B. 106; Foster v. G. E. Ry. (1920), 37 T. L. R. 268.

—*See, further*, *CARRIERS*, Vol. VIII., pp. 138–142, Nos. 908–930.

—*Of passengers.*—*See CARRIERS*, Vol. VIII., pp. 106–107, Nos. 708–719.

—*Carriage by sea.*—*See SHIPPING & NAVIGATION*.

121. Breach of warranty—Of soundness of horse.—Bone spavin in the hock is unsoundness in a horse, & therefore is a breach of a warranty of soundness, whether it produces lameness apparent at the time of the warranty or not, & though it may not produce lameness for years after.

If the horse-dealer does not perform his warranty, it does not follow that the man who has bought has a right to return it. The damages will be such as flow immediately from the breach of the contract, & will be the difference between the price & the value, & the expenses to the time when pltf. offered to send the horse back, & it was refused (*TINDALL, C.J.*).—*WATSON v. DENTON* (1835), 7 C. & P. 85, N. P.

122. — Of fitness of food—Loss by death of wife.—In an action for breach of a warranty that tinned salmon sold by defts., to pltf. was fit for consumption as human food pltf. claimed damages under following head, among others namely on the ground that his wife having partaken of the salmon had in consequence died, & that, she having performed services for him in the care of his house & family until her death, he was under the necessity after her death of hiring some one else to perform such services. The jury found a verdict for pltf. & awarded £200 in respect of the damages claimed as above mentioned:—*Held*: the death of pltf.'s wife not forming an essential part of the cause of action sued upon but only an element in ascertaining the damages arising therefrom there was no rule of law which prevented

such damages from being recoverable in the action.—*JACKSON v. WATSON & SONS*, [1909] 2 K. B. 193; 78 L. J. K. B. 587; 100 L. T. 799; 25 T. L. R. 454; 58 Sol. Jo. 447, C. A.

Annotations.—*Refd.* Cointat v. Myham, [1913] 2 K. B. 220. *Mentd.* The Amerika, [1914] P. 167; Berry v. Humm, [1915] 1 K. B. 627.

123. — Loss of trade—Fine & costs.—Defts., who were salesmen, sold to pltf., a butcher, meat unfit for human food for the purpose of sale in his shop, he relying on their skill & judgment & not knowing that the meat was bad. The meat was seized in the shop by an inspector & ordered by a magistrate to be destroyed; & the pltf. was convicted under s. 47, sub-s. 2, of the Public Health (London) Act, 1891, of having the bad meat on his premises & was fined. In an action for damages for breach of warranty the jury awarded damages in respect of the fine & costs & also for loss of trade owing to the conviction:—*Held*: pltf. was entitled to recover the damages in respect of the fine & costs & for his loss of trade.—*COINTAT v. MYHAM & SON*, [1913] 2 K. B. 220; 82 L. J. K. B. 551; 108 L. T. 556; 77 J. P. 217; 29 T. L. R. 387; 11 L. G. R. 760; *on appeal* (1914), 84 L. J. K. B. 2253, C. A.

Annotations.—*Distd.* Turpin v. Victoria Palace, [1918] 2 K. B. 539. *Refd.* Leslie v. Reliable Advertising & Addressing Agency, [1915] 1 K. B. 652; Proops v. Chaplin (1920), 37 T. L. R. 112; Weld-Blundell v. Stephens, [1920] A. C. 956.

124. Insurance against accident—Expenses & suffering caused by injury—Loss of time or profit.—Pltf. effected with defts. a contract of assurance, which stated that pltf. was thereby assured by the Railway Passengers Assurance Company, in the sum of £1,000 to be payable to his legal representatives in the event of death happening to the assured from railway accident whilst travelling in any class carriage on any line of railway in Great Britain or Ireland; or a proportionate part of the £1,000 will be paid to the assured himself in the event of his sustaining any personal injury by reason of such accident. Pltf. was travelling in a railway carriage to a certain place, & on the arrival of the train at the railway station there, & after it had stopped pltf., in stepping out of the carriage without any negligence on his part, slipped off the iron step, whereby he sustained an injury:—*Held*: this was a "railway accident" within the meaning of the contract of assurance, & pltf. was entitled to recover damages for the expense & suffering occasioned by the injury, but not for his loss of time or loss of profit.—*THEOBALD v. RAILWAY PASSENGERS ASSURANCE CO.* (1854), 10 Exch. 45; 23 L. J. Ex. 249; 23 L. T. O. S. 222; 18 Jur. 583; 2 W. R. 528; 2 C. L. R. 1034; 150 E. R. 349.

125. Contract to enter into partnership—Failure to form partnership—Recovery of incidental expenses.—Action of contract for breach of agreement to enter into a partnership. Declaration alleged that before entering on the agreement pltf. incurred expenses in journeys at request of deft. on the intended partnership business:—*Held*: evidence of the expenses incurred by pltf. on the journeys was admissible, not that pltf. was entitled to recover them absolutely, but as a means of estimating the damage resulting from a breach of contract.—*HERRING v. TOMLIN* (1854), 23 L. T. O. S. 92; 2 W. R. 470.

126. Contract of service—Refusal to serve on ground of illegality of service—Consequent arrest as deserter in foreign port.—Pltf. agreed with deft. to serve as one of the crew of a ship, whereof deft. was master, for twelve months, from London to Rio, or any other of the ports specified in the

Sect. 2.—Immediate or proximate cause: Sub-sects. 2 & 3.]

Pacific Ocean & back to a final port of discharge & to obey during that period all deft.'s lawful commands. He subsequently sailed for Rio with the ship. She was destined as it appeared from her charterparty for the service of the Peruvian Govt., & had on board a cargo of coal & ammunition. In the course of her voyage to Rio she joined company with two Peruvian war steamers to which from time to time she supplied coal & ammunition. At Rio it became known to pltf. & deft. that hostilities had commenced between Spain & Peru, two powers at peace with England. Deft. notwithstanding this circumstance, announced to pltf. that he intended to go on to Callao in the Pacific, another Peruvian port. He was at that time acting under the direction of a Peruvian agent on board the ship, who received his instructions from the commanders of the two war steamers. Pltf. objected to serve any further on the voyage on the ground that it had become illegal & involved greater danger than he had anticipated when he entered into his agreement with deft. He accordingly left the ship. In an action for breach of contract brought by him against deft.:—*Held*: deft. must be taken to have engaged pltf. for an ordinary voyage & pltf. was entitled to treat as a breach of contract deft.'s employment of him on a voyage which would expose him to greater danger than he originally had reason to anticipate. Pltf. was imprisoned at Rio for some days as a Peruvian deserter. When he came out of prison the ship had gone carrying some of his clothes on board of her. The jury awarded damages both for the imprisonment and the loss of clothes:—*Held*: these damages were too remote to be recoverable.—*BURTON v. PINKERTON* (1807), L. R. 2 Exch. 340; 36 L. J. Ex. 137; 17 L. T. 15; 31 J. P. 615; 15 W. R. 1139; 2 Mar. L. C. 694.

Annotations:—*Consd.* *Hobbs v. L. & S. W. Ry.* (1875), L. R. 10 Q. B. 111; *O'Neill v. Armstrong Mitchell*, [1895] 2 Q. B. 70. *Reid*, *Connelly v. Sibery* (1905), 69 J. P. 115. *Mentd.* *Austin Friars S.S. Co. v. Strack*, [1905] 2 K. B. 315; *Lloyd v. Sheen* (1905), 93 L. T. 174; *Palace Shipping Co. v. Caine*, [1907] A. C. 386.

127. — Wrongful dismissal.—By a deed of apprenticeship, it was provided that, if, during the term of apprenticeship, pltf. showed want of interest in his work, it should be lawful for defts. to cancel the deed upon giving him a week's notice. Pltf. was dismissed, without notice, on a false charge of misconduct. In an action for wrongful dismissal the judge directed the jury that they were not bound to limit the damages to the value of the week's notice which he had lost:—*Held*: there was no misdirection.—*MAW v. JONES* (1890), 25 Q. B. D. 107; 59 L. J. Q. B. 542; 63 L. T. 347; 54 J. P. 727; 38 W. R. 718, D. C.

Annotations:—*Distd.* *Baker v. Denkera Ashanti Mining Corp.* (1903), 20 T. L. R. 37; *Austwick v. Midland Ry.* (1909), 25 T. L. R. 728. *Consd.* *Addis v. Gramophone Co.*, [1909] A. C. 488; *Chaplin v. Hicks*, [1911] 2 K. B. 786.

128. — Difficulty of procuring fresh employment owing to dismissal.—*ADDIS v. GRAMOPHONE CO., LTD.*, No. 1, *ante*.

129. — No good ground for dismissal.—Pltf., a miner & prospector, sought to recover damages from defts., a mining co. owning property in the Gold Coast Colony of Africa, for wrongful dismissal. At the trial defts. admitted that pltf. had been wrongfully dismissed, & the only question for the jury was the amount of damages to which pltf. was entitled:—*Held*: defts. could not be made liable for more damages simply because they had not a good reason for dismissing pltf.—

BAKER v. DENKERA ASHANTI MINING CORPN., LTD. (1903), 20 T. L. R. 37.

130. Wrongful transfer of documents of title held upon trust—Insolvency of transferee.—A. having purchased jute, warehoused it at the London Docks, paid a deposit on it, & received weight notes for it from the dock co., & these he deposited with B. as a security for advances made to A. by C., & B. agreed to hold them as such security. The jute having been destroyed by fire, A. applied to B. for the notes, who wrongfully gave them up to him, & A. then went back to the vendor of the jute & obtained back the deposit & subsequently became insolvent & failed to repay C. his advances. C. having sued B. for his breach of contract in delivering up the weight notes to A.:—*Held*: C. was entitled to substantial & not merely nominal damages.—*MATTHEWS v. DISCOUNT CORPN.* (1869), L. R. 4 C. P. 228, Ex. Ch.; *previous proceedings* (1867), 16 L. T. 94.

131. Failure to honour bills of exchange—Costs of obtaining advances from third party.—Defts., bankers at Liverpool, by their letter of credit to pltf. merchants at Alexandria & Liverpool, undertook to accept the drafts of pltf.'s Alexandria firm, pltf. undertaking to put them in funds to meet the bills at maturity & defts. receiving $\frac{1}{2}$ per cent. for the accommodation. Bills were accepted by defts. under this arrangement & pltf. duly provided defts. with funds exceeding the amount of the acceptances. Before the bills became due, defts.' bank stopped & they gave notice to pltf. that they would be unable to meet the bills. Pltf. arranged with another house in Liverpool to take up the bills, paying $2\frac{1}{2}$ per cent. commission; they were also obliged to pay to the holders the expenses of protesting the bills at Liverpool & Alexandria; and had also to incur expense in telegraphic communications between Liverpool & Alexandria. In an action against defts. for breach of the contract contained in their letter of credit:—*Held*: pltf. were entitled to recover the commission & the notarial & telegraphic expenses.—*PREHN v. ROYAL BANK OF LIVERPOOL* (1870), L. R. 5 Exch. 92; 39 L. J. Ex. 41; 21 L. T. 830; 18 W. R. 463.

Annotations:—*Apld.* *Larios v. Bonany Y. Gurety* (1873), L. R. 5 P. C. 346; *Re General South American Co.* (1877), 7 Ch. D. 637. *Distd.* *Re English Bank of the River Plate, Ex p. Bank of Brazil*, [1893] 2 Ch. 438; *Banque Populaire de Bienne v. Cavé* (1895), 1 Com. Cns. 67. *Apld.* *Wallis Chlorine Syndicate v. American Alkali Co.* (1901), 17 T. L. R. 656. *Reid*, *Re Oriental Commercial Bank* (1871), L. R. 12 Eq. 501; *Barnett v. Hart* (No. 1) (1903), 48 Sol. Jo. 14; *Wilson v. United Counties Bank*, [1920] A. C. 102.

132. Failure to repair vessel—Loss sustained by detention.—In an action against defts. for breach of contract in improperly repairing a sea-going steam-vessel, pltf. claimed damages for the loss sustained by the detention of the vessel by reason of such improper repairs:—*Held*: they were entitled to do so, the detention of the vessel being the probable result of the breach of contract.—*WILSON v. GENERAL IRON SCREW COLLIERY CO., LTD.* (1877), 47 L. J. Q. B. 239; 37 L. T. 789; 3 Asp. M. L. C. 536.

Annotation:—*Reid*, *The Argentino* (1888), 13 P. D. 191.

133. Delay due to defect in ship—Loss of market.—*THE PARANA*, No. 105, *ante*.

134. Contract to stable horses—Damage suffered by cold.—Deft., an innkeeper, contracted with pltf., a horsedealet, to provide him with stabling for a number of horses during a fair at which they were to be sold, but in consequence of deft., in breach of such contract, having let his stables to another person, pltf.'s horses, after they had been put into deft.'s stables on their arrival there, from

a railway journey, were turned out by that person, assisted by deft.'s servant, without their clothing, & they remained in deft.'s yard exposed to the weather for some time until pltf. could find suitable stables for them elsewhere. Owing to this exposure several of them caught cold, which depreciated their value in the market:—*Held*: the damage in respect of such cold was recoverable, as it was the probable consequence of deft.'s breach of contract, & was not therefore too remote.

It is for the ct. & not the jury to determine whether the case comes within any of the following rules, namely, first, whether the damage is the necessary consequence of the breach; secondly, whether it is the probable consequence; & thirdly, whether it was in the contemplation of the parties when the contract was made; those last two are rather questions of fact for a jury, than of law for the ct., to determine (BRETT, L.J.).—*McMAHON v. FIELD* (1881), 7 Q. B. D. 591; 50 L. J. Q. B. 552; 45 L. T. 381; 46 J. P. 245, C. A. *Annotations*:—*Reid*, *Lepla v. Rogers*, [1893] 1 Q. B. 31; *Jackson v. Watson*, [1909] 2 K. B. 193. *Mentd.* *Lilley v. Doubleday* (1881), 7 Q. B. D. 510.

135. Breach of covenant—Not to sublet—Loss caused by dangerous business.—A lessee, in breach of his covenant not to sublet without the written consent of the lessor, sublet his premises to a turpentine distiller. In consequence of the dangerous character of the business the house was burnt down:—*Held*: the loss caused by the fire was the natural result of the breach of covenant, & was, therefore, recoverable as damages in the action.—*LEPLA v. ROGERS*, [1893] 1 Q. B. 31; 68 L. T. 584; 57 J. P. 55; 9 T. L. R. 23; 37 Sol. Jo. 11; 5 R. 57. *Mentd.* *Mackusick v. Carmichael*, [1917] 2 K. B. 581.

136. — To pay rates—Loss suffered by consequential distress.—A landlord agreed with his tenant to pay the rates of the premises, & on nonpayment the local authority distrained on the tenant. The tenant sued the landlord in the county ct. for damages for breach of the agreement, & the landlord denied liability, alleging that the distress was illegal, as the local authority had contravened the Courts (Emergency Powers) Act, 1914 (c. 78). The county ct. judge gave judgment for pltf. on the ground that, whether the distress was or was not illegal, deft. was liable for the breach of his contract:—*Held*: the judgment was right.—*ISAACS v. ARLIDGE* (1917), 87 L. J. K. B. 347; 82 J. P. 289; 34 T. L. R. 102; 62 Sol. Jo. 142; 16 L. G. R. 73, D. C.

137. — Breach of implied condition of fitness.—Damages sustained by a dealer in goods in consequence of selling goods with a warranty, in reliance upon a warranty by the person from whom he purchased them, can be recovered from the person who sold them to him, & are not too remote.—*DINGLE v. HARE* (1859), 7 C. B. N. S. 145; 29 L. J. C. P. 143; 1 L. T. 38; 6 Jur. N. S. 679; 141 E. R. 770.

Annotations:—*Reid*, *Mullett v. Mason* (1866), L. R. 1 C. P. 559. *Mentd.* *Baldry v. Bates* (1885), 1 T. L. R. 558.

138. Sale of goods—Goods supplied for special purpose.—*CORY v. THAMES IRONWORKS CO.*, No. 115, *ante*.

139. — Failure to supply—Steps bonâ fide taken to minimise loss of business.—*HOLDEN, LTD. v. BOSTOCK & CO., LTD.*, No. 116, *ante*.

—*See, further*, SALE OF GOODS.

140. Loss of profits based upon a contingency.]—

It was agreed at the beginning of 1908 between the pltf., a breeder of racehorses, & deft. the owner of a stallion, that deft.'s stallion should during the season of 1909 serve one of the pltf.'s brood mares in consideration of a sum of £315 to be paid by pltf. to deft. at the time of the service. Deft. in the summer of 1908 sold the horse to a purchaser in South America, & thus precluded himself from carrying out the contract. In an action for breach of contract, pltf. gave evidence that the profit he had made from the sale of foals by the same stallion out of other mares belonging to him considerably exceeded the £315, & he claimed damages upon the footing that he had in all probability lost a valuable foal:—*Held*: the damages claimed were too remote & contingent, & pltf. was only entitled to nominal damages.—*SAPWELL v. BASS*, [1910] 2 K. B. 486; 79 L. J. K. B. 932; 102 L. T. 811; 26 T. L. R. 452.

Annotation:—*Consd.* *Chaplin v. Hicks*, [1911] 2 K. B. 886.

141. Contract to ship by certain date—Loss due to market fluctuation.—By a contract made in July, 1919, for the sale of Cyprus locust beans, it was provided (*inter alia*) that shipment was to be made by the sellers in July &/or Aug. 1919, & that the bills of lading were to be dated for those months. The goods arrived in London on Sept. 27, 1919, & on Sept. 29 the buyers paid for them. It was subsequently discovered that the goods had not been shipped until Sept., & that the bills of lading, although dated Aug. 31, had not in fact been signed until on or after Sept. 6. From the date of the contract in July, the market for all locust beans had fallen heavily. The buyers had resold the beans, & so could not reject or return them. There was no difference in value at the material time between locust beans shipped in Aug. & those shipped in Sept. On a claim for damages *Held*: as the buyers' loss was not due to the sellers' breach of contract, the buyers were only entitled to nominal damages.—*TAYLOR & SONS, LTD. v. BANK OF ATHENS, PINNOCK BROTHERS v. BANK OF ATHENS* (1922), 91 L. J. K. B. 776; 128 L. T. 795; 27 Com. Cas. 142.

Contract for sale of land.—*See* SALE OF LAND.

Contracts of Bailment.—*See* BAILMENT, Vol. III., pp. 77, 90, 99, Nos. 163, 220, 272.

See, further, Nos. 296–307, *post*.

SUB-SECT. 3.—TORTS.

See, generally, Part V., *post*; TORTS.

142. Injury to feeling—General rule.—*HAM-LIN v. GREAT NORTHERN RY. CO.*, No. 291, *post*.

143. — Loss of service of son through injury.—If pltf.'s son, who was in fact his servant, in delivering parcels from a stage-coach, receive an injury, by which the father is deprived of his services, the father is not entitled, as part of the damages in an action for loss of his son's services, to have compensation for the injury done to his parental feelings.—*FLEMINGTON v. SMITHERS* (1826), 2 C. & P. 292, N. P.

144. — Loss of service of daughter through seduction.—In an action by a widow for the seduction of her daughter, *per quod servitium amisit*, the jury are not confined to the mere loss of service, but may give some damages for the

PART III. SECT. 2, SUB-SECT. 3.

a. General rule.—A wrongdoer is not liable in damages for injury which is not the natural, ordinary or direct consequence of his wrong-doing.—

ANDERSON v. VAN DER MERWE, [1921] C. P. D. 342.—**S. AF.**

t. ——Where two causes combine to produce the injury, both in their nature proximate, the one being caused by defts., & the other some

occurrence for which neither party is responsible, defts. are liable, provided the injury would not have been sustained but for their neglect.—*SHERWOOD v. HAMILTON CORPN.* (1875), 37 U. C. R. 410.—**CAN.**

Sect. 2.—Immediate or proximate cause: Sub-sect. 3.] distress & anxiety of mind which the mother has felt.—**ANDREWS v. ASKEY** (1837), 8 C. & P. 7, N. P. **Annotation:—****Refd.** *Hodsoll v. Taylor* (1873), L. R. 9 Q. B. 79.

145. — Conspiracy to use house of plaintiff for illegal purpose—Consequent correction of plaintiff.]—Declaration stated that pltf. was possessed of certain messuages & premises; that deft. & S. unlawfully & maliciously conspired to procure possession of a portion of the premises, & to set up & keep private stills thereon; that, in pursuance of such conspiracy, they, by falsely pretending & representing to pltf. that S. wanted such portion of the premises for the carrying on therein of a lawful trade, induced pltf. to demise them to him; that, in further pursuance of such conspiracy, deft. & S. entered & took possession of the premises & set up concealed stills therein, & falsely & maliciously pretended & represented, & by divers false & fraudulent means & devices made it appear & be believed that it was pltf. who had so set up such stills, & was the proprietor thereof; that the deft. & S. worked the stills, & falsely & maliciously pretended & represented, & by divers false & fraudulent means & devices made it appear & be believed that it was pltf. who so used the stills; & that by means & in consequence thereof, an excise officer entered, & finding pltf. upon the premises took him before a magistrate, who convicted him of keeping illicit stills:—**Held:** the declaration disclosed no cause of action—the damage to the pltf. not appearing to have been the natural & proximate consequence of the deft.'s act.—**BARBER v. LESITER** (1859), 7 C. B. N. S. 175; 29 L. J. C. P. 161; 6 Jur. N. S. 651; 141 E. R. 782.

Annotations:—**Refd.** *Castrique v. Behrens* (1861), 3 E. & E. 709; *Hasbó v. Matthews* (1867), L. R. 2 C. P. 684; *Hyde v. Bulmer* (1868), 18 L. T. 293; *Quinn v. Leatham*, [1901] A. C. 495; *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K. B. 600. **Mentd.** *Bynoe v. Bank of England* (1902), 86 L. T. 140.

146. — Death of wife—Loss of consortium—Damage suffered by child.]—Where a jury found that the death of the pltf.'s wife had been accelerated, but not to an appreciable extent, by taking a dose of tartar emetic negligently supplied by defts., & pltf. had suffered no damage thereby but that his minor child had incurred damage to the extent of \$1,000:—**Held:** the action must be dismissed because the damages attributable to defts. were, on those findings, which could not properly be disturbed, inappreciable & irrecoverable.—**KERRY v. ENGLAND**, [1898] A. C. 742; 67 L. J. P. C. 150, P. C.

147. Pain & suffering—General rule.]—**MEDIANA (OWNERS) v. COMET (OWNERS, ETC.), THE MEDIANA, No. 9, ante.**

148. —]—Every person who does a wrong, is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct' (**POLLOCK, C.B.**).—**RIGBY v. HEWITT** (1850), 5 Exch. 240; 19 L. J. Ex. 291; 155 E. R. 103.

Annotations:—**Consd.** *Lynch v. Knight* (1861), 5 L. T. 291; *Cory v. France, Fenwick*, [1911] 1 K. B. 114. **Refd.** *Greenland v. Chaplin* (1850), 5 Exch. 243; *Hoey v. Felton* (1861), 11 C. B. N. S. 142; *Re Polemis & Furness, Withy*, [1921] 3 K. B. 580. **Mentd.** *The Bernina* (No. 2) (1887), 13 P. D. 58.

149. — Nervous shock.]—A railway gate-keeper negligently allowed passengers to drive over a level crossing at a time of danger, & a collision having become imminent, though actually avoided, the passenger received a nervous shock

from fright, which led to illness. A jury having assessed damages for physical & mental injuries caused by the shock:—**Held:** such damages were not recoverable, as not being the natural & reasonable result of the negligent act.—**VICTORIAN RAILWAYS COMRS. v. COULTAS** (1888), 13 App. Cas. 222; 57 L. J. P. C. 69; 58 L. T. 390; 52 J. P. 500; 37 W. R. 129; 4 T. L. R. 286, P. C.

Annotations:—**Consd.** *Wilkinson v. Downton*, [1897] 2 Q. B. 57; *Dulieu v. White*, [1901] 2 K. B. 669; *Brown v. Watson* (1914), 111 L. T. 347. **Obtd.** *Coyle (or Brown) v. Watson*, [1915] A. C. 1. The authority of *Victorian Railways Comrs. v. Coultas* has been questioned, & to speak quite frankly, has been denied. I am humbly of opinion that the case can no longer be treated as a decision of guiding authority (**LORD SHAW**). **Refd.** *Pugh v. L. B. & S. C. Ry.*, [1896] 2 Q. B. 248; *Yates v. South Kirkby & Featherstone & Hemsworth Collieries* (1910), 103 L. T. 170; *Janvier v. Sweeney*, [1919] 2 K. B. 316.

150. —]—Deft., by way of a practical joke, falsely represented to pltf. a married woman that her husband had met with a serious accident whereby both his legs were broken. Deft. made the statement with intent that it should be believed to be true. Pltf. believed it to be true, & in consequence suffered a violent nervous shock which rendered her ill:—**Held:** these facts constituted a good cause of action.—**WILKINSON v. DOWNTON**, [1897] 2 Q. B. 57; 66 L. J. Q. B. 493; 76 L. T. 493; 45 W. R. 525; 13 T. L. R. 388; 41 Sol. Jo. 493.

Annotations:—**Consd.** *Dulieu v. White*, [1901] 2 K. B. 669; *Janvier v. Sweeney*, [1919] 2 K. B. 316. **Refd.** *Shapiro v. La Motta* (1923), 40 T. L. R. 39.

151. —]—Damages which result from a nervous shock occasioned by fright unaccompanied by any actual impact may be recoverable in an action for negligence if physical injury has been caused to pltf.—**DULIEU v. WHITE & SONS**, [1901] 2 K. B. 669; 70 L. J. K. B. 837; 85 L. T. 126; 50 W. R. 76; 17 T. L. R. 555; 45 Sol. Jo. 578, D. C.

Annotations:—**Refd.** *Willoughby v. G. W. Ry.* (1904), 6 W. C. C. 28; *Yates v. South Kirkby & Featherstone & Hemsworth Collieries* (1910), 103 L. T. 170; *Coyle (or Brown) v. Watson*, [1915] A. C. 1; *Janvier v. Sweeney*, [1919] 2 K. B. 316; *Marriott v. Maltby Main Colliery Co.* (1920), 90 L. J. K. B. 349. **Mentd.** *The Rigel*, [1912] P. 99; *Diamond Alkali Export Corp'n. v. Bourgeois*, [1921] 3 K. B. 443.

152. —]—False words & threats calculated to cause, uttered with the knowledge that they are likely to cause, & actually causing physical injury to the person to whom they are uttered are actionable. Defts. were two private detectives. One of them was designing to inspect certain letters, to which he believed pltf., a maid servant, had means of access. He instructed the other deft., who was his assistant, to induce pltf. to show him the letters, telling him that pltf. would be remunerated for this service. The assistant endeavoured to persuade pltf. by false statements & threats as the result of which pltf. fell ill from a nervous shock. In an action by pltf. against defts. for damages:—**Held:** the assistant was acting within the scope of his employment & both defts. were liable.—**JANVIER v. SWEENEY**, [1919] 2 K. B. 316; 88 L. J. K. B. 1231; 121 L. T. 179; 35 T. L. R. 360; 63 Sol. Jo. 430, C. A.

153. Loss of business or market—Detention of goods—False claim of lien.]—Declaration that pltf., a carpenter & builder, had purchased of C. certain spruce battins, to be used by him in his trade, for £11, which sum deft. had lent to pltf. for the purpose of making payment of them, & on the personal credit of pltf., without any agreement that deft. should have had any lien or control over the battins as a security for its repayment; yet that deft., well knowing the premises, &

contriving, etc., to deprive pltf. of the possession & use of the battins, & falsely & wrongfully assuming & pretending that he was entitled to a lien on them & had a right of staying & preventing the delivery of them to pltf. until the money should be repaid, wrongfully, & maliciously; & without reasonable or provable cause, but under colour of the pretended lien & right of detainer, directed C. not to deliver them to pltf. until further order from deft.; whereby & in consequence whereof, C. being induced to believe that deft. had such lien, etc., did in consequence of such order, refuse to deliver them to pltf. for three weeks, whereby pltf. was prevented from using them in his business, & certain houses which he was then building were greatly delayed, etc.:—*Held*: (1) it sufficiently appeared on the face of the declaration, that deft. made a knowingly false claim of lien; (2) the special damage alleged, viz., the non-delivery of the battins to pltf. was sufficiently connected with the wrongful act of the deft. to support the action.—*GREEN v. BUTTON* (1835), 2 Cr. M. & R. 707; 1 Gale, 349; Tyr. & Gr. 118; 5 L. J. Ex. 81; 150 E. R. 299.

Annotations:—*As to* (1) *Refd.* *Wren v. Weild* (1869), L. R. 4 Q. B. 730; *Miller v. David* (1874), 30 L. T. 58. *As to* (2) *Consd.* *Lumley v. Gye* (1853), 2 E. & B. 216; *Lynch v. Knight* (1861), 5 L. T. 291. *Refd.* *Wren v. Weild* (1869), L. R. 4 Q. B. 730; *Allen v. Flood*, [1898] A. C. 1.

154. — **Loss of profit.**—Action upon the case, brought by pltf., against deft., the collector of the customs of the port of Liverpool, for wrongfully neglecting & refusing to sign a bill of entry of a cargo of corn belonging to pltf., when presented to him for such purpose, in order that the cargo might be landed, the same being then free of duty; whereby pltf. were put to great expense in warehousing the same, & lost the profits they might have acquired in selling & disposing of the same.

Pltf. are of course entitled to receive back the amount paid by them to obtain possession of the wheat: & we think that they are also entitled to receive the amount of the loss sustained by them by reason of the fall in the price of wheat. Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price & the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market & buy. So, if a contract to accept & pay for goods is broken, the same rule may be properly applied; for the seller may take his goods into the market & obtain the current price for them. But the rule in such cases is inapplicable to the present. Pltf. might not have the money to pay the duties demanded; & deft., having improperly withheld from them the means of obtaining possession of their goods, should answer for all the loss resulting from his act (*TINDAL, C.J.*).—*BARROW v. ARNAUD* (1846), 8 Q. B. 595; 6 L. T. O. S. 453; 10 Jur. 319; 115 E. R. 1000, Ex. Ch.

155. — **Improper detention of scrip.**—Where deft., after signing an acknowledgment that certain scrip had been lodged in his hands by pltf., & was to be redelivered to him on request, wrongfully detained the scrip for a considerable time, so that its market value had been much diminished, & did not re-deliver it until action brought:—*Held*: the action was rightly brought in detinue, as the term lodged implied that the identical scrip was to be returned; & also pltf. was entitled to more than nominal damages.—*WILLIAMS v. ARCHER* (1847), 5 C. B. 318; 5 Ry. & Can. Cas. 289; 17 L. J. C. 82; 136 E. R. 899; Ex. Ch.
Annotations:—*Consd.* *Williams v. Peel River Land &*

Mineral Co. (1886), 55 L. T. 689. *Refd.* *Phillips v. Jones* (1850), 15 Q. B. 859; *Duckworth v. Ewart* (1863), 2 H. & C. 129; *Edmonson v. Nuttall* (1864), 17 C. B. N. S. 280; *Sarrao v. Noel* (1885), 15 Q. B. D. 549. *Mentd.* *Wilkinson v. Verity* (1871), L. R. 6 C. P. 206.

156. — **Detention of workman's tools.**—*BODLEY v. REYNOLDS*, No. 17, *ante*.

157. — **Repair of canal lock—Failure of statutory duty to give notice to.**—An Act enabling navigation Comrs. to grant a lease of a canal contained a clause as follows: In case the lessees during the term should permit the navigation to be out of repair, the Comrs. are hereby authorised & required to give notice thereof to such lessees. The lease having been granted in pursuance of the Act, during its continuance one of the locks of the canal became out of repair, but the Comrs., though they knew of the want of repair, gave no notice of it to the lessee though a sufficient time had elapsed for the giving of such notice. A barge entered the canal while the lock was so out of repair, but was prevented from getting out again by the falling in of the lock:—*Held*: assuming a duty in the Comrs. to give notice to the lessee to repair, they were not liable in an action by the owner of the barge for neglecting to give such notice, inasmuch as the detention of the barge was not a damage naturally flowing from their neglect.—*WALKER v. GOE* (1859), 4 H. & N. 350; 28 L. J. Ex. 184; 32 L. T. O. S. 336; 5 Jur. N. S. 737; 7 W. R. 289; 157 E. R. 875, Ex. Ch.

Annotation:—*Refd.* *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate*, [1899] 2 Ch. 392.

158. — **Injury on railway—Loss of profit on possible contracts.**—In an action of tort to recover damages for injuries sustained on a railway, damage for loss of profit on contracts which might have been entered into by pltf.:—*Held*: too remote & not recoverable.—*PRIESTLEY v. MACLEAN* (1860), 2 F. & F. 288, N. P.

159. — **Delay caused by collision.**—*THE NOTTING HILL*, No. 104, *ante*.

160. — **Vessel working at a loss.**—Where a vessel, worked at a loss to establish a new trade, was temporarily put out of employment whilst undergoing repairs necessitated by a collision, the contingent profit which may hereafter be earned, when the trade is established, & rates become remunerative, is too remote to be taken into consideration as special damage, & in such a case there being no loss, apart from actual expenses, which can be shown to result from the deprivation of the use of the vessel, general damages are also not recoverable from the owner of the wrong-doing ship.—*THE BODLEWELL*, [1907] P. 286; 76 L. J. P. 61; 96 L. T. 854; 23 T. L. R. 356; 10 Asp. M. L. C. 479.

161. — **Loss of fishing vessel.**—Pltf.' steam trawler was sunk by collision between it & defts.' steamship, the latter vessel being alone to blame:—*Held*: a claim by pltf. for loss of fishing till they got a new vessel to replace the one that was sunk was not maintainable.—*THE ANSELMA DE LARRINAGA* (1913), 29 T. L. R. 587.

162. **Loss of or injury to property—False representation as to credit.**—A tradesman can only recover against a person making a false representation of the means of one who referred to him, such damage as is justly & immediately referable to the false representation. Therefore, if the tradesman gives an indiscreet & ill-judging credit, he cannot make the referee answerable for any loss occasioned by it.—*CORBETT v. BROWN* (1832), 5 C. & P. 363, N. P.; *previous proceedings* (1831), 8 Bing. 33.

163. — **Ejectment from railway carriage—Loss of racing glasses.**—A passenger by a railway

Sect. 2.—Immediate or proximate cause: Sub-sects. 3 & 4. Sect. 3: Sub-sects. 1 & 2.]

carriage was ordered to leave it by the co.'s servants under circumstances which did not justify them in what they were doing; & it appeared that upon leaving the carriage he left a pair of race-glasses upon the seat, which, as the train proceeded without him, were lost:—*Held*: the loss of these glasses was not the natural result of the wrongful act, & pltf. could not recover their value.—*GLOVER v. LONDON & SOUTH WESTERN RY. Co.* (1867), L. R. 3 Q. B. 25; 37 L. J. Q. B. 57; 17 L. T. 139; 32 J. P. 39.

164. — Damage by flood—Injury to reversion.]—Owing to the negligence of the defts. a building estate belonging to the pltf. was overflowed by a flood. Part of the land was covered with houses which were in pltf.'s possession. Another part was covered with houses erected by builders under building leases. Other parts were the subjects of building agreements under which houses were in course of erection, & pltf. was bound to make & had made advances to the builders on the security of the property. The remainder of the land was vacant, & in pltf.'s possession. The amount of damages to which pltf. was entitled was referred to a special referee. On appeal:—*Held*: a reversioner could only recover damages where the injury to the property is permanent, so that it would continue to affect it when the reversioner came into possession & he was not entitled to damages in respect of a temporary injury, on the ground that it affected the present saleable value of his reversion.—*RUST v. VICTORIA GRAVING DOCK Co. & LONDON & ST. KATHARINE DOCK Co.* (1887), 36 Ch. D. 113; 56 L. T. 216; 35 W. R. 673, C. A.; *subsequent proceedings* (1889), 60 L. T. 645, C. A.

Annotations.—*Consd.* Tunncliffe & Hampson v. West Leigh Colliery Co., [1900] 2 Ch. 22. *Refd.* Granby v. Bakewell U. D. C. (1923), 87 J. P. 105. *Mentd.* Meux's Brewery v. City of London Electric Lighting Co., Shelfer v. City of London Electric Lighting Co. (1894), 42 W. R. 644.

165. — Arising from possession by court as stake holder.]—The law does not regard loss to a party in an action who is ultimately successful arising from the possession of the ct. or a receiver appointed by the ct., as stakeholder, as loss directly & naturally resulting from the previous wrongful acts of his adversary. When possession of the subject of controversy is with the ct., the competing parties are simply preferring their claims in the ordinary course of law; & any damages which the successful party may suffer from the continuance of litigation are due to the law's delay, & not to any legal wrong perpetrated by his unsuccessful competitor.—*PERUVIAN GUANO Co. v. DREYFUS BROTHERS & Co.*, [1892] A. C. 166; 61 L. J. Ch. 749; *sub nom.* DREYFUS BROTHERS v. PERUVIAN GUANO Co., PERUVIAN GUANO Co. v. DREYFUS BROTHERS, 66 L. T. 536; 8 T. L. R. 327; 7 Asp. M. L. C. 225, H. L.; *varying* (1889), 43 Ch. D. 316, C. A.

Annotations.—*Foll.* Slack v. Leeds Industrial Co-op. Soc., [1923] 1 Ch. 431. *Refd.* Martin v. Price, [1894] 1 Ch. 276; Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co., [1895] 1 Ch. 287. *Mentd.* Phillips v. Homfray (1890), 44 Ch. D. 694; Dakshina Mohun Roy v. Saroda Mohun Roy (1893), 9 T. L. R. 682; *Re* A. B. (No. 2), [1900] 2 Q. B. 429; Cowper v. Laidler, [1903] 2 Ch. 337.

166. Loss of custom—Obstruction of access to

premises.]—Damage by loss of custom in pltf.'s business caused by unreasonable building operations carried on in the neighbourhood so as to obstruct & render inconvenient the access to pltf.'s shop by his customers, is not too remote to be the subject of an action.—*FRTZ v. HOBSON* (1880), 14 Ch. D. 542; 49 L. J. Ch. 321; 42 L. T. 225; 28 W. R. 459; 24 Sol. Jo. 366.

Annotations.—*Consd.* Lingke v. Christchurch Corpn. (1912), 106 L. T. 376. *Refd.* Landrock v. Met. Dist. Ry. (1886), 2 T. L. R. 532; Martin v. L. C. C. (1898), 79 L. T. 170; Royce v. Paddington B. C., [1903] 1 Ch. 109. *Mentd.* Reddall v. Maitland (1881), 17 Ch. D. 174; Penrice v. Williams (1883), 23 Ch. D. 353; Serrao v. Noel (1885), 15 Q. B. D. 549; Barker v. Purvis (1886), 56 L. T. 131; Serff v. Acton L. B. (1886), 55 L. J. Ch. 569; Chapman, Morson v. Auckland Grdns. (1889), 23 Q. B. D. 294; Dreyfus v. Peruvian Guano Co. (1889), 43 Ch. D. 316; Milson v. Carter, [1893] A. C. 638; Chaplin v. Westminster Corpn., [1901] 2 Ch. 329; Chessum v. Gordon, [1901] 1 K. B. 694; Slack v. Leeds Industrial Co-op. Soc., [1923] 1 Ch. 431.

167. Increased cost of carriage of goods—Carriage by land—Obstruction to carriage by water.]

—Where pltf. declared that before & at the time of committing the grievance, he was navigating his barges laden with goods along a public navigable creek, & that deft. wrongfully moored a barge across, & kept the same so moored, from thence hitherto, & thereby obstructed the public navigable creek, & prevented pltf. from navigating his barges so laden, *per quod* pltf. was obliged to convey his goods a great distance over land, & was put to trouble & expense in the carriage of his goods over land:—*Held*: this was such a special damage for which an action upon the case would lie.—*ROSE v. MILES* (1815), 4 M. & S. 101; 105 E. R. 773; *previous proceedings, sub nom.* MILES v. ROSE (1814), 5 Taunt. 705.

Annotations.—*Foll.* Greasley v. Codling (1824), 2 Bing. 263. *Consd.* Rose v. Groves (1843), 1 Dow. & L. 61; Hicket v. Met. Ry. (1865), 5 B. & S. 156; Lyon v. Fishmongers' Co. & Thames Conservators (1875), 44 L. J. Ch. 408. *Refd.* Wilkes v. Hungerford Market Co. (1835), 2 Bing. N. C. 281; Anglo-Algerian S.S. Co. v. Houlder Line, [1908] 1 K. B. 659. *Mentd.* R. v. Montague (1825), 4 B. & C. 598; Buccleugh & Queensberry v. Metropolitan Board of Works (1868), 18 L. T. 906.

168. Negligence.]—I entertain considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, & in respect of mischief which could by no possibility have been foreseen, & which no reasonable person would have anticipated (POLLOCK, C.B.).—*GREENLAND v. CHAPLIN* (1850), 5 Exch. 243; 19 L. J. Ex. 293; 15 L. T. O. S. 185; 155 E. R. 104.

Annotations.—*Consd.* Cory v. France, Fenwick, [1911] 1 K. B. 114. *Refd.* Clark v. Chambers (1878), 3 Q. B. D. 327; The Bernina (No. 2) (1887), 12 P. D. 58; *Re* Polemis & Furness, Withy, [1921] 3 K. B. 560. *Mentd.* General Steam Navigation Co. v. Morrison (1853), 13 C. B. 581.

See, generally, NEGLIGENCE.

SUB-SECT. 4.—RECOVERY OF COSTS AND EXPENSES.

See Sect. 4, *post*.

SECT. 3.—CIRCUMSTANCES IN CONTEMPLATION OF PARTIES.

SUB-SECT. 1.—IN GENERAL.

See, generally, Part V., post.

169. Circumstances must have been in con-

PART III. SECT. 3, SUB-SECT. 1.

169 1. Circumstances must have been in contemplation of parties at time of contract.]—Where pltf. had given up

certain claims in consideration that he should be supplied by deft. with funds for certain purposes for a certain period & before the expiration of such period, deft. had refused to carry

out the contract any further:—*Held*: pltf. was entitled to a liberal amount of damages in respect of loss & embarrassment to avoid which he gave up such prior claims & which were present to

templation of parties—At time of contract.]—
HADLEY v. BAXENDALE, No. 101, *ante*.

170. ———.]—HOBBS v. LONDON & SOUTH WESTERN RY. CO., No. 106, *ante*.

171. ——— Except in actions of tort.]—THE ARGENTINO, No. 26, *ante*.

172. ———.]—A passenger claimed to recover as damages from a railway co. a sum of money, of which he had been robbed, in consequence, as he alleged, of the co.'s negligence in allowing their carriage to be overcrowded:—**Held**: the damage claimed for was too remote.

The law is that the damages must be the direct & natural consequence of the breach of obligation complained of. The law is the same in this respect with regard both to contracts & to torts, subject to the disqualification, that in the case of the former the law does not consider too remote damages which may be reasonably supposed to have been in the contemplation of the parties when the contract was made (**BOWEN, L.J.**).—**COBB v. GREAT WESTERN RY. CO.**, [1893] 1 Q. B. 459; 62 L. J. Q. B. 335; 68 L. T. 483; 57 J. P. 437; 41 W. R. 275; 9 T. L. R. 253; 37 Sol. Jo. 248; 4 R. 283, C. A.; *affd.*, [1894] A. C. 419, H. L.

Annotations:—**Consd.** **Abraham v. Bullock** (1902), 86 L. T. 796. **Refd.** **Weld-Blundell v. Stephens**, [1920] A. C. 956. **Mentd.** No. 7 **Steam Sand Pump Dredger v. S.S. Greta Holme**, **The Greta Holme**, [1897] A. C. 596.

SUB-SECT. 2.—BREACH OF CONTRACT.

See, generally, Part V., post.

173. Loss of profit—Failure to deliver threshing machine—Damage to crops by weather.]—A., a farmer, contracted with B., also a farmer, for the purchase of a threshing machine, to be delivered by Aug. 14. The machine was not delivered at the time named, & *pltf.* expecting its delivery from day to day, in accordance with the promises made by *deft.* abstained from obtaining one from another quarter. Heavy rain fell, & *pltf.*'s corn was damaged to a considerable extent:—**Held**: *pltf.* was entitled to recover such damages as might fairly & reasonably be considered as arising

naturally & in the usual course of things from the breach of contract, or such as might reasonably be supposed to be in the contemplation of both the parties, at the time they made the contract, as the probable result of the breach of it.—**SMEED v. FOORD** (1859), 1 E. & E. 602; 28 L. J. Q. B. 178; 32 L. T. O. S. 314; 5 Jur. N. S. 291; 7 W. R. 266; 120 E. R. 1035.

Annotations:—**Consd.** **Collard v. S. E. Ry.** (1861), 7 H. & N. 79. **Refd.** **Prior v. Wilson** (1860), 1 L. T. 549; **Phelps v. L. & N. W. Ry.** (1865), 13 W. R. 782; **Wilson v. Newport Dock Co.** (1866), L. R. 1 Exch. 177; **Elbinger Act. fur Fabrication Von Eisenbahn Materiel v. Armstrong** (1874), 23 W. R. 127; **The Parana** (1877), 2 P. D. 118.

174. ——— Contract for "forward delivery"—Loss on resale.]—The loss of profit on a resale cannot be taken into calculation in estimating the damages which the original vendor is liable to pay for non-delivery, although the original contract was a contract for "forward delivery," & in the place where it was made such purchases are commonly followed by a resale, & are made with that view, & although such a resale has been actually made before the breach of the original contract by non-delivery. The damages which may be recovered are only such as will naturally & in the ordinary course of things, arise from the breach of duty complained of, or such as may fairly be considered to have been in the contemplation of the parties.—**WILLIAMS v. REYNOLDS** (1865), 6 B. & S. 495; 6 New Rep. 293; 34 L. J. Q. B. 221; 12 L. T. 729; 11 Jur. N. S. 973; 13 W. R. 940; 122 E. R. 1278.

Annotations:—**Refd.** **Ströms Bruks Akt. v. Hutchison** (1905), 74 L. J. P. C. 130; **Williams v. Agius**, [1914] A. C. 510; **Slater v. Hoyle & Smith**, [1920] 2 K. B. 11.

175. ——— Failure to transmit message in cipher—Loss of commission upon order.]—*Deft.*'s business was to collect telegraphic messages for transmission to America & other places. *Pltf.* entrusted *deft.* with a message in cipher, which was unintelligible to *deft.*, for transmission to America. *Deft.* negligently omitted to send the message. The consequence was that *pltf.* lost a sum of money which they would have earned for commission upon an order to which the message related:—**Held**: *pltf.* could not recover such sum of money from the *deft.* but only nominal damages.

the minds of both parties when making the contract.—**PARKER v. CUNNINGHAM** (1879), 5 V. L. R. 202.—**AUS.**

169 ii. ———.]—UNION INSURANCE SOCIETY OF CANTON, LTD. v. WILLS (GEORGE) & Co. (1914), 16 W. A. L. R. 150.—**AUS.**

169 iii. ———.]—A. sold to B. a new engine & agreed to take from B. certain old engines at a fixed price. The old engines were not delivered in time. A. then demanded rent from B. for the old engines still in his possession:—**Held**: any loss of rental accruing to A. could not be held to have been within the contemplation of the parties & was therefore not recoverable as damages.—**VANCOUVER MACHINERY DEPOT v. VANCOUVER TIMBER & TRADING CO.** (1914), 29 W. L. R. 93.—**CAN.**

169 iv. ———.]—Proper damages are those which might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of a breach of it.—**WALTON v. FERGUSON** (1914), 29 W. L. R. 949.—**CAN.**

169 v. ———.]—In determining what consequences the parties may be reasonably supposed to have contemplated, the knowledge of the circumstances in which the contract was made must be, not merely an important, but the decisive consideration.—**RIVERS v. WHITE (GEORGE) &**

SONS CO., LTD., [1919] 2 W. W. R. 189.—**CAN.**

169 vi. ———.]—A party can obtain only such damages as the parties knew, when they made the contract, to be likely to result from the breach.—**MUTHAYA MANIAGARAN v. LEKKU REDDIAR** (1914), 1 L. R. 37 Mad. 412.—**IND.**

169 vii. ———.]—For the purpose of rendering a *deft.* responsible for damages which, in the ordinary course of things flow from a particular breach, it is unnecessary that the actual breach which ensued should have been within the contemplation of the parties.—**WILSON v. DUNVILLE** (1879), 6 L. R. Ir. 210.—**IR.**

169 viii. ———.]—In an action for wrongful delivery to a third party of a document delivered to *deft.* by *pltf.* for safe keeping, damages were claimed for the loss sustained by *pltf.* by reason of his being subjected to a false prosecution for forgery as a result of *deft.* not having retained possession of the document:—**Held**: in the absence of anything to show that *deft.* might reasonably have contemplated that the result of parting with the document would be to expose *pltf.* to a false prosecution for forgery, the damages claimed were too remote.—**DRUMMOND v. LEZARD** (1906), 23 S. C. 60.—**S. AF.**

169 ix. ———.]—In claiming damages for breach of contract, *pltf.* must show

that the damages claimed were in the contemplation of the parties at the time of entering into the contract.—**EMSLIE v. AFRICAN MERCHANTS, LTD.**, [1908] E. D. L. 82.—**S. AF.**

PART III. SECT. 3, SUB-SECT. 2.

a. Loss of profit—Failure to deliver billiard table to innkeeper during sugar season.]—*Deft.* sold to *pltf.*, an innkeeper, a billiard table for the use of his inn, *deft.* being expressly informed that it was for such use that it was purchased. *Deft.* delivered the table, but it was found to be defective & useless; & was returned. In an action for damages *pltf.* claimed loss of profits he would have derived from the use of the table, & in addition, damages for extraordinary loss sustained by his not having the table at a particular season of the year, called the "sugar season," when the place was frequented by people in that trade:—**Held**: the damages claimed for loss of extraordinary profits that would have arisen by having the billiard table at the sugar season were not recoverable, same not being in the contemplation of the contractor.—**DOYLE v. JACOBS** (1872), 11 N. S. W. S. C. R. 77.—**AUS.**

b. ——— Failure to complete work by time agreed—Loss of tenant.]—In an action by *pltf.* for the contract price for the erection by *pltf.* of a vault in a building owned by *deft.*, *deft.*

Sect. 3.—Circumstances in contemplation of parties:
Sub-sects. 2 & 3.]

—**SANDERS v. STUART** (1876), 1 C. P. D. 326; 45 L. J. Q. B. 682; 40 J. P. 728; 24 W. R. 949; *sub nom.* **SAUNDERS v. STEWART**, 35 L. T. 370.

176. — Delay of chartered vessel.]—GIA-CHETTI v. SPEEDING, MARSHALL & Co. (1899), 15 T. L. R. 401.

177. Loss of business—Failure to insert advertisement.]—MARCUS v. MYERS & DAVIS (1895), 11 T. L. R. 327.

*Annotations:—***Consd.** **Turpin v. Victoria Palace**, [1918] 2 K. B. 539. **Refd.** **Cointat v. Myham**, [1913] 2 K. B. 220.

178. — Failure to deliver plates for construction of barge—Plates not procurable elsewhere—Increased cost of construction.]—WATSON v. GRAY (1900), 16 T. L. R. 308.

*Annotations:—***Refd.** **Cointat v. Myham**, [1913] 2 K. B. 220; **Turpin v. Victoria Palace**, [1918] 2 K. B. 539.

179. — Contract to offer chance of engagement.]—CHAPLIN v. HICKS, No. 98, ante.

180. — Failure to supply goods—Loss of sub-contracts.]—DOE v. BOWATER (W. H.), LTD., [1916] W. N. 185.

181. Loss of publicity—Contract with theatrical performer.]—Defts. entered into a contract whereby they engaged pltf., a music-hall artiste, to perform at their music-hall. The contract contained no clause which placed on defts. any express or implied obligation to allow pltf. to appear & perform at their music-hall during the contract periods. Pltf. brought an action against defts. for damages for breach of contract, alleging that they had wrongfully repudiated their bargain with her. She claimed damages for loss of salary, & for loss of publicity arising from the refusal of defts. to permit her to perform. No evidence was given at the trial that it was the common intent of the parties, at the date of the contract, that enhanced publicity should follow from pltf.'s appearance at defts.' hall, & defts. entered into the contract upon no other basis than the business engagement of an artiste at the salary they agreed to pay. The jury found that defts. had committed the breach of contract alleged & assessed the damages at £100 for loss of salary, & £100 for loss of publicity:—**Held**: on the contract & in the circumstances, damages for loss of publicity were not recoverable in law, & there must be judgment for pltf. for £100 only for loss of salary.

An application for a new trial on the ground of

counterclaimed damages for the loss of a tenant who had agreed to take a lease of one floor of the building on condition that the vault was completed by a specified date:—**Held**: in order to recover deft. must show that pltf. was so far aware of the agreement between deft. & his proposed tenant that he must be taken to have contracted to bear the loss covered by the repudiation of the tenancy in consequence of his failure to carry out the terms of his contract.—**SANDERS v. SUTCLIFFE** (1905), 38 N. S. R. 352.—**CAN.**

c. — Breach of contract to thresh crop—Loss of crop by weather conditions.]—In an action for breach of contract to thresh a crop, & for loss through destruction of crop by wild ducks & weather conditions while waiting for deft. to fulfil his contract:—**Held**: such loss was not recoverable because not contemplated or reasonably to be contemplated by the parties as a natural result of the breach.—**WALKER v. SHARPE**, [1921] 1 W. W. R. 410.—**CAN.**

d. — Defective gas engine.]—A claim for damages based on the profits which would have accrued

from the fact that two firms competing with pltf. had gone out of business during the period the engine was needed.—**ALABASTINE Co., PARIS, LTD. v. CANADA PRODUCER & GAS ENGINE Co., LTD.** (1912), 23 O. W. R. 841; 4 O. W. N. 486; 8 D. L. R. 405.—**CAN.**

e. — Defective tractor.]—Damages recoverable by a purchaser of a tractor for breach of warranty in the contract of sale may include loss of profits derivable from crops which would have been grown had the tractor fulfilled the warranty, if the circumstances are such that such profits were or ought to have been within the contemplation of the parties when the contract was made.—**MAGER v. BAIRD RANCH Co., LTD. & BAIRD**, [1919] 3 W. W. R. 428.—**CAN.**

PART III. SECT. 3, SUB-SECT. 3.

184 i. Necessity for.]—S. agreed to permit F. to have the use of an engine & plough for putting in her spring crops, which agreement he wrongfully refused to carry out, & her crop was reduced in consequence, & further work necessitated on the land in the

excessive damages was dismissed.—**TURPIN v. VICTORIA PALACE** [1918] 2 K. B. 539; 88 L. J. K. B. 569; 119 L. T. 405; 34 T. L. R. 548; *affd.*, [1919] 1 K. B. 366, C. A.

182. Breach of warranty—Defective machinery—Damage to third party.]—Pltfs., a firm of stevedores, contracted to discharge a cargo from deft.'s ship, deft. agreeing to supply all necessary cranes, chains & other gearing reasonably fit for that purpose. Dft. in breach of his agreement supplied a defective chain, which broke while being used, & in consequence one of pltfs.' workmen was injured. Pltfs. might have discovered the defect in the chain by the exercise of reasonable care. Pltfs. settled an action by the workman by paying the workman £125, which sum they sought to recover from deft. as damages for breach of his contract. It was not disputed that the settlement of the action brought by the workman was a proper one:—**Held**: pltfs.' liability to pay compensation to their workman was the natural consequence of deft.'s breach of contract, & such as might reasonably be supposed to have been within the contemplation of the parties when the contract was entered into, & therefore the damages claimed were not too remote.—**MOWBRAY v. MERRYWEATHER**, [1895] 2 Q. B. 640; 65 L. J. Q. B. 50; 73 L. T. 459; 59 J. P. 804; 44 W. R. 49; 12 T. L. R. 14; 40 Sol. Jo. 9; 14 R. 767, C. A.

*Annotations:—***Follis v. Oulton** (1899), 81 L. T. 435. **Apld.** **Bentley v. Metcalfe** (1906), 75 L. J. K. B. 891. **Refd.** **Hawkins v. Smith** (1896), 12 T. L. R. 532; **Scott v. Foley, Alkman** (1890), 5 Com. Cas. 53.

SUB-SECT. 3.—NOTICE OF SPECIAL CIRCUMSTANCES.

See, generally, Part V., *post*.

183. General rule.]—HADLEY v. BAXENDALE, No. 101, ante.

184. Necessity for.]—COUPER & Co. v. RICHARDS & Co. (1887), 3 T. L. R. 739.

185. Where no knowledge of special purpose—Chattel purchased for special purpose.]—CORY v. THAMES IRONWORKS Co., No. 115, ante.

186. — Trover—Goods not procurable elsewhere.]—FRANCE v. GAUDET, No. 6, ante.

187. — Articles valueless for ordinary purpose.]—On breach of contract by the seller to deliver an article obviously valueless, if used for the purpose for which such an article is ordinarily used,

following year:—**Held**: in the absence of knowledge on the part of S. of special circumstances, F. only entitled to the extra cost of getting the ploughing done by some one else beyond the expense F. would have been under with S.'s engine & plough.—**WALTON v. FERGUSON** (1914), 29 W. L. R. 949.—**CAN.**

184 ii. —.]—Damages for loss of market caused by delay in shipping goods cannot be recovered against a carrier, unless specific notice has been given to him that the contract has been made in view of a particular market.—**NEW ZEALAND SHIPPING Co. v. BLACK** (1884), 3 N. Z. L. R. 288.—**N.Z.**

1. Where no knowledge of special purpose—Contract of carriage—Detention of ship.]—The owners of a steamship sent a piston by rail from G. to P. A delay of between 3 & 4 days having taken place in delivery, the shipowners sued the co. for damages, including outlays & loss of profit caused by the detention of the ship. The co. received notice from the shipowners, that the carriage was urgent, & any delay in the delivery of the casting would cause detention of the

the buyer is entitled to recover damages based on the value of the article, if used for the specific purpose for which the buyer bought it, although such specific purpose were unknown to the seller at the time of the sale.—*DE MATTOS & Co. v. GREAT EASTERN S.S. Co.* (1885), 1 T. L. R. 283; *Cab. & El.* 489; *reversd.* on other grounds (1886), 2 T. L. R. 401, C. A.; (1887), 3 T. L. R. 639, H. L.

188. — **Loss on sub-contract.**—*WATSON v. GRAY* (1900), 16 T. L. R. 308.

Annotations:—*Reid. Cointat v. Myham*, [1913] 2 K. B. 220; *Turpin v. Victoria Palace*, [1918] 2 K. B. 539.

189. — **Loss of goodwill.**—*Defts.* contracted to sell sulphuric acid commercially free from arsenic. *Pltfs.* did not expressly or by implication make known to *defts.* the particular purpose for which the goods were required. *Pltfs.* required the acid for manufacturing brewing sugar. The acid supplied was not commercially free from arsenic. *Pltfs.* could, by exercising ordinary care, have discovered the presence of arsenic, but failed to do so. *Pltfs.* manufactured brewing sugar & sold it to brewers, who used it in brewing beer. The brewers, by reason of the poisonous beer, suffered loss, & *pltfs.* accordingly became liable to the brewers. In an action to recover damages for fraudulent misrepresentation & breach of contract:—*Held*: the contract was for a sale by description, & there was no fraudulent misrepresentation, & damages were not recoverable for the loss of goodwill or for the brewers' claims. The damages recoverable were confined to the price paid for the impure acid, & the value of the goods spoilt by being mixed with the impure acid.—*BOSTOCK & Co., LTD. v. NICHOLSON & SONS, LTD.*, [1904] 1 K. B. 725; 73 L. J. K. B. 524; 91 L. T. 626; 53 W. R. 155; 20 T. L. R. 312; 9 Com. Cas. 200.

Annotations:—*Distd. Pinnock v. Lewis & Peat*, [1923] 1 K. B. 690. *Reid. Turpin v. Victoria Palace*, [1918] 2 K. B. 539.

Mentd. Cointat v. Myham, [1913] 2 K. B. 220; *Taylor v. Bank of Athens, Pinnock v. Bank of Athens* (1922), 91 L. J. K. B. 776.

190. **Where knowledge of special purpose—Contract of carriage—Expenses incurred to perform sub-contract.**—*Pltf.* told *deft.* that *Admty.* contracts were out for coals, & inquired if he had any tonnage to offer. In consequence, *pltf.* chartered a ship of *deft.* which was not ready in time to enable *pltf.* to fulfil his *Admty.* contract. *Pltf.* thereupon arranged with another vessel to take his coals, in pursuance of the contract, & the jury found that this was best for the interests of all concerned:—*Held*: *pltf.* was entitled to recover as damages for the breach of the charter, the extra expense incurred by so forwarding the coals.—*PRIOR v. WILSON* (1860), 1 L. T. 549; 8 W. R. 260.

191. — **Liability under contract with third party.**—*Deft.*, in Jan., 1872, agreed to furnish *pltfs.* with 666 sets of wheels & axles according to tracings, 100 of which were to be delivered at stated intervals in the months of Feb., Mar., & Apr. free on board at Hull. *Pltfs.* were under a contract with a Russian railway co. to deliver them 1,000 waggons, 500 on May 1, 1872, & 500 on May 31, 1873, & they were bound to pay two roubles per waggon for each day's delay in delivery.

ship, but the co. was not informed of the size of the ship, that it had a crew of 57 men on board & that the casting was a piston forming part of the machinery of the vessel:—*Held*: the co. was not liable for the loss of profit & were only liable for part of the outlays caused by the detention of the ship.—*DEN OF OGIL CO., LTD. v. CALEDONIAN RY. CO.* (1902), 5 F. (Ct. of Sess.) 99.—*SCOT.*

g. Where knowledge of special

purpose—Contract of carriage—Inevitable fall in value.—Where a carrier has notice from the description of goods that delay in a voyage would diminish their value, & where there are circumstances which it is reasonable to assume are known to the carrier, from which the object in ordering the goods ought to be inferred by the carrier, damages are recoverable for loss through an inevitable fall in the market value of the goods.—*BAULD v. SMITH* (1901), 40 N. S. R. 294.—*CAN.*

In the course of the negotiations between *pltfs.* & *deft.*, *deft.* was informed of this contract, but neither the precise day for the delivery nor the amount of the penalties was mentioned. Delay occurred in the delivery of the 100 sets of wheels, & *pltfs.*, in consequence, had to pay certain penalties, but the Russian co. consented to take one rouble a day, amounting in the whole to £100. *Pltfs.* having brought an action against *deft.* for the delay, sought to recover as damages the £100:—*Held*: *pltfs.* were not entitled as damages, as matter of right, to the amount of penalties, but that the jury might reasonably have assessed the damages at that amount.—*ELBINGER ACT. v. ARMSTRONG* (1874), L. R. 9 Q. B. 473; 43 L. J. Q. B. 211; 30 L. T. 871; 38 J. P. 774; 23 W. R. 127.

Annotations:—*Folld. Grébert-Bornis v. Nugent* (1885), 15 Q. B. D. 85. *Reid. Hydraulic Engineering Co. v. McHaffie* (1878), 4 Q. B. D. 670. *Mentd. Hinde v. Liddell* (1875), L. R. 10 Q. B. 265.

192. — **Pltf.** having received an order from P. to supply from 150 lb. to 200 lb. wound cotton daily, verbally agreed with *deft.* that *deft.* should undertake the winding of it, informing *deft.*, as was the fact, that *pltf.* had taken upon himself the consequences of late delivery, if any, to P., & obtaining from *deft.* the assurance that he, *pltf.*, might rely on him. Afterwards, & on the day of the interview, *pltf.* sent *deft.* a written order for the cotton, on the express condition that the same should be delivered daily, but containing no notice or stipulation as to the sub-contract of *pltf.* with P. *Deft.* failing to deliver regularly to *pltf.*, & *pltf.* to P., the result was that P. claimed, & *pltf.* paid to P. the sum of £300 by way of reimbursing P. for his loss upon resale of the goods which P.'s customers had refused to accept, as having been delivered late:—*Held*: *pltf.* might recover the sum of £300 from *deft.* as damages for the breach of contract to deliver the cotton daily.—*SAWDON v. ANDREW* (1874), 30 L. T. 23.

193. — **Defts.** contracted with *pltf.* to deliver goods to him of a particular shape & description at certain prices & by instalments at different times. When the contract was made *defts.* knew that, except as to price, it corresponded with & was substantially the same as a contract which *pltf.* had entered into with a French customer of his, & that it was made in order to enable *pltf.* to fulfil such last-mentioned contract. *Defts.* broke their contract & there being no market for goods of the description contracted for, *pltf.*'s customer recovered damages against him in the French ct. In an action against *defts.* for their breach of contract:—*Held*: *pltf.* was not only entitled to recover as damages the amount of profit he would have made had he been able to fulfil his contract with his customer, but also damages in respect of his liability to such customer.—*GRÉBERT-BORGNIS v. NUGENT* (1885), 15 Q. B. D. 85; 54 L. J. Q. B. 511; 1 T. L. R. 434, C. A.

Annotations:—*Apld. Levi v. S. E. Ry.* (1886), 2 T. L. R. 817. *Expld. Hammond v. Bussey* (1887), 20 Q. B. D. 79.

h. — Breach of warranty of flax seed.—*Pltf.* sowed flax seed bought from *deft.*, & brought an action for damages for breach of warranty upon the sale:—*Held*: the special purpose for which the flax was wanted by *pltf.* was made known to *deft.*, & the damages contemplated would be the amount of injury which would ordinarily follow from a breach in the special circumstances so made known.—*NARGANG v. KIRBY* (1911), 18 W. L. R. 625.—*CAN.*

Sect. 3.—Circumstances in contemplation of parties:
Sub-sect. 3 & 4. Sect. 4: Sub-sect. 1.]

Refd. *Vickers v. Church Extension Assocn.* (1888), 4 T. L. R. 874; *Re Borgeois & Wilson Holgate* (1920), 26 Com. Cas. 260.

194. — Loss of profit.]—Pltfs., in July, 1877, contracted with J. to make for him a machine, to be delivered at the end of Aug. Defts. contracted with pltfs. to make "as soon as possible" part of the machine called a "gun." Defts. were aware that the machine was wanted by J. at the end of Aug., but they did not finish the "gun" until the latter part of Sept. J. then refused to accept the machine from pltfs. The delay on the part of defts. was owing to the circumstance that at the time of the undertaking to manufacture the "gun" they had not a foreman competent to prepare certain patterns without which it could not be made:—**Held:** pltfs. were entitled to recover damages for the loss of profit upon the contract with J., & for the expenditure uselessly incurred by them in making other parts of the machine.—**HYDRAULIC ENGINEERING CO. v. McHAFFIE** (1878), 4 Q. B. D. 670; 27 W. R. 221, C. A.

Annotation:—Mentd. *Hammond v. Bussey* (1887), 20 Q. B. D. 79.

195. — Agreement to lend money.—To complete contract.]—MANCHESTER & OLDHAM BANK, LTD. *v.* COOK (W. A.) & CO., No. 396, post. **Contracts of carriage.]—**See CARRIERS, Vol. VIII., pp. 138–142, Nos. 908, 910, 911, 918–922, 926, 928, 932–934.

— **By sea.]—**See SHIPPING & NAVIGATION.

Sale of goods.]—See SALE OF GOODS.

Sale of land.]—See SALE OF LAND.

Trover.]—See TROVER & CONVERSION.

SUB-SECT. 4.—RECOVERY OF COSTS AND EXPENSES.
See Sect. 4, post.

SECT. 4.—RECOVERY OF COSTS AND EXPENSES.

SUB-SECT. 1.—IN GENERAL.

196. Costs included in damages.]—If two persons have dealings & make up their accounts an *assumpsit* will lie against him who owes the balance. A jury may assess damages as far as counted for, & also costs beyond that sum.—**EGLES v. VALE** (1605), Cro. Jac. 60; 70 E. R. 59; *sub nom.* **VALE v. EGLES**, Yelv. 70.

Annotation:—Mentd. *Feathers v. Bryan* (1747), 1 Wils. 180.

197. —.]—In contemplation of law the word damages emphatically includes costs. It is so considered by Lord Coke, & in various authorities which have been cited. Costs therefore properly fall under the *nomen generale* of damages (**LORD ELLENBOROUGH, C.J.**).—**PHILLIPS v. BACON** (1808), 9 East, 298; 103 E. R. 587.

Annotation:—Mentd. *Mullet v. Challis* (1851), 16 Q. B. 239.

198. Whether recoverable—If in nature of special damage—& not so pleaded—Action for false imprisonment.]—Pltf. had been improperly committed to prison on a defective warrant for which a good warrant was afterwards substituted. He sued & recovered 1s. damages:—**Held:** he was not entitled, as the pleadings were framed, to

recover the costs as damages since these costs were not consequential damages but special, & special damages had not been claimed.—**SPENCER v. MEYNELL** (1846), 10 J. P. Jo. 771.

199. What costs recoverable—Trespass to goods—Money paid for release of goods improperly seized.]—Where the goods of a party have been seized under lawful process against him improperly executed upon him, & he pays a sum of money to release his goods, he is entitled to recover, in an action of trespass, damages to the full amount of the money paid, & the measure of damages is not limited by the injury actually sustained.

Where the damages are under £20, the ct. will not grant a new trial on the ground that the verdict is against evidence, although the decision is one affecting the inhabitants of a large district.—**SOWELL v. CHAMPION** (1838), 6 Ad. & El. 407; 2 Nev. & P. K. B. 627; Will. Woll. & Dav. 667; 2 L. J. Q. B. 197; 112 E. R. 156.

Annotations:—Consd. *Allum v. Boutbee* (1854), 9 Exch. 738. **Mentd.** *White v. Hill* (1844), 6 Q. B. 487; *Rowles v. Senior* (1846), 8 Q. B. 677; *Wakeman v. Lindsey* (1850), 14 Q. B. 625.

200. — Costs of vacating warrant of attorney.]—In trespass for taking pltf.'s goods in execution under a warrant of attorney & judgment which were afterwards set aside as illegal, pltf. cannot claim as part of the damage his costs incurred in vacating the warrant of attorney & judgment.—**HOLLOWAY v. TURNER** (1845), 6 Q. B. 928; 14 L. J. Q. B. 143; 4 L. T. O. S. 372; 9 Jur. 160; 115 E. R. 349.

Annotations:—Apld. *Atthorp v. Bedford & Cambridge Ry.* (1863), 8 L. T. 200. **Refd.** *Foxall v. Barnett* (1853), 2 E. & B. 928.

201. — Costs of recovering debt.]—Action for goods sold & delivered. Plea, except as to £22 8s. 3d., never indebted, & as to £22 8s. 8d. payment after action brought of £22 8s. 3d. in satisfaction of the claim of £22 8s. 3d. & all damages accrued in respect thereof. At the trial, pltf. offered no evidence on the first issue, & deft. proved that he paid £22 8s. 3d. to pltf., who accepted it, no mention being made of costs:—**Held:** the plea was not proved, since the costs which were part of the damages, were not paid; & therefore pltf. was entitled to a verdict with nominal damages.—**COOK v. HOPEWELL** (1856), 11 Exch. 555; 25 L. J. Ex. 71; 26 L. T. O. S. 224; 2 Jur. N. S. 66; 4 W. R. 291; 156 E. R. 951.

Annotations:—Refd. *Howarth v. Brown* (1863), 1 H. & C. 694; *Soc. des Hôtels Le Touquet Paris-Plage v. Cummings*, [1922] 1 K. B. 451. **Mentd.** *Tetley v. Wantles* (1867), 16 L. T. 601.

202. — Trespass to land—Cost of obtaining injunction in Chancery.]—In an action of trespass for taking possession of pltf.'s land:—**Held:** pltf. could not recover costs incurred by him in preparing a bill in equity for an injunction.—**ARTHORP v. BEDFORD & CAMBRIDGE RY. CO.** (1863), 8 L. T. 200.

203. — Cost of prosecuting for forcible entry.]—The damages were laid under three heads, viz.: (1) the actual damage caused to the premises by deft.'s forcible entry; (2) mesne profits to which pltf. said he was entitled by reason of deft. keeping him out of possession from Mar. 7, 1893, until Apr. 18 of that year; & (3) the costs incurred by pltf. in prosecuting deft. for the forcible entry. This latter item was the main issue in the case; after carefully considering all the arguments he

PART III. SECT. 4, SUB-SECT. 1.

199 i. What costs recoverable—Trespass to goods—Money paid for release of goods improperly seized.]—An action for the amount paid to get rid of a wrongful distress will be treated

as an action for trespass for the unlawful seizure of the goods, & the amount paid will be treated as a measure of damage.—**McINTYRE'S CREDITORS' TRUSTEES v. LETT** (1883), 2 N. Z. L. R. 198.—N.Z.

199 ii. — Whether expense of

sheriff's inquiry.]—In an action for trespass to goods:—**Held:** pltf. could not recover as damages the expense of an inquiry held by the sheriff for his own information as to the right to the goods.—**WILSON v. ELLIS** (1838), Ber. [497] 325.—CAN.

was unable to see how such costs could be said to be the reasonable consequence of deft.'s criminal offence of forcible entry. The costs of the action of ejectment were recoverable as damages in an action for mesne profits, but there was a great difference between that course & a criminal indictment, as in this case. Upon that issue pltf. had failed (CHARLES, J.).—*POCOCK v. FAULKES* (1894), 10 T. L. R. 183.

See, generally, DISTRESS; EXECUTION; TRESPASS.

204. — *Cost of setting aside conviction.*—Deft. convicted pltf. of an offence under the 29 Car. 2, c. 7, in selling walnuts on the Lord's day, & in the conviction adjudged him to pay the sum of 5s. & costs, to be levied by distress, & in default of sufficient distress to be set in the stocks. The conviction having been set aside by

the Ct. of Q. B. on the ground that the power of setting in the stocks was a punishment in lieu of the money penalty, & not a mode of recovering it: *Qu.*: whether, in such action, pltf. can recover as damages his costs of setting aside the conviction.—*BARTON v. BUCKNELL* (1850), 15 L. T. O. S. 478; *subsequent proceedings*, 13 Q. B. 393.

205. — *Cost of granting coroner's inquisition.*—Pltf., who had been committed to gaol for manslaughter by a coroner's warrant, was afterwards admitted to bail, & subsequently got the inquisition, under which he had been committed, quashed. In an action against the coroner for false imprisonment, alleging as special damage that he had been obliged to pay money in procuring his discharge from custody:—*Held*: he was entitled to recover the costs of quashing the inquisition.—*FOXALL v. BARNETT* (1853), 2 E. & B.

204 i. — *Cost of setting aside conviction.*—In an action for false imprisonment:—*Held*: pltf. was entitled in this action to recover the expenses to which he had been put in securing the reversal of the judgment by which he suffered arrest.—*CARMAN v. DUNN* (1883), 23 N. B. R. 335.—*CAN.*

k. — *Whether fees of expert witnesses.*—Fees paid to medical men who had not attended pltf. during his injuries but who were simply called in at the last moment to examine him to qualify themselves to give evidence at the trial cannot be recovered as damages.—*LANT & LOUGHLIN v. WHITE FEATHER MAIN REEFS* (1905), 7 W. A. L. R. 203.—*AUS.*

l. — *Whether travelling & hotel expenses.*—In an action for causing dust to enter pltf.'s premises during demolition of neighbouring building:—*Held*: travelling expenses but not hotel expenses included in assessment of damages.—*HARRIS v. CARNEGIE'S, LTD.*, [1917] V. L. R. 95.—*CAN.*

m. — *—*—In an action for breach of partnership agreement:—*Held*: pltf. was entitled to travelling, hotel & other expenses in trying to get deft. to admit him into partnership.—*WHITBY v. WIDEN*, [1922] 2 W. W. R. 1216.—*CAN.*

n. — *Whether travelling expenses.*—Where pltf. had incurred expense in replacing, altering & repairing lock castings, which deft. did not make or finish in the manner contracted for:—*Held*: pltf. could properly claim travelling expenses to which he had put in connection therewith.—*LALOR v. BURROWS* (1868), 18 C. P. 321.—*CAN.*

o. — *—*—Deft., a contractor, agreed with pltf. that if they would go to N. Y., at their own expense, & procure labourers, he would give them work. Pltf. brought the labourers, but deft. refused to employ them:—*Held*: pltf. were entitled as damages to their expenses in going to & returning from N. Y., & the amount of advances made by them in paying the fares of the labourers from N. Y.—*MANDIA v. MCMAHON* (1890), 17 A. R. 34.—*CAN.*

p. — *—*—Pltf. tendered goods to defts. under a contract but defts. refused to accept. Pltf. failed to resell the goods at as high a price as he ought to have obtained:—*Held*: travelling expenses incurred in & about the resale could not be recovered as a result of the breach.—*BRADLEY v. BAILEY TOBACCO CO. & JASPERSON* (1922), 62 D. L. R. 397.—*CAN.*

q. — *Breach of contract—Expenses of altering site of monument.*—In an action for damages, arising from nonimplement of an agreement to place M.'s monument on W.'s property at C.:—*Held*: pursuer was entitled to indemnification for the expenses

incurred in consequence of the alteration of the site of the monument.—*WALKER v. MILNE* (1825), 3 Sh. (Ct. of Sess.) 478.—*SCOT.*

r. — *Breach of agreement not to trade in opposition—Higher rate of wages paid.*—In an action for breach of agreement, not to go into business for a certain time, by reason of which breach pltf. claimed he had been compelled to pay a higher rate of wages:—*Held*: pltf. was entitled to damages for extra costs of hands.—*WHITTAKER v. WELCH* (1874), 2 Pug. 436.—*CAN.*

s. — *Breach of covenant to carry on hotel—Expenses of new licence & refurnishing hotel.*—Deft. covenanted to carry on pltf.'s hotel for ten years &, in breach of his covenant, sold all the furniture in the house & closed it up, his licence being forfeited. In an action for breach of covenant pltf. claimed as damages the licence fee of £30; £2 paid for a certificate of renewal of licence, £20 for expenses incurred in refurnishing the hotel:—*Held*: pltf. could not recover the £30 paid for the licence fee but could recover the other two amounts.—*MACKAY v. BLACKSTON* (1906), 6 S. R. N. S. W. 248.—*AUS.*

t. — *Breach of warranty—Special machine—Expense of ascertaining if up to warranty.*—Pltf. bought from deft. an ice machine capable of turning out 100 seers of pure ice per hour. The ice machine turned out eventually a quantity much less than 100 seers a day:—*Held*: pltf. was entitled as damages to the expenses of ascertaining whether it would turn out 100 seers a day.—*LAMOURBOUX v. EVILLE* (1866), 1 Ind. Jur. N. S. 274.—*IND.*

u. — *Adulterated butter—Whether fine imposed.*—Deft. sold to pltf. adulterated butter, with a warranty. Pltf. retailed same to customers, & being prosecuted under the Margarine Act, was fined. In an action for breach of warranty:—*Held*: pltf. could not recover as damages the amount of the fine.—*FITZGERALD v. LEONARD* (1893), 32 L. R. Ir. 675.—*IR.*

b. — *Rescinded contract—In general.*—Expenses necessarily incident to a rescinded contract may be recovered as damages.—*KERR v. RHODES* (1888), 6 N. Z. L. R. C. A. 515.—*N.Z.*

c. — *Non-delivery of goods—Extra carriage on obtaining goods elsewhere.*—In an action for non-delivery of wheat sold:—*Held*: pltf. was entitled to recover as damages the amount paid by him for additional carriage on wheat which he was forced to purchase in a more distant market.—*BRUCE v. TOLTON* (1879), 4 A. R. 144.—*CAN.*

d. — *—*—*"Out of pocket" expenses.*—In an action for damages

for non-delivery of goods:—*Held*: entitled to out of pocket disbursements caused by deft.'s breach of contract.—*SHIELDS v. LANDRETT*, [1919] 1 W. W. R. 263.—*CAN.*

e. — *Non-delivery of machinery—Whether wages of workmen on building awaiting machinery.*—In an action for damages for the non-delivery of machinery:—*Held*: pltf. were not entitled to the wages of workmen employed upon the building in which the machinery was to be used.—*RUTHVEN WOOLLEN MANUFACTURING CO. v. GREAT WESTERN RY. CO.* (1868), 18 C. P. 316.—*CAN.*

f. — *Defective machinery—Wages & board of men while employed.*—In an action for the contract price of a portable saw-mill, deft. counter-claimed damages for breach of contract, including an amount paid for wages & board of his men while unemployed:—*Held*: entitled to same.—*CORBIN v. THOMPSON* (1907), 41 N. S. R. 386.—*CAN.*

g. — *—*—*Wages of man hired to do necessary work.*—Where a tractor, for the efficient working of which deft. was responsible, failed to work properly:—*Held*: pltf. entitled as damages to the additional cost in hiring another to break the land instead of breaking it himself with the tractor bought.—*JOHNSTON v. ALBERTA FOUNDRY & MACHINE CO., LTD.*, [1922] 2 W. W. R. 1011.—*CAN.*

h. — *Breach of hire-purchase agreement—Expenses of removal to hirer's premises.*—In an action on a hire-purchase agreement of a printing press where pltf. had recovered possession & claiming as damages *inter alia* the costs & expenses of taking down, packing, loading & removal to their premises, including freight & charges:—*Held*: entitled to cost of transport as part of their damages.—*MULLIN v. HOE* (1885), Cass. Dig. 124.—*CAN.*

aa. — *"Steam heated" flat—Heating inadequate—Cost of attempting to heat.*—A flat was leased by deft. to pltf. as "steam heated"; steam-heating was in fact provided, but was inadequate & pltf. sued for damages for breach of the implied agreement to supply adequate heat:—*Held*: pltf. was entitled to recover damages in respect of the extra cost of attempting to heat the flat.—*BYRMER v. THOMPSON* (1915), 34 O. L. R. 543.—*CAN.*

bb. — *Grain destroyed by animals—Cost of threshing wheat.*—In an action for damages for grain destroyed:—*Held*: entitled to additional cost of threshing through damaged condition.—*ALTHOUSE v. BESANA*, [1919] 3 W. W. R. 725.—*CAN.*

cc. — *Necessary expenses incurred by reason of dog bite.*—The words "actual damage" in s. 20 of Dog Act include necessary expenses incurred by reason of the injury.—

Sect. 4.—Recovery of costs and expenses: Sub-sects. 1 & 2.]

928; 22 L. T. O. S. 100; 2 W. R. 61; 2 C. L. R. 273; 118 E. R. 1014; *sub nom.* FOXHALL v. BARNETT, 23 L. J. Q. B. 7; 18 J. P. 41; 18 Jur. 41.

Annotation:—*Mentd.* Everett v. Griffiths, [1921] 1 A. C. 631.

206. — Costs not claimed in previous action between same parties—Res judicata.]—FURNESS, WITHEY & CO., LTD. v. HALL (J. & E.), LTD., No. 66, ante.

See, further, ESTOPPEL.

Costs against supposed principal.]—*See* AGENCY, Vol. 1., pp. 487, 665-667, Nos. 1655, 2795, 2797, 2801, 2803, 2804.

Costs of surety.]—*See* GUARANTEE.

207. Costs incurred in previous action against two jointly—Recoverable as joint damages.]—Where two persons sued jointly in case, for injury sustained by the unlawful maintenance of an

action of trespass brought against them, & which they defended by one attorney & the jury found for plffs., confining the damages to the amount of the attorney's bill in the former action:—*Held*: the costs & expenses incurred by plffs., in their defence in the former action, constituted a joint damage, for which they might jointly sue.—*PECHEL v. WATSON* (1841), 8 M. & W. 691; 11 L. J. Ex. 225; 151 E. R. 1217.

Annotations:—*Mentd.* Flight v. Leman (1843), 4 Q. B. 883; *Cotterell v. Jones* (1851), 11 C. B. 713; *Collins v. Cave* (1860), 6 H. & N. 131; *Ram Coommar Coondoo v. Chunder Canto Mookerjee* (1876), 2 App. Cas. 186; *Bradlaugh v. Newdigate* (1883), 11 Q. B. D. 1; *Harris v. Brisco* (1886), 17 Q. B. D. 504; *Oram v. Hutt*, [1914] 1 Ch. 98; *Neville v. London Express Newspaper*, [1919] A. C. 368.

208. — Recoverable by one.]—Where one of several defts., in an indictment for conspiracy, pays the costs of himself & the others of defending the indictment, he may recover such costs as damages in an action for a malicious prosecution.—*ROWLANDS v. SAMUEL* (1847), 11 Q. B. 39; 17

McKINNON v. DWYER, [1905] V. L. R. 28.—**AUS.**

k. — Personal injuries—Whether cost of surgical operation.]—Pltf. tripped over an iron pipe & sustained severe injuries:—*Held*: in assessing damages it would be error to include as part of the damages the cost of an operation which, if had, would probably reduce the impairment complained of, & which, if not undergone, would not represent any item of damage.—*EDWARDS v. SYDNEY CITY* (1918), 52 N. S. R. 116.—**CAN.**

l. — Depositing rubbish—Cost of raising level of house.]—Where large quantities of rubbish were deposited in a lane adjoining pltf.'s cottages by which the lane was raised 3 or 4 feet coming up to the windows & the filth ran over into the basement & pltf. was compelled to raise one of the houses & remove the kitchen to suit the level of the lane:—*Held*: the expense of raising the house & removing the kitchen could not be recovered.—*LEWIS v. TORONTO CITY* (1876), 39 U. C. R. 343.—**CAN.**

m. — Withdrawal of support—Sinking of floor—Whether expense of moving tenants.]—*DAVID v. McDONALD, DAVID & HOPKINS v. DAVID* (1863), 8 L. C. J. 44; 14 L. C. R. 31.—**CAN.**

n. — Wrongful detention of ship by Marine Board—Whether money expended on replacing mast wrongfully condemned.]—The Marine Board of N. detained pltf.'s schooner on the ground that the foremast was rotten, & refused to allow her to proceed to sea till a new mast had been substituted, & plffs. brought an action under 45 Vict. No. 6, & the judge found that the Board had acted wrongfully, that the foremast was perfectly sound & superior to the one afterwards put in, & found a verdict for plffs. for the costs incidental to the detention & survey of the ship:—*Held*: plffs. could not recover the expenses of taking out the old mast & putting in the new one.—*AUSTRALIAN BANKING CO. v. RUSSELL* (1889), 11 N. S. W. L. R. 6.—**AUS.**

o. — Breach of shipping contract for carriage—Expense of sending vessel to port & back.]—Pltf., having been induced by defts.' error to suppose he could obtain a cargo of 8,000 instead of 3,000 bushels of wheat from C. to O., abandoned a contract for a cargo from D., & sent his vessel to C., whence it sailed with 3,000 bushels only:—*Held*: the damages were the expenses of sending the vessel to C. & back.—*LANE v. MONTREAL TELEGRAPH CO.* (1857), 7 C. P. 23.—**CAN.**

p. — Customs duty.]—Def. agreed to carry wheat of plffs. from O. to a port in the United States, by Mar. 17, when, as def. knew, the

reciprocity treaty would expire & an import duty be payable there. He failed to do so, & plffs. were compelled to pay a large duty:—*Held*: such duty was recoverable as damages for the breach of contract.—*GIBBS v. GILDERLEEVE* (1867), 26 U. C. R. 471.—**CAN.**

q. — Carriage to wrong port—Freight back to proper port.]—Pltf. delivered a quantity of clover seed to defts. at W., to be carried to London. The seed was sent to Liverpool, & it did not reach London until too late for the sowing trade, so that the seed had to be sold at a heavy loss:—*Held*: defts. were bound to indemnify pltf. against the loss sustained by reason of the additional sum paid for the freight from Liverpool to London.—*MONTGOMERY v. MERCHANTS' DESPATCH & TRANSPORTATION CO.* (1884), 9 A. R. 282.—**CAN.**

r. — Expense of maintaining & driving sheep to port & back.]—Pltf. at K. agreed with def. for the carriage of sheep from B. to H. Pltf.'s sheep were driven down from K. to B. & kept there for some time, when, as the steamer did not arrive, some of them were driven back to pltf.'s station:—*Held*: pltf. was entitled to recover as damages all reasonable expenses incurred in driving the sheep from K. to B. in maintaining them there, & driving them back to the station.—*McNAB v. McMECKAN, Mac.* 445.—**N.Z.**

s. Costs of previous action.]—Where pltf. claims as damages the costs of prior legal proceedings, it is necessary for him to prove that such costs were the direct consequence of either default or the commission of some wrongful act by def.—*WEILBACH v. DIERIKSEN* (1896), 3 O. R. 80.—**S. AF.**

t. —Pltf., having been ejected, sued under a covenant for quiet enjoyment in a deed:—*Held*: pltf. was not entitled to increase the damages by the costs of the ejectment suit.—*ECCLES v. LOWRY* (1873), 34 U. C. R. 75.—**CAN.**

u. — Whether extra-judicial expenses.]—In an action by a seller against a purchaser for the price of the subject sold, pursuer obtained decree for the price & expenses, but certain charges for extra-judicial expenses incurred in that action were not allowed. The seller having brought a second action to recover these extra-judicial expenses in name of damages sustained by him through breach of contract:—*Held*: action was incompetent.—*McDOWALL v. STEWART* (1871), 10 Macph. (Cl. of Sess.) 193; 44 Sc. Jur. 116.—**SCOT.**

v. — Previous action unsuccessful.]—Pltf. sued defts., claiming as

special damages the costs of an unsuccessful action:—*Held*: such costs could not be recovered.—*MERRITT v. NEVIN* (1861), 20 U. C. R. 540.—**CAN.**

w. — Action not justified—Payment not result of breach.]—Where costs are incurred in an action which pltf. was not justified in bringing, & the payment of which was not the necessary result of def.'s breach of contract, they cannot be recovered.—*DEVEBER v. KOOP* (1876), 3 Pug. 295.—**CAN.**

d. — By defendant in such action.]—Def., a coroner unlawfully committed pltf. to gaol on a charge of arson. In an action for false imprisonment:—*Held*: pltf. could not recover as damages the costs he had incurred in defending himself at his trial.—*CHIFFELL v. THOMSON* (1869), 8 N. S. W. S. C. R. 219.—**AUS.**

e. ——In an action on a replevin bond for damages for detention of the vessel replevied:—*Held*: pltf. was entitled to his costs of defence.—*BURN v. BLECHER* (1861), 14 C. P. 415.—**CAN.**

f. ——Plffs. sued upon a covenant for quiet enjoyment:—*Held*: entitled to recover all the costs incurred by them in defending a previous chancery suit.—*TRUST & LOAN CO. OF UPPER CANADA v. COVERT* (1876), 39 U. C. R. 327.—**CAN.**

g. — Costs in House of Lords—Not awarded.]—Where a party had, in an appeal to the House of Lords, obtained a reversal of a judgment pronounced against him in the Cl. of Sessions:—*Held*: he could not claim in an action of damages as an item of loss, his expenses in the appeal, which according to the practice of the House of Lords, had not been awarded to him.—*HEDDLE v. BAIRIE* (1846), 8 Dunl. (Cl. of Sess.) 376; 18 Sc. Jur. 170.—**SCOT.**

h. — Solicitor & client costs.]—Where the avowant successfully defends a replevin suit, & subsequently institutes proceedings on the bond, he is not entitled to recover as damages the excess of solr. & client costs of his defence, over & above his taxed party & party costs, in that action.—*WILLIAMS v. CROW* (1884), 10 A. R. 301.—**CAN.**

aa. ——A mtgee. suing in trover is entitled to add the costs & charges properly incurred in protecting his property & enforcing his security where he would be entitled to recover such costs & charges as against the mtgor. by virtue of the security.—*MANNING v. JONAS* (1894), 14 N. Z. L. R. 53.—**N.Z.**

bb. — When not paid.]—A purchaser, who had been ejected,

L. J. Q. B. 65; 10 L. T. O. S. 109; 12 J. P. 107; 116 E. R. 389.

Costs incurred in Prohibition.—See CROWN PRACTICE, Vol. XVI., p. 397, Nos. 2410, 2418, 2418a.

SUB-SECT. 2.—OF ACTIONS BY OR AGAINST THIRD PARTIES.

209. Costs must have been reasonably incurred.]

—Where a person becomes bail above for another, he is entitled to recover all the expenses he has been put to by reason of it, & may therefore recover his expenses in sending after the principal to take him, in order to render him, but not expenses of a suit improperly defended on such account.—*FISHER v. FALLOWS* (1804), 5 Esp. 171, N. P.

210. —.]—In an action for running down a ship, it appeared that pltf. had been obliged in consequence of the injury to employ a steam tug, the owners of which demanded £150 for salvage, & commenced a suit in the Ct. of Admty. against pltf., who paid £20 into ct. The ct. ultimately decreed £45 to the salvors:—*Held*: upon these facts, pltf. was not entitled to recover the amount of the costs incurred by him in that suit. *Semble*: the proper question for the jury in such a case is, whether, in respect to the suit for salvage, pltf. pursued the course which a prudent & reasonable man would do in his own case, & if the jury think he did, the costs of the suit may be recovered.—*TINDALL v. BELI* (1843), 11 M. & W. 228; 12 L. J. Ex. 160; 152 E. R. 786.

Annotations:—*Consd.* The *Legatus* (1856), Sw. 168; *Mors-Le-Blanch v. Wilson* (1873), L. R. 8 C. P. 227; *Nettlingham v. Powell* (1912), 108 L. T. 219. *Refd.* *Collen v. Wright* (1857), 8 E. & B. 647; *Broom v. Hall* (1859), 7 C. B. N. S. 503; *Ronneberg v. Falkland Islands Co.* (1864), 17 C. B. N. S. 1; *The Flying Fish* (1865), Brown & Lush, 436; *Baxendale v. L. C. & D. Iy.* (1874), L. R. 10 Exch. 35; *Hammond v. Bussey* (1887), 57 L. J. Q. B. 58; *The Wallsend*, [1007] P. 302.

211. — **Notice given to defendants—Instructions by defendant to defend.**—A tenant for life, with leasing power, demised for 99 years, with a clause that for himself, his heirs, & assigns he would, during the term, warrant & defend the premises to the lessee his exors. & assigns. On the death of the tenant for life, the remainderman brought ejectment against the lessee, & recovered judgment & possession of the premises, on the ground that the lease was invalid, not being made in accordance with the leasing power:—*Held*: (1) the clause in the lease amounted to an express

suing upon his covenant for a good title, may recover as damages the costs of defending an ejectment, brought against him, even though he has not actually paid them.—*STUBBS v. MARTINDALE* (1857), 7 C. P. 52.—**CAN.**

k. —.]—*GLEESON v. DOMVILLE* (1879), 19 N. B. R. 77.—**CAN.**

PART III. SECT. 4, SUB-SECT. 2.

209 i. **Costs must have been reasonably incurred.**—In an action brought for damages for deft.'s misrepresentation:—*Held*: pltf. could not add their costs, of needlessly defending a suit brought by their bank, to their other damages.—*MORWICK v. WALTON* (1908), 18 Man. L. R. 245.—**CAN.**

209 ii. —.]—Pltf. claimed by way of damages her costs incurred in the defence of an action brought by M. against her, as well as any costs she might be liable for to M. in connection with that suit:—*Held*: entitled to judgment by way of damages for such costs as she may have necessarily

incurred owing to the action brought against her by M.—*HILL v. BARWIS* (1908), 7 W. L. R. 428.—**CAN.**

209 iii. —.]—In an action for wrongful seizure the co. which, under instructions from the principal deft. had removed & stored the chattels, was joined as deft. After judgment had been given in pltf.'s favour in respect of detention of the chattels, the co. applied for an order that the other deft. should pay the costs of the action:—*Held*: the co.'s remedy was to bring an action against its co-deft. in which the costs properly incurred in defending the present action would be within the damages recoverable.—*SCHOLLUM v. BARRIPP* (No. 2), [1917] N. Z. L. R. 448.—**N.Z.**

209 iv. —.]—M. who had contracted to supply a pump to a district council, ordered a pump from B. The council rejected the pump & M. brought an action against the council for the price. Shortly after the raising of the action M. intimated to B. that he rejected the pump as being disconform to

covenant for quiet enjoyment, & therefore that the lessee might maintain an action of covenant for the breach of it against the exors. of the lessor; (2) the proper amount of damages in such an action would be the value of the unexpired term, the mesne profits paid to the remainderman, & the necessary costs of defending the action of ejectment, the latter being defended at the request of the exors. of the lessor.

As to the mesne profits & the value of the term lost, the liability of the exors. is too clear to require discussion. We think also, that the present defts. are bound to pay the costs of the present pltf. in defending the actions of ejectment, because the present defts., by directing a defence, admitted that there was reasonable ground for defending, & from the statement, it appears that the costs in question were necessary for such defence (*TINDALL, C.J.*).—*WILLIAMS v. BURRELL* (1845), 1 C. B. 402; 14 L. J. C. P. 98; 4 L. T. O. S. 415; 9 Jur. 282; 135 E. R. 596.

Annotations:—*As to* (1) *Refd.* *Child v. Stenning* (1879), 11 Ch. D. 82; *Baynes v. Lloyd*, [1895] 1 Q. B. 820. *As to* (2) *Apd.* *Child v. Stenning* (1879), 11 Ch. D. 82. *Refd.* *Lock v. Furze* (1866), L. R. 1 C. P. 441.

212. — **Refusal by defendants to intervene.**—Deft. by indenture demised to pltf. a piece of garden ground at the yearly rent of a peppercorn, & the indenture contained a covenant for quiet enjoyment without interruption by any one claiming from & under deft. Pltf. built a conservatory upon the piece of ground. An action of trespass was brought against him by a person who occupied the adjoining messuage under a demise by deft. of prior date to pltf.'s. Pltf. wrote more than once to deft., informing him of the action, but deft. sent no answer. Pltf. then defended the action, & deft. appeared as a witness at the trial on his behalf, but a verdict was obtained against pltf., with 40s. damages & costs. He thereupon sued deft. for breach of covenant, & obtained a verdict, & in assessing the damages the jury included the costs of the action which he had defended, the cost of the conservatory, & £102 for the value of the piece of ground:—*Held*: pltf., receiving no reply to his letters informing deft. of the action of trespass, was justified in considering the deft.'s silence as an authority to him to defend the action, & although the rent paid by pltf. for the land was nominal, it was for the jury to estimate its real value to pltf.—*ROLPH v. CROUCH* (1867), L. R. 3 Exch. 44; 37 L. J. Ex. 8; 17 L. T. 249; 16 W. R. 252.

Annotation:—*Refd.* *G. W. Ry. v. Fisher*, [1905] 1 Ch. 316.

contract, & that he proposed to settle the action with the council:—*Held*: in actions between M. & B. M. was entitled to recover as damages *inter alia* the amount of the expenses incurred by him in the action against the council.—*MUNRO & Co. v. BENNETT & SON*, [1911] S. C. 337.—**SCOT.**

212 i. — **Notice given to defendant—Refusal by defendant to intervene.**—Pltf. instructed P., a stock-broker, to buy shares for him. P. bought the shares from deft. Pltf. lodged the transfer with the co. & was registered as the holder. Subsequently it was discovered that the signature to the transfer was a forgery.

The co. then took proceedings in equity against pltf. to have the share certificate delivered up to be cancelled. Pltf. took notice of these proceedings to deft. Deft. refused to defend the suit. Pltf. then brought this action against deft. to recover *inter alia* the costs of the equity suit:—*Held*: entitled to recover.—*COOPER v. GARDINER* (1902), 3 S. R. N. S. W. 67.—**AUS.**

Sect. 4.—Recovery of costs and expenses: Sub-sect. 2.]

213. — — — — —.]—Where an action is brought against A. to recover unliquidated damages for which he has become liable through the default of B., notice being given to B., who declines to intervene, A. is justified in defending the action, & is not bound to let judgment go by default, or to pay money into ct. The proper questions for the jury in such a case are, whether it was a reasonable thing to defend the action, & whether the defence was conducted in a reasonable manner.—*MORS-LE-BLANCH v. WILSON* (1873), L. R. 8 C. P. 227; 42 L. J. C. P. 70; *sub nom.* *LE-BLANCH v. WILSON*, 28 L. T. 415; 21 W. R. 109; 1 Asp. M. L. C. 605, H. L.

*Annotations:—***Consd.** *Baxendale v. L. C. & D. Ry.* (1874), L. R. 10 Exch. 35; *Hammond v. Bussey* (1887), 20 Q. B. D. 79; *Aglus v. Great Western Colliery Co.* (1899), 47 W. R. 403. **Mentd.** *Furness, Withy v. White*, [1894] 1 Q. B. 183.

214. — — — — —.]—Deft. contracted for the sale of coal of a particular description to plffs., knowing that they were buying such coal for the purpose of reselling it as coal of the same description. Plffs. did so resell the coal. The coal delivered by deft. to plffs. under the contract & by them delivered to their subvendees did not answer such description but this could not be ascertained by inspection of the coal, & only became apparent upon its use by the sub-vendees. The sub-vendees thereupon brought an action for breach of contract against plffs. Plffs. gave notice of the action to deft., who, however, repudiated all liability, insisting that the coal was according to contract. Plffs. defended the action against them, but at the trial the verdict was that the coal was not according to contract, & the sub-vendees accordingly recovered damages from plffs. Plffs. thereupon sued deft. for breach of contract, claiming as damages the amount of the damages recovered from them in the action by their sub-vendees & the costs which had been incurred in such action. Deft. paid the amount of the damages in the previous action into ct. but denied his liability in respect of the costs:—**Held:** the defence of the previous action being, under the circumstances reasonable, the costs incurred by plffs. as defts. in such action were recoverable, as being damages which might reasonably be supposed to have been in the contemplation of the parties at the time when they made the contract as the probable result of a breach of it.—*HAMMOND & Co. v. BUSSEY* (1887), 20 Q. B. D. 79; 57 L. J. Q. B. 58; 4 T. L. R. 95, C. A.

*Annotations:—***Fold.** *Aglus v. Great Western Colliery Co.*, [1899] 1 Q. B. 413. **Consd.** *Prince of Wales Dry Dock Co. (Swansea) v. Fownes Forge & Engineering Co.* (1901), 90 L. T. 527. **Apd.** *Pinnock v. Lewis & Peat* [1923] 1 K. B. 690. **Refd.** *Scott v. Foley, Alkman* (1899), 16 T. L. R. 55; *Sanderson v. Blyth Theatre Co.*, [1903] 2 K. B. 533; *The Millwall*, [1905] P. 155; *The Wallsend*, [1907] P. 302; *Furness, Withy v. Hall* (1909), 25 T. L. R. 233; *Clare v. Dobson*, [1911] 1 K. B. 35; *Cointat v. Myham*, [1913] 2 K. B. 220; *South Wales & Liverpool S.S. Co. v. Nevill's Dock & Ry.*, *Nevill's Dock & Ry. v. Maatschappij S.S. Beestvaert, Rotterdam* (1913), 108 L. T. 568; *The Cairnbahn* (No. 2) (1914), 30 T. L. R. 309; *Hoole U. C. v. Fidelity & Deposit Co. of Maryland* (1915), 85 L. J. K. B. 237; *Weld-Blundell v. Stephens*, [1919] 1 K. B. 520; *Proops v. Chaplin* (1920), 37 T. L. R. 112; **Mentd.** *The Argentine* (1888), 13 P. D. 191.

215. — — — — —.]—A colliery co. committed a breach of a contract to supply a coal merchant with coal, which they knew was required for the purpose of coaling a ship, with the result that the merchant was unable to fulfil a contract between him & the shipowners. The shipowners having sued the merchant in respect of his breach of contract for over £150 damages, the merchant asked the co. to defend the action, but the co.

replied that they denied all liability, & in any case the claim was excessive. The merchant then paid £20 into ct. with a denial of liability, & at the trial it was found that that sum was sufficient to satisfy the shipowners' claim, & judgment was given for the merchant, with costs to the shipowners up to the date of the payment into ct., & to the merchant after that date. In an action by the merchant against the co. to recover damages for their breach of contract:—**Held:** the defence of the previous action being in the circumstances reasonable, the merchant was entitled to recover as damages which might reasonably be supposed to have been in contemplation of the parties at the time they made the contract as a probable result of a breach of it, the £20 paid into ct. in the previous action to meet the shipowners' claim, the shipowners' costs of the action prior to the payment into ct., & the merchant's costs in the action after that date, less the costs recovered from the shipowners, to be taxed as between solr. & client upon the scale used when such costs are to be paid by a person other than the client.—*AGIUS v. GREAT WESTERN COLLIERY CO.*, [1899] 1 Q. B. 413; 68 L. J. Q. B. 312; 80 L. T. 140; 47 W. R. 403, C. A.

*Annotations:—***Apd.** *Pinnock v. Lewis & Peat*, [1923] 1 K. B. 690. **Refd.** *Scott v. Foley, Alkman* (1899), 5 Com. Cas. 53; *Clare v. Dobson*, [1911] 1 K. B. 35; *South Wales & Liverpool S.S. Co. v. Nevill's Dock & Ry.*, *Nevill's Dock & Ry. v. Maatschappij S.S. Beestvaert, Rotterdam* (1913), 108 L. T. 568; *The Cairnbahn* (No. 2) (1914), 30 T. L. R. 309; *The Solway Prince* (1914), 31 T. L. R. 56; *Weld-Blundell v. Stephens*, [1920] A. C. 556.

216. — — — — — **Defendant defends for own benefit.**]—Where plff. succeeds against deft. who having given a third party notice succeeds against the third party but is shown by the evidence to have defended the action for his own benefit, deft. must bear the costs of the original action in exoneration of the third party.—*BLONE v. ASHBY* (1889), 42 Ch. D. 682; 58 L. J. Ch. 779; 61 L. T. 766; 38 W. R. 141.

217. — — — — — **No notice given to defendants.**]—A steamship ran down & sank a fishing vessel in the river Thames. The owners of the steamship admitted liability subject to the claim of the owners of the fishing vessel being referred to the registrar & merchants. At the reference the owners of the fishing vessel claimed £355, the sum which the Thames Conservancy were claiming from them as the cost of raising the vessel. The registrar rejected the claim. The Thames Conservancy sued the owners of the fishing vessel in the K. B. D. & recovered the expense of raising the wreck & costs. The owners of the fishing vessel appealed from the decision of the Admlty. registrar:—**Held:** the owners of the fishing vessel were not entitled to recover from the owners of the steamship the costs paid to the conservancy in the K. B. action, as the owners of that steamship had had no opportunity of saying whether that action should be defended or not.—*THE WALLSEND*, [1907] P. 302; 76 L. J. P. 131; 96 L. T. 851; 23 T. L. R. 356; 10 Asp. M. L. C. 476.

218. — — — — —.]—Where a tenant holds over after the expiration of a notice to quit, the landlord is entitled to recover against him the reasonable damages & costs sustained by him in an action at the suit of a party to whom he had contracted to let the premises, but to whom the tenant's wrongful act had prevented him from delivering possession.—*BRAMLEY v. CHESTERTON* (1857), 2 C. B. N. S. 592; 27 L. J. C. P. 23; 29 L. T. O. S. 227; 31 J. P. 807; 3 Jur. N. S. 1104; 5 W. R. 690; 140 E. R. 548.

*Annotation:—***Mentd.** *Portman v. Middleton* (1858), 27 L. J. C. P. 231

219. —.]—A., a broker, contracted with B. for the purchase, on behalf of C., of certain goods. C. refusing to accept the goods, B. sued A. for the breach of contract. C. had notice of the proceedings, but repudiated his liability, & A. defended the action unsuccessfully. In an action by A. against C. for the damages & costs paid & incurred by him in the first action, C. paid into ct. enough to cover the damages only, & it was left to the jury to say whether A., in defending the former action, had pursued the course which a prudent & reasonable man would have done in his own case. The jury having found for pltf. :—*Held* : A. was entitled to recover the costs.—*BROOM v. HALL* (1859), 7 C. B. N. S. 503; 141 E. R. 911.

Annotation :—*Consd.* The Millwall, [1905] P. 155.

220. —.]—A declaration stated that pltf., having agreed with deft. to make for & sell to him bricks, to be marked as deft. might direct, deft. wrongfully directed pltf. to mark them with the name of R. Dft. knew, & pltf. did not know, that R. used that name as a mark on bricks made & sold by him, to distinguish them from bricks made & sold by other persons, & pltf., by so marking the bricks to be made for deft., would become liable to legal proceedings for damages at the suit of R. Pltf., in ignorance of the consequences, & of R.'s rights, marked the bricks as directed by deft., & delivered them to him. R. thereupon filed a bill against pltf., & pltf. compromised such suit by paying R. a large sum of money for his damages, costs & expenses, & was also compelled to pay large sums of money for the costs of his own necessary defence to the suit. On demurrer :—*Held* : the declaration disclosed a good cause of action, on the ground that the natural consequence of deft.'s act being to plunge pltf. into the Ch. suit, & thereby to cause him to incur costs & expenses, pltf., whether or not he was liable to the suit, had a good cause of action against deft. to recover the damages so sustained.—*DIXON v. FAWCUS* (1861), 3 E. & E. 537; 30 L. J. Q. B. 137; 3 L. T. 693; 7 Jur. N. S. 895; 9 W. R. 414; 121 E. R. 544.

Annotations :—*Refd.* *Burrows v. Rhodes*, [1899] 1 Q. B. 816. *Mentd.* *Bow v. Hart* (1905), 74 L. J. K. B. 341.

221. —.]—Pltfs. were owners of a vessel chartered as a general ship from London to Valparaiso, with liberty to touch at the Falkland Islands. She had on board goods consigned to defts. at the Falkland Islands, & 400 barrels of gunpowder for Valparaiso. When she arrived at the Falkland Islands, it was necessary for her to unload her gunpowder before she could enter the harbour. Defts. accordingly lent the captain a vessel in which temporarily to stow the powder. Subsequently, defts. removed the powder into another vessel, which was not a proper one for the purpose, & the latter vessel went down with the powder on board. The captain went on to Valparaiso, & not having delivered the gunpowder or otherwise satisfied the consignees, he was sued by them. The captain defended the action & was defeated, incurring considerable costs in so doing :—*Held* : though defts. were liable to pltfs. for the value of the gunpowder, they were not liable for the costs incurred in defending the action at Valparaiso.

The question is, whether pltfs. have given any evidence that their incurring the litigation they did at Valparaiso was a reasonably necessary consequence of the wrong done to them by defts. I think the costs incurred in a defence which was wholly untenable was a useless & wasteful expenditure of money, which pltfs. have no right to

call upon defts. to reimburse them for (*WILLIAMS, J.*)—*RONNEBERG v. FALKLAND ISLANDS CO.* (1864), 17 C. B. N. S. 1; 4 New Rep. 243; 34 L. J. C. P. 34; 10 L. T. 530; 10 Jur. N. S. 940; 12 W. R. 914; 2 Mar. L. C. 30; 144 E. R. 1.

222. —.]—A boat-staging or suspended platform, put up for pltfs. by deft. under a contract between them, to enable pltfs. to paint a house, fell, through being insecurely fastened by deft., & hurt a painter in the employment of pltfs. He brought an action against pltfs. for injuries sustained in consequence of the defective state of the boat-staging. Pltfs. settled the action by paying to the painter £125, & then sued deft. for breach of his contract :—*Held* : deft. was liable under the contract, but inasmuch as pltfs. had employed a competent contractor to put up the boat-staging & there was on the facts no evidence of negligence by pltfs., they were not liable to their servant for the injury he had sustained, & therefore the money which they had paid to settle his action was not recoverable as damages from the deft. for his breach of contract.—*KIDDLE v. LOVETT* (1885), 16 Q. B. D. 605; 34 W. R. 518.

Annotations :—*Refd.* *Mowbray v. Merryweather*, [1895] 2 Q. B. 640. *Mentd.* *Hiddle v. Hart*, [1907] 1 K. B. 649.

223. —.]—V. & Co. hired some sacks from O. to unload a cargo of peas. While one sack was being hoisted out of the ship it gave way, & a labourer named B. was injured. B. brought an action in the county ct. against V. & Co., & recovered £25 & costs. V. & Co. appealed against this decision, but the appeal was dismissed with costs :—*Held* : the sack was not reasonably fit for the purpose for which it was supplied, & therefore, the action in the county ct. not having been unreasonably defended, V. & Co. could recover against O. the £25 damages, the costs they had to pay B., & their own costs in that ct., but the costs of the appeal could not be recovered.—*VOGAN & CO. v. OULTON* (1899), 81 L. T. 435; 18 T. L. R. 37, C. A.

Annotation :—*Mentd.* *Scott v. Foley, Aikman* (1899), 5 Com. Cas. 53.

224. —.]—Deft. conveyed part of a building estate in fee simple as beneficial owner to pltfs. Pltfs. had notice both on the face of & outside the conveyance that previous purchasers of parts of the estate had rights of way over a road. As between pltfs. & deft., however, the former were to take the land discharged from those rights. The conveyance contained no express covenants for title nor any qualification of the implied covenants. Pltfs. entered on the land & blocked up the road, & a previous purchaser claimed £5,000 damages from them for doing so. Pltfs. gave notice to deft. &, under protest, went to arbn. An award was made giving the previous purchaser £510. Pltfs. still disputed his right, & he brought an action in which, on a special case, pltfs. were held liable to pay him the £510 & interest, & the costs of the arbn. proceedings & of the action. They paid these sums, & brought this action claiming from deft. repayment of the money thus paid & of their own costs of the arbn. & action :—*Held* : (1) pltfs. were entitled to bring an action for damages under deft.'s implied covenants for title; (2) their knowledge of the previous purchaser's rights did not prevent them from making this claim, & deft. was liable to indemnify them, & must repay the £510 & interest & the costs which they had paid to the previous purchaser, & must also pay to them subsequent interest on the £510 & their costs of the arbn. proceedings as between solr. & client, but he need not pay their costs of the special case.—*GREAT*

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WESTERN RY. CO. v. FISHER, [1905] 1 Ch. 316; 74 L. J. Ch. 241; 92 L. T. 104; 53 W. R. 279.

225. —.]—Pltfs. gave defts. an open cover slip by which they undertook to reinsure defts. to the extent of one-half their interest up to £1,000 on certain shipments of lumber. Pursuant to the cover slip, pltfs. reinsured defts. by two policies respectively on interests by two vessels. Under the policies defts. claimed & were paid by pltfs. sums amounting to £1,354 4s. 10d. Defts. subsequently recovered from the shipowners damages by reason of having been induced to pay losses on the two vessels by fraudulent misrepresentations of an official in their employment. The measure of the damages so recovered by defts. was the sum which upon inquiry appeared to flow from the liability of defts. as insurers in respect of the two vessels, & included the £1,354 4s. 10d. Pltfs. then sued defts. for the repayment of the £1,354 4s. 10d. as money received by them to the use of pltfs. :—*Held* : defts. were entitled to deduct from the £1,354 4s. 10d. the reasonable expenses of recovering that sum from the owners.—*ASSICURAZIONI GENERALI DE TRIESTE v. EMPRESS ASSURANCE CORPN., LTD.*, [1907] 2 K. B. 814; 76 L. J. K. B. 980; 97 L. T. 785; 23 T. L. R. 700; 51 Sol. Jo. 703; 10 Asp. M. L. C. 577; 13 Com. Cas. 37.

226. — *Defence conducted by third party.—In name of but without consent of defendant.*—By a policy of insurance defts. insured the assured in respect of accidents caused by his employees when in charge of his horsedrawn vehicles. The total liability of defts. was limited to £300 for all claims for compensation & costs, charges & expenses, paid or payable in respect of or arising out of any accident or occurrence, & defts. were to be entitled, in the name & on behalf of the assured, to take over & have the absolute control of all negotiations & proceedings which might arise in respect of any accident or claim. There was a further provision that defts. might pay the maximum sum to the assured in the case of any one accident or occurrence, & thereupon their liability in respect of that accident or occurrence should cease, but if the assured desired defts. to continue the defence he should pay & make good all costs & expenses incurred thereby. Two persons who had been injured by an accident caused by a cart belonging to the assured brought actions against him claiming damages. The assured gave notice thereof to defts., & they defended the actions, the assured not being consulted nor having anything to say as to the advisability of defending the actions. The actions resulted in verdicts against the assured for £200 & £175 respectively. The costs in these actions recoverable by the two pltfs. against the assured amounted to £218, & as he did not pay those costs an execution was levied on his goods, & to get rid of this he had to pay the £218, which he now claimed to recover from defts. :—*Held* : although there were two accidents there was only one occurrence within the meaning of the policy, & therefore defts.' limit of £300 applied, but defts. having defended the actions in the name of the assured without his consent they incurred a common law liability for the costs, & were, therefore, liable to repay the £218 which the assured had been compelled to pay.—*ALLEN v. LONDON GUARANTEE & ACCIDENT CO., LTD.* (1912), 28 T. L. R. 254.

227. —.]—A shipping co. had a preferential right to occupy a certain berth in a dock & were

not entitled to use any other berth in the same port. The agreement between the two cos. provided that in the event of any accident beyond the control of the dock co. which caused loss or delay to the shipping co. the latter should be entitled to use some other berth, the dock co. being under no liability to make good or pay compensation for such loss or delay. On Oct. 28, 1911, the shipping co.'s steamer P. arrived in the port, & found that the particular berth to which she should have gone was occupied by the steamship B., belonging to a Dutch co., which had gone to the berth & remained there contrary to the orders of the dock co. Owing to shortness of water in the dock the B. could not be moved to admit of the P. occupying the berth, & the P. accordingly went into an inner dock by the direction of the dock co., & by reason of shortness of water was detained there for a week, & consequently lost a complete round voyage. A portion of her cargo was shut out, & taken on by the next steamer of the line. The shipping co. claimed from the dock co. damages for the delay suffered by the P. & the dock co. in turn sued the owners of the B. to recover any damages they might be called upon to pay to the shipping co. :—*Held* : the owners of the B. were not liable to pay the dock co.'s costs in defending the action brought by the shipping co., because it was unreasonable for the dock co. to defend the action.—*SOUTH WALES & LIVERPOOL S.S. CO., LTD. v. NEVILL'S DOCK & RY. CO., LTD.*, *NEVILL'S DOCK & RY. CO., LTD. v. MAATSCHAPPIJ S.S. BESTEVAER, ROTTERDAM* (1913), 108 L. T. 568; 29 T. L. R. 301; 12 Asp. M. L. C. 328; 18 Com. Cas. 124.

228. *Must be necessary & proximate consequences of breach.*—A. sold a picture to B., warranting it a Claude. B. sold it to J., & warranted it a Claude to him. The picture was not a Claude, & J. brought an action against B. on the warranty. B. defended the action, & J. recovered damages & costs against him. B. then brought an action against A. upon the first warranty :—*Held* : B. was in this action entitled to recover against A. the amount of the damages & costs that B. had paid to J., & also the costs incurred by B. in defending the first action.—*PENNEL v. WOODBURN* (1835), 7 C. & P. 117, N. P.

Annotation :—*Reid. Penley v. Watts* (1841), 7 M. & W. 601.

229. —.]—A ship's husband covenanted that his ship should at one port take in a quantity of brandy & convey it to another port, & there receive a cargo of fruit, etc., which the freighters of the ship covenanted to supply. He did not take the brandy, & the freighters did not furnish a full homeward cargo, for which he recovered damages against them. They afterwards brought an action against his widow & representative to recover damages for the breach of his covenant :—*Held* : they could not recover in any shape, in that action, either the damages they had paid him or the costs they had incurred in defending the former action, although they were prevented from obtaining the homeward cargo by the neglect of the ship's husband in not taking in the brandy.

On the question of damages, they must be the necessary & immediate consequence, & not so remote as those sought to be recovered (*TINDAL, C.J.*).—*WALTON v. FOTHERGILL* (1835), 7 C. & P. 392, N. P.

230. —.]—A. contracted with B. to repair a steam threshing-machine, undertaking to get it ready for harvest time. A new fire-box being needed, C. engaged to make one for A., in about a fortnight, but failed in the performance of his

contract, & A., who had paid C. for the article, was obliged to get one made elsewhere, at an additional cost, but this he did not do in time to enable him to perform his contract with B., although there was ample time for him to have done so after C. had broken his contract. B. sued A., who paid him £20 to settle the action:—*Held*: A. was entitled to recover from C. the sum he had paid him for the fire-box, & the extra cost incurred in getting another, but the compensation paid by A. to B. was not such a damage as might fairly & reasonably be considered either as arising naturally from C.'s breach of contract, or such as might reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it.—*PORTMAN v. MIDDLETON* (1858), 4 C. B. N. S. 322; 27 L. J. C. P. 231; 4 Jur. N. S. 689; 6 W. R. 598; 140 E. R. 1108; *sub nom.* *PORTMAN v. NICHOL*, 31 L. T. O. S. 152.

Annotations:—*Refd.* *Dingle v. Hare* (1859), 7 C. B. N. S. 145; *Gee v. L. & Y. Ry.* (1860), 6 H. & N. 211; *Wilson v. L. & Y. Ry.* (1861), 3 L. T. 859.

231. —.]—Pltf. being desirous of purchasing a public-house A. introduced him to one C. who had one to dispose of, & who referred pltf. to her agent B. A. volunteered to see B. on the subject, & accordingly went to him, & afterwards told pltf. that B. represented the receipts of the house to average a certain sum daily, upon the faith of which statement pltf. bought the house for £400. It turned out that the value of the business had been grossly exaggerated, & pltf. without any notice to A., & without making any inquiry brought an action against C., charging her with a deceitful representation on the sale. B. swore at the trial that he never made any such representation as A. had stated, & the jury being satisfied that A.'s statement was false, returned a verdict for deft. Pltf. then sued A. for the damages he had sustained from his false representation, when the jury gave him £300, being the difference between the price he paid for the business, & the sum for which he afterwards sold it, £100 for loss of time, & £181 8s. 6d., the costs of the abortive action against C.:—*Held*: the action was maintainable so far as related to the £300 & £100, but the costs of the first action were not, under the circumstances, the natural & proximate consequence of A.'s misrepresentation, & therefore were not recoverable.—*RICHARDSON v. DUNN* (1860), 8 C. B. N. S. 655; 30 L. J. C. P. 44; 2 L. T. 430; 8 W. R. 582; 141 E. R. 1323.

232. — Failure of action against third party—Due to defendant.]—A declaration in case, by A. against B., for not attending the trial of a cause between A. & C. in obedience to a subpoena, alleged that A. had a good cause of action against C., & that the testimony of B. was material for evidence for A. on that trial; & that, in consequence of such non-attendance, A. was compelled to withdraw the record, & became liable to pay to the then deft. the costs of the day, & also incurred costs in preparing for trial. B. pleaded not guilty, leave & licence, & that A. might have

proceeded to the trial without his testimony:—*Held*: B. having admitted, by his course of pleading, that A. had a good cause of action against C., it was not competent to B. to avail himself of the record in that suit, which was put in by A. for the purpose of showing that such a record existed & had been withdrawn, to show that the declaration therein was so defective that a verdict thereon would have been fruitless.

Pltf. is entitled to recover all the costs he has been put to by the non-attendance of deft. as a witness, that is, the costs incurred in going down to a fruitless trial, & the costs he has become liable to pay to the opposite party in consequence of the withdrawal of the record (*COLTMAN, J.*).—*NEEDHAM v. FRASER* (1845), 1 C. B. 815; 3 Dow. & L. 190; 14 L. J. C. P. 256; 5 L. T. O. S. 199; 9 Jur. 734; 135 E. R. 764.

Annotations:—*Refd.* *Couling v. Cox* (1848), 6 C. B. 703. *Mentd.* *Cornett v. Hooker* (1850), 15 L. T. O. S. 69; *Marshall v. York, Newcastle, & Berwick Ry.* (1851), 11 C. B. 398.

233. — Collateral contracts.]—Pltf. contracted with a tramways co. to construct a tramway for them in a public road, & made a sub-contract with deft.'s, an asphalté co., under which the latter undertook to lay the asphalté & to keep it in good repair & condition for twelve months. In consequence of the defective state of the asphalté within that period one H. who was driving along the road, was thrown out of his cart & injured. H. thereupon brought an action against the tramway co. who gave notice to pltf. Pltf. then called upon defts. to defend H.'s action but they declined to have anything to do with it. Pltf. resisted H.'s claim & ultimately compromised it for £70 but was obliged also to pay £40 for the costs of H.'s attorney, & expended £18 more for the costs of defending the action. The jury found that the course taken by the pltf. in resisting & ultimately compromising H.'s action was a reasonable & proper one:—*Held*: defts. were liable for the £70 but not for the £40 or the £18, these latter charges not being the natural or necessary consequence of their default, the contracts between pltf. & the tramway co. & between pltf. & defts. being separate & independent contracts.—*FISHER v. VAL DE TRAVERS ASPHALTE Co.* (1876), 1 C. P. D. 511; 45 L. J. Q. B. 479; 35 L. T. 366.

Annotations:—*Refd.* *Hammond v. Bussey* (1887), 20 Q. B. D. 79; *Aglus v. Great Western Colliery Co.*, [1899] 1 Q. B. 413. *Mentd.* *Hornby v. Cardwell* (1881), 8 Q. B. D. 329; *The Millwall* (No. 2) (1905), 74 L. J. P. 82.

234. — —.]—*BOSTOCK & Co., LTD. v. NICHOLSON & SONS, LTD.*, No. 189, *ante*.

235. — Costs of conviction—Goods sold under warranty of soundness.]—Pltf. bought of defts. certain tins of fish warranted to be sound but in fact unsound. He had no knowledge of their unsoundness. The fish was seized, condemned & destroyed under Public Health (London) Act, 1891 (c. 76), & pltf. was convicted under sect. 47 of that Act, as the person on whose premises the fish was found, & fined £20 & ten guineas costs, & he paid seven guineas costs in his defence at the police ct.:—*Held*: he was entitled to recover from defts. as damages, in addition to the full

1. Failure of action against third party—Due to defendant.]—In an action brought by an infant, pltf.'s solr. represented to defts. that the infant's next friend was qualified by age. In an action against the solr.:—*Held*: the measure of damages to which defts. in the former action were entitled was the costs they had incurred in defending the action.—*FERNER v. GORLITZ* (1915), 49 I. L. T. 134.—*IR.*

m. — —.]—Where deft.

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fraudulently purports to act as agent for another, & in consequence pltf. unsuccessfully sued such other person for something arising out of the transaction between himself & deft., pltf. is entitled to recover the costs of the action against the other person as damages.—*HAIN & SON v. YOUNG* (1903), 24 N. L. R. 466.—*S. AF.*

n. — Costs of action brought on second contract with third party depending for its performance on the first contract.]—Where the purchaser

under a contract for the sale of goods had, on the strength thereto, entered into another contract for the sale of the same goods to a third person, & through default in delivery was unable to perform his contract with such third person who took proceedings & recovered damages:—*Held*: entitled to the costs paid to the third person under the legal proceedings referred to.—*CRISPIN & Co. v. EVANS, COLEMAN & EVANS, LTD.*, [1922] 3 W. W. R. 261.—*CAN.*

Sect. 4.—Recovery of costs and expenses: Sub-sects. 2, 3, 4 & 5.]

value of the fish, the ten guineas costs imposed by the magistrate & the seven guineas paid in his defence, as these two payments flowed from defts.' breach of warranty but the fine of £20 could not be recovered in the absence of anything to show what consideration influenced the magistrate when he imposed it.—*CRAGE v. FRY* (1903), 67 J. P. 240; 1 L. G. R. 253.

Annotations:—*Reid*, *Coltatt v. Myham*, [1913] 2 K. B. 220; *Weld-Blundell v. Stephens*, [1919] 1 K. B. 520. **Mentd.** *Leslie v. Reliable Advertising & Addressing Agency*, [1915] 1 K. B. 652.

236. Where former action caused by wrongdoing of plaintiff.]—A firm of money-lenders contracted with a firm of advertising agents that the latter should address a number of circulars inviting applications for loans with the names & addresses of a large section of the public given in a certain handbook, but omitting therefrom all the names of minors appearing in the handbook. By an oversight the advertising agency addressed one of the circulars to a minor, with the result that the money-lenders sent the same to the addressee. They & their manager were prosecuted for having knowingly circularised an infant. They were convicted & fined, & claimed, in a civil action against the advertising agency, as damages for breach of the contract, or the negligence in wrongly addressing the circular, the penalties & costs of prosecution, & defence incurred by them & their manager:—**Held:** the whole of the claim must fail, but if the claim could have been maintained, the damages were not too remote.—*LESLIE (R.), LTD. v. RELIABLE ADVERTISING & ADDRESSING AGENCY, LTD.*, [1915] 1 K. B. 652; 84 L. J. K. B. 719; 112 L. T. 947; 31 T. L. R. 182.

Annotations:—*Reid*, *Weld-Blundell v. Stephens*, [1920] A. C. 956. **Mentd.** *Proops v. Chaplin* (1920), 37 T. L. R. 112.

237. ——Pltf. employed deft., a chartered accountant, to investigate the affairs of a co. in which he was interested. In a letter of instructions to deft. pltf. inserted libellous statements concerning two officials of the co. Dft. handed the letter to his partner, who negligently left it at the co.'s office. The manager found it, read it, & communicated its contents to the two persons defamed, each of whom sued pltf. for libel & obtained judgment against him for damages & costs. Pltf. then sought to recover from deft. the amount which he had paid for damages & costs in the libel actions as damages for breach of an implied duty to keep secret the letter of instructions.

The jury found that it was the duty of deft. to keep the letter secret, that he had neglected that duty, and that the actions for libel & the damages recovered therein were the natural & probable consequence of deft.'s negligence, & they awarded pltf. substantial damages:—**Held:** the pltf.'s liability for damages in the libel actions did not result from the deft.'s breach of duty, & the deft. was liable for nominal damages only.—*WELD-BLUNDELL v. STEPHENS*, [1920] A. C. 956; 89 L. J. K. B. 705; 123 L. T. 593; 36 T. L. R. 640; 64 Sol. Jo. 529, H. L.

Annotations:—*Reid*, *Proops v. Chaplin* (1920), 37 T. L. R. 112; *Re Polemis & Furness, Withy*, [1921] 3 K. B. 560; *The San Onofre*, [1922] P. 243; *Adelaide S.S. Co. v. R.*, [1923] 1 K. B. 59. **Mentd.** *A. & B. Taxis v. Secretary of State for Air*, [1922] 2 K. B. 328; *Adelaide S.S. Co. v. R.*, [1922], 127 L. T. 63; *Elliot Steam Tug Co. v. Shipping Controller*, [1922] 1 K. B. 127.

238. Costs of appeal.]—*VOGAN & Co. v. OULTON*, No. 223, *ante*.

239. ——Pltf. recovered judgment against

defts. for damages & costs in an action for injuries sustained by reason of the negligence of defts.' sub-contractors, who were brought in as third parties & who had undertaken to be answerable for all accidents & damages that might occur during the progress of the work, & to indemnify & bear defts. harmless therefrom. Defts. appealed, but the third parties, who received notice of the appeal, did not give any sanction or co-operation to the appeal, which was dismissed with costs:—**Held:** the third parties were not compelled by the indemnity to pay to defts. the costs of the appeal.—*MAXWELL v. BRITISH THOMSON HOUSTON CO.*, [1904] 2 K. B. 342; 73 L. J. K. B. 644.

240. ——The directors of a co. issued a prospectus on the faith of which B. applied for & was allotted shares in the co. The co. went into liquidation. B. brought an action, under Directors' Liability Act, 1890 (c. 64), against three of the directors for compensation on the ground that the prospectus contained an untrue statement. Judgment was given in his favour with costs & an inquiry as to damages directed. Defts. appealed to the C. A. & the H. L., but both appeals were dismissed with costs. A compromise was arrived at under which the inquiry was dropped, & B. was paid compensation at the rate of 15s. per share, his taxed costs of the inquiry, & £700 additional costs. Many other shareholders made claims, which were also compromised; & the three defts. in B.'s action & some of the other directors paid large sums in this way. They did not take advantage of third party procedure, but brought this action against the remaining directors & the exors. of three of them, who had died since the prospectus was issued, to enforce, under sect. 5, of the above Act, contribution by them of their share of the compensation which had been paid:—**Held:** they were not liable to contribute in respect of the costs of the appeals from the decision in B.'s case.—*SHEPHEARD v. BRAY*, [1906] 2 Ch. 235; 75 L. J. Ch. 633; 95 L. T. 414; 22 T. L. R. 625; 13 Mans. 279; on appeal, [1907] 2 Ch. 571, C. A.

Annotation:—*Mentd.* *Gelpel v. Peach*, [1917] 2 Ch. 108.

As to costs in actions brought by or against agent.]—*See AGENCY*, Vol. I., pp. 486-488, 531-533, 605-607, Nos. 1648, 1654-1656, 1658, 1660, 1886, 1899-1904, 2791, 2796-2798, 2801, 2803, 2804.

Third party procedure generally.]—*See PRACTICE & PROCEDURE*.

SUB-SECT. 3.—UNDER CONTRACTS OF INDEMNITY.

See GUARANTEE.

SUB-SECT. 4.—ACTION ON COVENANTS IN, AND ASSIGNMENTS OF LEASES.

See LANDLORD & TENANT.

SUB-SECT. 5.—SCALE ON WHICH COSTS RECOVERABLE.

241. Order for payment to plaintiff made in previous action—Costs cannot be claimed as damages in fresh action.]—In an action for malfeasance, whereby pltf. incurred costs in judicial proceedings, if there is an order of another ct. for deft. to pay the costs of these proceedings to pltf., he can neither recover as special damage, the sum at which they are taxed, nor the extra cost as

between himself & his attorney.—**HATHAWAY v. BARROW** (1807), 1 Camp. 151, N. P.

Annotations :—**Apld.** **Jenkins v. Biddulph** (1827), 12 Moore, C. P. 390; **Hodges v. Litchfield** (1835), 1 Scott, 443. **Mentd.** **Blakemore v. Glamorganshire Canal Co.** (1835), 1 Gale, 78; *In the Estate of Crippen*, [1911] P. 108.

242. ———.]—Deft. having entered into a contract for the sale of an estate to pltf., the latter objecting to the title, a bill in equity was filed against him for not completing the purchase, which bill was ultimately dismissed with costs. In an action against the vendor to recover damages for the breach of contract :—**Held** : he was not entitled to the extra costs of the equity suit.—**HODGES v. LITCHFIELD (EARL)** (1835), 1 Bing. N. C. 492; 1 Scott, 443; 1 Hodg. 40; 131 E. R. 1207. **Annotation** :—**Follid.** **Malden v. Fyson** (1847), 11 Q. B. 292.

243. When order for taxation made in previous action—Whether taxed costs only recoverable.]—In an action for a malicious arrest pltf. can recover no damages for extra costs.

Pltf. has recovered already in the shape of taxed costs all the costs which the law allows, & it cannot be that an action may be sustained for the surplus (**MANSFIELD, C.J.**).—**SINCLAIR v. ELDRED** (1811), 4 Taunt. 7; 128 E. R. 229.

Annotations :—**Follid.** **Webber v. Nicholas** (1826), Ry. & M. 419; **Jenkins v. Biddulph** (1827), 12 Moore, C. P. 390. **Consd.** **Hodges v. Litchfield** (1835), 1 Scott, 443. **Distd.** **Howard v. Lovegrove** (1870), 23 L. T. 396. **Refd.** **Nowel v. Roake** (1827), 6 L. J. O. S. C. B. 26; **Saxon v. Castle** (1837), 6 Ad. & El. 652. **Mentd.** **Nicholson v. Coghill** (1825), 4 B. & C. 21; **Webb v. Hill** (1828), 3 C. & P. 485; **Doe d. Drax v. Filliter** (1843), 11 M. & W. 80.

244. ———.]—In an action for maliciously holding pltf. to bail he is entitled in the calculation of damages to recover, not merely the taxed costs, but the costs as between attorney & client.—**SANDBACK v. THOMAS** (1816), 1 Stark. 306, N. P.

Annotations :—**N.F.** **Webber v. Nicholas** (1826), Ry. & M. 419; **Grace v. Morgan** (1836), 2 Bing. N. C. 534; **Holloway v. Turner** (1845), 6 Q. B. 928. **Distd.** **Howard v. Lovegrove** (1870), 19 W. R. 188.

245. ———.]—In an action for malicious arrest, pltf. cannot recover damages for the extra costs.—**WEBBER v. NICHOLAS** (1826), Ry. & M. 419.

Annotation :—**Refd.** **Doe d. Drax v. Filliter** (1843), 11 M. & W. 80.

246. ———.]—In an action against the sheriff for a false return of *non est inventus, per quod* pltf. was outlawed, pltf. cannot recover the extra costs of the outlawry.—**JENKINS v. BIDDULPH** (1827), 4 Bing. 160; 12 Moore, C. P. 390; 5 L. J. O. S. C. P. 138; 130 E. R. 729.

Annotations :—**Follid.** **Hodges v. Litchfield** (1835), 1 Scott, 443; **Grace v. Morgan** (1836), 2 Bing. N. C. 534.

247. ———.]—In an action for mesne profits pltf. is entitled to receive only the taxed costs of the ejectment, & not the extra costs.—**DOE v. HARE** (1833), 2 Dowl. 245; 4 Tyr. 29.

Annotations :—**Refd.** **Doe v. Filliter** (1844), 13 M. & W. 47. **Mentd.** **Barber v. Brown** (1856), 1 C. B. N. S. 121; **Peruvian Guano Co. v. Dreyfus** (1887), [1892] A. C. 170, n.

248. ———.]—In an action for a malicious distress, pltf. cannot recover his extra costs as between attorney & client, incurred in an action of replevin which pltf. had brought to recover the goods distrained.—**GRACE v. MORGAN** (1836), 2 Bing. N. C. 534; 1 Hodg. 398; 2 Scott, 790; 5 L. J. C. P. 180; 132 E. R. 208.

Annotations :—**Follid.** **Doe v. Filliter** (1844), 13 M. & W. 47. **Distd.** **Howard v. Lovegrove** (1870), 23 L. T. 396.

249. ———.]—In a case for malicious arrest pltf. is entitled to recover costs incurred in the former suit beyond the taxed costs in that suit.—**GOULD v. BARRATT** (1838), 2 Mood. & R. 171.

250. ———.]—Where the costs of an ejectment have been taxed, pltf. cannot, in an action for mesne profits, recover costs as between

attorney & client, & it makes no difference that the costs have been taxed on the application of deft.—**DOE v. FILLITER** (1844), 13 M. & W. 47; 13 L. J. Ex. 275; 3 L. T. O. S. 184; 153 E. R. 20. **Annotation** :—**Refd.** **Swinten v. Chelmsford** (1860), 4 H. & N. 890.

251. ———.]—A ct. of summary jurisdiction made an order under Public Health Act, 1875 (c. 55), s. 96, upon the owner of premises to comply with a notice served upon him by the local authority requiring him to abate a nuisance upon the premises. The ct. of quarter sessions dismissed an appeal against the order but stated a case. The High Ct. ordered that the order of quarter sessions should be quashed, & instead thereof judgment entered for the owner, & that the local authority should pay to the owner the costs of the two appeals. These costs were taxed & paid to the owner by th local authority. The expenses incurred by the owner in promoting the appeals exceeded the costs so paid to him. All the expenses incurred by the owner throughout the proceedings were reasonably & properly incurred :—**Held** : the owner's expenses of the proceedings in the ct. of summary jurisdiction & the difference between his costs taxed as between party & party & his actual expenses of the two appeals were not damage for which he was entitled to compensation under the above Act, sect. 308.—**BARNETT v. ECCLES CORPN.**, [1900] 2 Q. B. 423; 69 L. J. Q. B. 834; 83 L. T. 66; 64 J. P. 692; 16 T. L. R. 463, C. A.

Annotations :—**Consd.** **G. W. Ry. Co. v. Fisher**, [1905] 1 Ch. 316. **Refd.** **Wiffen v. Bailey & Romford U. C.**, [1914] 2 K. B. 5. **Mentd.** **Hobbs v. Winchester Corpn.** (1910), 79 L. J. K. B. 1123.

252. Where no taxation in previous action—Previous judgment reversed on writ of error—Full costs recoverable.]—In an action for mesne profits, pltf. may recover by way of damages, costs incurred by him in a ct. of error in reversing a judgment in ejectment obtained by deft.

There can be no doubt that the ct. of error could not award costs to pltf. But the expenses incurred in the ct. of error were part of the damages sustained by pltf. by reason of his having been wrongfully kept out of possession by the act of deft., & I think that the jury might reasonably consider the costs between attorney & client as the measure of the damages which he had sustained (**LORD TENDERDEN, C.J.**).—**NOWEL v. ROAKE** (1827), 7 B. & C. 404; 1 Man. & Ry. K. B. 170; 6 L. J. O. S. K. B. 26; 108 E. R. 774.

Annotations :—**Consd.** **Symonds v. Page** (1830), 1 Cr. & J. 29. **Refd.** **Doe v. Filliter** (1844), 13 M. & W. 47. **Mentd.** **Doe d. Capps v. Capps** (1837), 6 Dowl. 634.

See, now, R. S. C. Ord. 58, r. 4.

253. ———.] Action for ejectment—Full costs recoverable.]—The costs of an ejectment may be recovered in an action for mesne profits, though deft. has appeared & pleaded in the ejectment, & no costs have been taxed.—**SYMONDS v. PAGE** (1830), 1 Cr. & J. 29; 148 E. R. 1322.

Annotation :—**Consd.** **Doe v. Filliter** (1844), 13 M. & W. 47.

254. ———.]—Where there is judgment by default in an ejectment pltf. may in an action for mesne profits recover all the expenses he has been necessarily put to in the ejectment, & is not limited to the taxed costs as between party & party.—**DOE v. HUDDART** (1835), 2 Cr. M. & R. 316; 4 Dowl. P. C. 437; 5 Tyr. 846; 150 E. R. 137.

Annotations :—**Refd.** **Doe v. Filliter** (1844), 13 M. & W. 47. **Mentd.** **Freeman v. Cooke** (1848), 2 Exch. 654; **Kepp v. Wiggitt** (1850), 10 C. B. 35; **Litchfield v. Ready** (1850), 5 Exch. 939; **Matthew v. Osborne** (1853), 13 C. B. 919; **Wilkinson v. Kirby** (1854), 15 C. B. 430; **Cammell v. Sewell** (1860), 5 H. & N. 728; **Irving v. Cuthbertson** (1860), 6 Jur. N. S. 1211.

255. Costs disallowed in previous action—

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Not recoverable.]—A deft. on whose application a judgment has been set aside, for irregularity in practice, without costs, cannot recover such costs as damages in an action of trespass against pltf.'s attorney for taking the goods under colour of the judgment.—*LOTON v. DEVEREUX* (1832), 3 B. & Ad. 343; 1 L. J. K. B. 103; 110 E. R. 129.

Annotations:—*Distd. Pritchett v. Boevey* (1833), 1 Cr. & M. 775. **Mentd.** *Codrington v. Lloyd* (1839), 8 Ad. & El. 449.

256. ———.]—M. agreed with F. to purchase land of him. On production of F.'s title, M. objected to it. F. insisted that it was good, & gave notice that he should sell at M.'s risk. M. then filed a bill against F. for a specific performance, & the question of title was referred by the Ct. of Ch. to a master, who reported that F. had not a good title, whereupon the bill was dismissed without costs on either side, that being the practice of the Ct. of Ch. in such cases:—**Held:** M. could not recover from F., as damages for breach of the contract, costs incurred by M. in the Ch. suit.—*MALDEN v. FYSON* (1847), 11 Q. B. 292; 17 L. J. Q. B. 85; 12 Jur. 228; 116 E. R. 486; *previous proceedings* (1846), 9 Beav. 347.

Annotations:—*Reid. Swinton v. Chelmsford* (1860), 5 H. & N. 890; *Thomas v. Rowlands* (1886), 3 T. L. R. 148. **Mentd.** *Onions v. Cohen* (1865), 2 Hem. & M. 354.

257. ———.]—J. deposited with a banking co., with whom he kept an account, the certificates of some railway stock belonging to him. He also gave to the bank, in the name of the manager, a power of attorney to receive 'he dividends on the stock, which were to be carried to the credit of his current account. He paid a small commission to the bank for keeping his account. The certificates were placed in a strong box in the room of the manager, of which box he kept the key. Other securities, some of which were the property of the bank, were kept in the same way. No entry was made by the bank in any book of the securities which were placed in their custody. The manager improperly sold the railway stock, & executed forged transfers to the purchasers. When the forgery was discovered J. instituted suits in Ch. against the purchasers & the railway co. to recover the stock. In those suits he was successful, but he was deprived of his costs of the suits on the ground that he had been guilty of negligence, inasmuch as in one case he had given the railway co. the office of the bank as his address, stating that the manager was his agent, & in the other case had given a club as his address. In both cases the manager of the bank obtained possession of letters which the railway co. sent to ask whether the transfer was correct, & answered the letters affirmatively in the name of J. The bank being afterwards wound up, J. carried in a claim for costs of the suits as damages which he had sustained by reason of the negligence of the bank:—**Held:** the bank were guilty of negligence as to the certificates, & were liable for the consequences of their negligence, but the costs of the suit were not a direct & necessary consequence of the negligence of the bank, & therefore, the bank were not liable for those costs.—*Re UNITED SERVICE CO., JOHNSTON'S CLAIM* (1871), 6 Ch. App. 212; 40 L. J. Ch. 286; 24 L. T. 115; 19 W. R. 457, L. J. J.

Annotations:—*Mentd.* *Leese v. Martin* (1873), L. R. 17 Eq. 224; *Arnold v. Cheque Bank* (1876), 34 L. T. 729; *Re Cooper, Cooper v. Vesey* (1882), 20 Ch. D. 611; *Jobson v. Palmer*, [1893] 1 Ch. 71.

258. No order as to costs in previous action—Costs paid may be recovered.]—A rule having been obtained for discharging a party illegally arrested, was referred by the ct. to a judge at chambers, who

ordered the applicant to be discharged, & offered to give him the costs of his application if he would undertake to bring no action for the arrest, but on his refusal, made no order about costs. An action of trespass & false imprisonment was afterwards brought, laying as damage, that pltf. had been obliged to pay, & had paid, a large sum of money in order to procure his discharge. There was no distinct evidence of payment of the money by pltf. to his attorney:—**Held:** pltf. was entitled to recover his costs as special damage in this form of action, but as the declaration alleged actual payment of them by him, he could not recover that part which he had not paid, but so much only as had been advanced on his account, by his attorney, as for so much money paid by himself through an agent.—*PRITCHETT v. BOEVEY* (1833), 1 Cr. & M. 775; 3 Tyr. 949; 2 L. J. Ex. 251.

Annotation:—*Reid. Richardson v. Chasen* (1847), 10 Q. B. 756.

259. Extra costs—Awarded as damages or application under Companies Act, 1862 (c. 89) s. 35.]—Upon motion, under Companies Act, 1862 (c. 89), s. 35, for an order to remove the appt.'s name from the register of shareholders of a new co. which he had never agreed to join, the ct., holding the conduct of the new co. in putting him on their list wholly unjustifiable, gave him, in addition to the costs of his appln., & by way of damages sustained by him, the legal expenses which he had been occasioned by the co.'s conduct.—*Re NEW QUEBRADA CO., LTD., PONTIFEX'S CASE* (1867), 36 L. J. Ch. 903; 15 W. R. 955.

260. — Not recoverable as damages in same action.]—I am of opinion that it is not according to law to give to a party by way of damages the costs as between solr. & client of the litigation in which the damage is recovered (*JESSEL, M.R.*):—*COCKBURN v. EDWARDS* (1881), 18 Ch. D. 449; 51 L. J. Ch. 46; 45 L. T. 500; 30 W. R. 446, C. A.

Annotations:—*Mentd.* *Craddock v. Rogers* (1884), 53 L. J. Ch. 968; *Pooley's Trustee v. Whetham* (1886), 33 Ch. D. 111; *Andrews v. Barnes* (1888), 39 Ch. D. 133; *Bright v. Campbell* (1889), 41 Ch. D. 388; *Simmons v. London Joint Stock Bank, Little v. London Joint Stock Bank*, [1891] 1 Ch. 270; *Stokes v. France*, [1898] 1 Ch. 212; *The Swiftsure* (1900), 16 T. L. R. 275; *Wrigley v. Gill*, [1906] 1 Ch. 165; *Nocton v. Ashburton*, [1914] A. C. 932.

261. — Recoverable when reasonably incurred.]—*AGIUS v. GREAT WESTERN COLLIERY CO.*, No. 215, *ante*.

262. ———.]—The charterer, having been compelled in an action to pay damages to a stevedore for personal injuries sustained by reason of the defective condition of the vessel:—**Held:** he was entitled to recover such damages & all costs incurred from the persons from whom he chartered.

Pltf.'s own costs should include solr. & client costs, subject to taxation, because if it was reasonable for him to defend the action it was inevitable that he should incur those costs (*BIGHAM, J.*).—*SCOTT v. FOLEY, AIKMAN & Co.* (1899), 16 T. L. R. 55; 5 Com. Cas. 53.

263. ———.]—In an action for an injunction against an adjoining owner & his builder to restrain an interference with light & for trespass, the builder severed in his defence from his employer & appeared separately at the trial, when an injunction was granted with costs against deft., the adjoining owner:—**Held:** under the circumstances, the builder was entitled to complete indemnity, & to an order for the payment of his solr. & client costs by his co-deft.—*BORN v. TURNER*, [1900] 2 Ch. 211; 69 L. J. Ch. 593; 48 W. R. 697; 44 Sol. Jo. 502.

264. ———.]—*GREAT WESTERN RY. CO. v. FISHER*, No. 224, *ante*.

265. ———.]—Owing chiefly to the negligence of defts.' servants a steamship of defts. came into collision with another steamship & sank in pltf's. canal. Pltf's. employed tugs to assist vessels past the wreck, & after removing it sold it to a purchaser, who refused to carry out his bargain. Pltf's. then sued the purchaser & obtained judgment with costs. In an action by pltf's. against defts. to recover the expenses incurred through the sinking of defts.' steamship:—*Held*: as pltf's. had acted reasonably in employing the tugs & in suing the purchaser, there must be included in the expenses which they were entitled to recover the expense of employing the tugs & such costs of the action against the purchaser as had been necessarily incurred though they had not been allowed on taxation.—*THE SOLWAY PRINCE* (1914), 31 T. L. R. 56.

In contracts of indemnity.]—See GUARANTEE.

In action for maintenance.]—See ACTION, Vol. I., p. 88, Nos. 721-725.

266. ———.]—*HULTON (E.) & Co., LTD. v. MOUNTAIN* (1921), 37 T. L. R. 869, C. A.

SECT. 5.—REMOTENESS AND INTERVENING CAUSE.

Liability of bailee.]—See BAILMENT, Vol. III., pp. 53 *et seq.*

267. General rule.]—The rule of law appears to me to be now well established, that if deft.'s breach of contract or duty is the primary & substantial cause of the damage sustained by pltf., defts. will be responsible for the whole loss, though it may have been increased by the wrongful conduct of a third person, & although that wrongful conduct may have contributed to the loss (*LORD ALVERSTONE, C.J.*).—*DE LA BERE v. PEARSON, LTD.*, [1907] 1 K. B. 483; 76 L. J. K. B. 309; 96 L. T. 425; 23 T. L. R. 264; *affd.*, [1908] 1 K. B. 280, C. A.

Annotation:—*Apld. H.M.S. London*, [1914] P. 72.

268. ———.]—Children's cases are always troublesome. They are the commonest cases of the general rule that a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of pltf. himself that injury would not have occurred (*HAMILTON, L.J.*).—*LATHAM v. JOHNSON (R.) & NEPHEW, LTD.*, [1913] 1 K. B. 398; 82 L. J. K. B. 258; 108 L. T. 4; 77 J. P. 137, C. A.

Annotations:—*Consd. Crane v. South Suburban Gas Co.*, [1916] 1 K. B. 33; *Ruoff v. Long*, [1916] 1 K. B. 148. *Reid. Fairman v. Perpetual Investment Bldg. Soc.*, [1923] A. C. 74. *Mentd. Norman v. G. W. Ry.*, [1914] 2 K. B. 153; *Elliott v. Roberts*, [1916] 2 K. B. 518; *Wilson v. Barry Ry.* (1916), 116 L. T. 71; *Hayward v. Drury Lane Theatre & Moss' Empires*, [1917] 2 K. B. 899; *MacLennan v. Segar*, [1917] 2 K. B. 325; *Pritchard v. Peto*, [1917] 2 K. B. 173; *Everett v. Griffiths*, [1920] 3 K. B. 163; *Hardy v. C. L. Ry.*, [1920] 3 K. B. 459; *Glasgow Corp'n v. Taylor*, [1922] 1 A. C. 44; *Mersey Docks & Harbour Board v. Procter*, [1923] A. C. 253.

PART III. SECT. 5.

267 i. General rule.]—A person who commits a wrongful act or tort is, generally speaking, not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knew or had reasonable means of knowing that consequences not usually resulting from the act were, by reason of some existing cause, likely to intervene so as to occasion damage.—*O'CONNOR v. BANK OF NEW SOUTH WALES* (1887), 13 V. L. R. 820.—*AUS.*

267 ii. ———.]—Where a wrongful act

has occasioned exposure to the weather, & illness has resulted from such exposure, such illness is not to be regarded as due to an intervening independent cause. The rule with regard to remoteness of damage is the same whether the damages are claimed in an action of contract or of tort. The inquiry is, what is the natural & probable consequence of the breach.—*MORRISON v. PERE MARQUETTE Ry. Co.* (1913), 28 O. L. R. 319; 4 O. W. N. 889.—*CAN.*

270 i. Immediate damage caused by third party—Resulting from original

269. Failure by defendant to repair fences—Damage by animals to property of third party.]—*HOLBACH v. WARNER* (1623), Cro. Jac. 665; Palm. 331; 79 E. R. 576.

Annotations:—*Reid. Powell v. Salisbury* (1828), 2 Y. & J. 391. *Mentd. R. v. Bucknall* (1702), 2 Ld. Raym. 804; *Rider v. Smith* (1790), 3 Term Rep. 766.

See, also, ANIMALS, Vol. II., pp. 217, 218, Nos. 126-132; BOUNDARIES, FENCES & PARTY WALLS, Vol. VII., p. 292, Nos. 183-187.

270. Immediate damage caused by third party—Resulting from original wrongful act of defendant.]

—Trespass & assault will lie for originally throwing a squib, which after having been thrown about in self-defence by other persons, at last put out pltf.'s eye.—*SCOT v. SHEPHERD* (1773), 3 Wils. 403; 2 Wm. Bl. 892; 95 E. R. 1124.

Annotations:—*Apld. Sneesby v. L. & Y. Ry.* (1874), L. R. 9 Q. B. 263; *Clark v. Chambers* (1878), 3 Q. B. D. 327; *H.M.S. London*, [1914] P. 72. *Reid. Clifford v. Brooke* (1806), 13 Ves. 131; *Fitzsimons v. Inglis* (1814), 5 Taunt. 534; *Langridge v. Levy* (1837), 6 L. J. Ex. 137; *Rich v. Basterfield* (1846), 2 Car. & Kir. 257; *Sharrod v. L. & N. W. Ry.* (1849), 4 Exch. 580; *Latham v. Johnson & Nephew*, [1913] 1 K. B. 398; *Ruoff v. Long*, [1916] 1 K. B. 148; *Weld-Blundell v. Stephens*, [1920] A. C. 956. *Mentd. Leame v. Bray* (1803), 3 East, 593; *M'Laughlin v. Pryor* (1842), 4 Man. & G. 48; *Gilbertson v. Richardson* (1848), 5 C. B. 502; *Coward v. Baddoley* (1859), 33 L. T. O. S. 125; *Seymour v. Greenwood* (1861), 6 H. & N. 359; *Clark v. Hoskins* (1868), 37 L. J. Ch. 561; *The George & Richard* (1871), L. R. 3 A. & E. 466; *Holmes v. Mather* (1875), 44 L. J. Ex. 176; *Whalley v. L. & Y. Ry.* (1884), 13 Q. B. D. 131; *R. v. Ashwell* (1885), 16 Q. B. D. 190; *Bradley v. Newsom*, [1919] A. C. 16.

271. ———.]—In an action of trespass against a huntsman for hunting over the lands of another, damages may be recovered, not only for the mischief immediately occasioned by deft. himself, but also for that done by the concurrence of people who accompanied him.—*HUME v. OLDACRE* (1816), 1 Stark. 351, N. P.

272. ———.]—A declaration alleged that pltf., deft. & C. had entered into a joint speculation in railway shares: that C. had advanced £6,000: £2,000 on his own behalf, £2,000 as a loan to pltf., & £2,000 on behalf of deft.; that C. was desirous of retiring from the adventure, & deft. offered to take upon himself the whole of the adventure & debt of £6,000, provided pltf. would consent to abandon his share to deft., & C. would accept deft. as his debtor in the place of pltf. for the said sum of £2,000; that pltf. did abandon his share of the adventure to deft., & deft. agreed to take upon himself the whole adventure & become debtor to C. for the whole £6,000; & C. on the faith & in the belief that such an arrangement was made, consented to accept deft. as such debtor in the place of pltf.; nevertheless, deft. knowing that he alone was capable of proving that pltf. had assented to the arrangement, fraudulently, falsely, & maliciously, & before 14 & 15 Vict. c. 99, & in order to induce C. to believe that the joint adventure had never been put an end to, & to induce C. to sue pltf. for the £2,000, & to deter pltf. from calling deft. as a witness, & to destroy his credit as a witness if so called, wrote & sent to C. a letter purporting to be addressed to pltf. but

wrongful act of defendant.]—If a local council, knowing that an excavation is being made by a stranger on a road which they have not formed, take no steps to prevent same, it will be liable in damages at the action of a person to whom injury has been thereby caused.—*HITCHINS v. PORT MELBOURNE CORPN.* (1888), 14 V. L. R. 748.—*AUS.*

o. Immediate damage caused by plaintiff's own act—Resulting from original wrongful act of defendant.]—Pltf. was in a buggy which collided with deft.'s motor-car. As a result

Sect. 5.—Remoteness and intervening cause.

directed to C., wherein he fraudulently & falsely pretended to expostulate with pltf., & asserted that pltf. had positively refused to concur in the arrangement. By means whereof C. was induced to & did believe that pltf. had never agreed to retire from the adventure, & acting on such behalf C. brought an action against pltf. to recover the £2,000: that the action was referred to an arbitrator upon the terms that neither pltf. not deft. should be examined: & C. recovered against pltf. £2,486, which he was compelled to pay:—*Held*: the declaration was bad, since it did not appear that the damage to pltf. was the natural result of the wrongful act of deft.—*COLLINS v. CAVE* (1860), 6 H. & N. 131; 30 L. J. Ex. 55; 6 Jur. N. S. 1160; 8 W. R. 586; 158 E. R. 54, Ex. Ch.

Annotations:—*Reid*, *Spedding v. Nevell* (1869), 38 L. J. C. P. 133; *Fitzjohn v. Mackinder* (1861), 7 Jur. N. S. 1283.

273. ———.]—A railway engine fell over from deft.'s line into the garden of pltf. This happened through the negligence of the co.'s servants. Damage was done to flowers in the garden by a crowd that assembled there. In an action against the co., brought by the occupier of the garden:—*Held*: the damage done by the crowd was too remote.—*SCHOLES v. NORTH LONDON RY. CO.* (1870), 21 L. T. 835.

274. ———.]—Deft., who was in the occupation of certain premises abutting on a private road consisting of a carriage & footway, which premises he used for the purposes of athletic sports, had erected a barrier across the road to prevent persons driving vehicles up to the fence surrounding his premises & overlooking the sports. In the middle of this barrier was a gap which was usually open for the passage of vehicles, but which, when the sports were going on, was closed by means of a pole let down across it. It was admitted that deft. had no legal right to erect this barrier. Some person, without deft.'s authority, removed a part of the barrier armed with spikes, from the carriageway where deft. had placed it, & put it in an upright position across the footpath. Pltf., on a dark night, was lawfully passing along the road on his way from one of the houses to which it led. He felt his way through the opening in the middle of the barrier, & getting on to the footpath was proceeding along it when his eye came in contact with one of the spikes & was injured:—*Held*: deft. having unlawfully placed a dangerous instrument in the road was liable in respect of injuries occasioned by it to pltf., who was lawfully using the road, notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party in removing the dangerous instrument from the carriageway, where deft. had placed it, to the footpath.—*CLARK v. CHAMBERS* (1878), 3 Q. B. D. 327; 47 L. J. Q. B. 427; 38 L. T. 454; 42 J. P. 438; 26 W. R. 613.

Annotations:—*Apld.* *McDowall v. G. W. Ry.*, [1902] 1 K. B. 618. *Distd.* *Ruoff v. Long*, [1916] 1 K. B. 148. *Consd.* *Weld-Blundell v. Stephens*, [1920] A. C. 956. *Refd.* *Thalhausen v. Davies* (1888), 59 L. T. 436; *A.-G. v. Tod-Heatly & Brownrigg* (1897), 76 L. T. 174; *Bull v. Shore-ditch Corp.* (1909), 67 J. P. 37; *Cory v. France, Fenwick*, [1911] 1 K. B. 114. *Mentd.* *The Bernina* (2) (1887), 12 P. D. 58; *Coldrick v. Partridge, Jones* (1909), 78 L. J. K. B.

of the collision, pltf. jumped down from the buggy & owing to this she alleged she had a miscarriage two weeks later. In an action for damages by pltf.:—*Held*: she could recover damages for the nervous shock due to the collision.—*LAPORTE v. CHAMPAGNE* (1921), 64 D. L. R. 520.—*CAN.*

p. ———.]—A merchant whose store was burnt as the result of the negligence of a firm of carriers, received injuries through falling from a roof on to which he had climbed with a hose for the purpose of extinguishing the fire. In an action at his instance against the carriers:—

452; *Latham v. Johnson & Nephew*, [1913] 1 K. B. 398; *Glasgow Corp. v. Taylor*, [1922] 1 A. C. 44; *The San Onofre*, [1922] P. 243.

275. ———.]—*COBB v. GREAT WESTERN RY. CO.*, No. 172, *ante*.

276. ———.]—There is no rule of law to prevent a master being liable for negligence of his servant whereby opportunity was given for a third person to commit a wrongful or negligent act immediately producing the damage complained of. Whether the original negligence was an effective cause of the damage is a question of fact in each case.

Deft. employed a man to drive a cart, with instructions not to leave it, & a lad, who had nothing to do with the driving, to go in the cart & deliver parcels to the customers of deft. The driver left the cart, in which the lad was, & went into a house. While the driver was absent the lad drove on & came into collision with pltf.'s carriage. In an action to recover for the damage caused by the collision:—*Held*: the negligence of the driver in so leaving the cart was the effective cause of the damage, & deft. was liable.—*ENGELHART v. FARRANT & Co.*, [1897] 1 Q. B. 240; 66 L. J. Q. B. 122; 75 L. T. 617; 45 W. R. 179; 13 T. L. R. 81, C. A.

Annotations:—*Consd.* *McDowall v. G. W. Ry.*, [1903] 2 K. B. 331; *Ricketts v. Tilling*, [1915] 1 K. B. 644; *Weld-Blundell v. Stephens*, [1920] A. C. 956. *Refd.* *Harris v. Flat Motors* (1906), 22 T. L. R. 556; *Jefferies & Atkey v. Derbyshire Farmers* (1920), 36 T. L. R. 825. *Mentd.* *Latham v. Johnson & Nephew*, [1913] 1 K. B. 398; *Norman v. G. W. Ry.*, [1914] 2 K. B. 153.

277. ———.]—A railway co. is not responsible for injury to a person using a highway caused by a brake-van which the interference of trespassers has sent running down an inclined siding on to the highway, where the danger of such interference, as a probable cause of injury to persons using the highway, was not known to the railway co., & where, independently of such interference, the brake-van was in a position & condition not at the time dangerous.

I do not think that counsel for applts. in his argument was wrong when he said that in those cases in which part of the cause of the accident was the interference of a stranger or a third person you do not find defts. responsible unless that which they do, or omit to do, the negligence to perform a particular duty, is itself the effective cause of the accident. Bearing that in mind, it seems to me that in every case in which the circumstances are such that any one of common sense would recognise the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury (*VAUGHAN WILLIAMS, L.J.*).—*McDOWALL v. GREAT WESTERN RY. CO.*, [1903] 2 K. B. 331; 72 L. J. K. B. 652; 88 L. T. 825; 19 T. L. R. 552; 47 Sol. Jo. 603, C. A.

Annotations:—*Apld.* *Wheeler v. Morris* (1915), 84 L. J. K. B. 1435. *Consd.* *Weld-Blundell v. Stephens*, [1920] A. C. 956. *Refd.* *Ruoff v. Long*, [1916] 1 K. B. 148. *Mentd.* *Cooke v. Mid. G. W. Ry. of Ireland*, [1909] A. C. 229; *Clinton v. Lyons*, [1912] 3 K. B. 198; *Latham v. Johnson & Nephew*, [1913] 1 K. B. 398; *Everett v. Griffiths*, [1920] 3 K. B. 163.

278. ———.]—*DE LA BERE v. PEARSON, LTD.*, No. 267, *ante*.

279. ———.]—To sustain an action for

Held: these injuries were too remote to found a claim for damages.—*MACDONALD v. MACBRATNE, LTD.*, [1915] S. C. 716.—*SCOT.*

q. *Failure by defendant's builder to construct proper roof—Damage by storm to property of third party.*—

negligence it must be shown that the negligence found by the jury is the proximate cause of the damage. Where the proximate cause is the malicious act of a third person against which precautions would have been inoperative, deft. is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen & provided against it.—*RICKARDS v. LOTHIAN*, [1913] A. C. 263; 82 L. J. P. C. 42; 108 L. T. 225; 29 T. L. R. 281; 57 Sol. Jo. 281, P. C.

Annotations:—*Reid*. *Ruoff v. Long*, [1916] 1 K. B. 148; *Edwards v. Birmingham Canal Navigations* (1923), 40 T. L. R. 88. *Mentd*. *Charing Cross, West End & City Electricity Supply Co. v. London Hydraulic Power Co.*, [1913] 3 K. B. 442; *Hanley v. Edinburgh Corp.* (1913), 77 J. P. 233.

280. ———.]—By reason of a collision, due to the negligence of those in charge of another vessel, pltf.'s vessel was obliged to go into dry dock to repair the damage sustained, & whilst there, delay occurred owing to a strike of workmen. On objection, on the ground of remoteness, to the allowance by the registrar of an item in pltf.'s claim in respect of this delay:—*Held*: the item, covering the loss of the use of the vessel during the period of the strike, was properly allowed in accordance with the principles of the common law, for the loss flowed directly, naturally, & in the usual or ordinary course of things from the proximate cause, namely, the negligence of defts. in bringing about a collision with pltf.'s vessel, & thereby rendering it necessary to dry-dock her for the purpose of repair.—*H.M.S. LONDON*, [1914] P. 72; 83 L. J. P. 74; 109 L. T. 960; 30 T. L. R. 196; 12 Asp. M. L. C. 405.

Annotations:—*Reid*. *The Charles Le Borgne* (1918), [1920] P. 15, n. 1; *The Katue* (1919), 123 L. T. 559. *Mentd*. *The Amerika*, [1914] P. 167; *Re Polemis & Furness, Withy*, [1921] 3 K. B. 560.

281. ———.]—Pltf. was walking along a highway under a sun-blind outside deft.'s shop, when two men jumped up from the pavement to one of the iron supports, & mischievously pulled the blind down on deft., with the result that he was injured. The blind was properly constructed & in a good state of repair:—*Held*: there was no evidence on which the ct. could properly hold that there was a duty on deft. to have the blind fixed & secured so as to prevent its being brought down on pltf. by the action of the two men, & pltf. was not entitled to damages.—*WHEELER v. MORRIS* (1915), 84 L. J. K. B. 1435; 113 L. T. 644, C. A.

Annotation:—*Consd*. *Ruoff v. Long*, [1916] 1 K. B. 148.

282. ———.]—A person lawfully leaving his property unattended in a highway must take reasonable means to prevent such mischief as he ought to contemplate as likely to arise from his user of the highway. He is not liable for damage caused by his property through such interference of third persons as he is not bound to anticipate.

Defts.' servants momentarily left stationary but unattended in a highway, a steam motor lorry. In order to start the lorry it was necessary to withdraw a hand-pin from the gear lever & then to move that & two other levers. Two soldiers seeing the lorry mounted it. One tried but failed to set it in motion. The other succeeded in starting it backwards so that it ran into pltf.'s shop front & did damage for which the action was brought:—*Held*: (1) there was in the circum-

stances no evidence of negligence in leaving the lorry unattended; (2) assuming that there was negligence, there was no evidence that it caused the damage.—*RUOFF v. LONG & CO.*, [1916] 1 K. B. 148; 85 L. J. K. B. 364; 114 L. T. 186; 80 J. P. 158; 32 T. L. R. 82; 60 Sol. Jo. 323, D. C.

283. ———.]—Workmen employed by defts., a gas co., for the purpose of carrying out repairs to a gas main in a highway, placed a fire pail, on which was a ladle containing molten lead, on unenclosed land adjacent to the highway. Pltf., a young child, was playing with other children near the fire when a passer-by accidentally knocked over the fire pail, & the molten lead was spilled on pltf., causing her injury. In an action by pltf. to recover damages the county ct. judge found that defts. were guilty of negligence in leaving the fire unattended & unguarded with the knowledge that it was surrounded by children, & that it was being used for molten lead:—*Held*: there was evidence on which the county ct. judge could find that defts. were negligent; & defts. were also liable on the ground that what they were doing was a nuisance in that it was dangerous unless precautions were taken to guard persons using the highway from the danger.—*CRANE v. SOUTH SUBURBAN GAS CO.*, [1916] 1 K. B. 33; 85 L. J. K. B. 172; 114 L. T. 71; 80 J. P. 51; 32 T. L. R. 74; 60 Sol. Jo. 222; 14 L. G. R. 382, D. C.

284. ———.]—Defts., an urban authority, acting under the provisions of Public Health Acts Amendment Act, 1890 (c. 43), planted trees in certain of their highways, & surrounded each tree with an iron-spiked guard. Subsequently to the erection of the guards an order was promulgated by the chief constable, acting under the Defence of the Realm regs., by which all street lights in defts.' area were ordered to be extinguished at a certain hour. Pltf., who was crossing a road at night in the darkness, came into contact with one of the guards & suffered very serious injury. In an action to recover damages for negligence, the jury found that the guard was dangerous in the circumstances of the darkness that existed, & that defts. had not taken reasonable measures to neutralise the danger; the judge entered judgment for pltf.:—*Held*: after the promulgation of the lighting order there was a continuing duty on defts. to take reasonable measures to prevent the guard from being a danger to the public lawfully using the road, & pltf. was entitled to maintain his action.—*MORRISON v. SHEFFIELD CORPN.*, [1917] 2 K. B. 866; 86 L. J. K. B. 1456; 117 L. T. 520; 81 J. P. 277; 33 T. L. R. 402; 61 Sol. Jo. 611; 15 L. G. R. 667, C. A.

Annotations:—*Consd*. *Baldock v. Westminster City Council* (1918), 88 L. J. K. B. 502. *Reid*. *Sheppard v. Glossop Corp.*, [1921] 3 K. B. 132.

285. ———.]—Under Metropolis Management Act, 1855 (c. 120), s. 108, defts. had power to erect street refuges, & under sect. 130 they had a duty to light the streets within their district. Owing to the restriction of the lighting system, due to war conditions, & because it was difficult to maintain electric pressure, a light on a street refuge erected by defts. had become erratic. On the night of Mar. 20, 1917, the light was at some times burning & at others extinguished, & at a

The roof of deft.'s house was blown off in a storm & fell on pltf.'s house. The house had been constructed for deft. by a builder, but was built negligently, the roof not being sufficiently strong:—*Held*: deft. was liable.—*LAMB v. PHILLIPS* (1911), 11 S. R. N. S. W. 109.—*AUS.*

r. Fright occasioning illness—Re-

sulting from original wrongful act of defendant.—In an action of damages for physical injuries & nervous shock, the pursuer averred that defender's cow was driven from the market to defender's farm by a boy; that the boy set a dog at the cow with the result that it was frightened & entered pltf.'s house; that the pursuer was

thrown into a state of terror & sustained a very severe nervous shock; & that as the effect of the fright, her health had suffered. Defender having objected to the relevancy of these averments the ct. repelled the objection, & approved an issue for the trial of the cause.—*GILLIGAN v. ROBB*, [1910] S. C. 856.—*SCOT.*

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directed to C., wherein he fraudulently & falsely pretended to expostulate with pltf., & asserted that pltf. had positively refused to concur in the arrangement. By means whereof C. was induced to & did believe that pltf. had never agreed to retire from the adventure, & acting on such behalf C. brought an action against pltf. to recover the £2,000: that the action was referred to an arbitrator upon the terms that neither pltf. not deft. should be examined: & C. recovered against pltf. £2,486, which he was compelled to pay:—*Held*: the declaration was bad, since it did not appear that the damage to pltf. was the natural result of the wrongful act of deft.—*COLLINS v. CAVE* (1860), 6 H. & N. 131; 30 L. J. Ex. 55; 6 Jur. N. S. 1160; 8 W. R. 586; 158 E. R. 54, Ex. Ch.

Annotations:—*Reid*, *Spedding v. Nevell* (1869), 38 L. J. C. P. 133; *Fitzjohn v. Mackinder* (1861), 7 Jur. N. S. 1283.

273. ———.]—A railway engine fell over from deft.'s line into the garden of pltf. This happened through the negligence of the co.'s servants. Damage was done to flowers in the garden by a crowd that assembled there. In an action against the co., brought by the occupier of the garden:—*Held*: the damage done by the crowd was too remote.—*SCHOLES v. NORTH LONDON RY. CO.* (1870), 21 L. T. 835.

274. ———.]—Deft., who was in the occupation of certain premises abutting on a private road consisting of a carriage & footway, which premises he used for the purposes of athletic sports, had erected a barrier across the road to prevent persons driving vehicles up to the fence surrounding his premises & overlooking the sports. In the middle of this barrier was a gap which was usually open for the passage of vehicles, but which, when the sports were going on, was closed by means of a pole let down across it. It was admitted that deft. had no legal right to erect this barrier. Some person, without deft.'s authority, removed a part of the barrier armed with spikes, from the carriageway where deft. had placed it, & put it in an upright position across the footpath. Pltf., on a dark night, was lawfully passing along the road on his way from one of the houses to which it led. He felt his way through the opening in the middle of the barrier, & getting on to the footpath was proceeding along it when his eye came in contact with one of the spikes & was injured:—*Held*: deft. having unlawfully placed a dangerous instrument in the road was liable in respect of injuries occasioned by it to pltf., who was lawfully using the road, notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party in removing the dangerous instrument from the carriageway, where deft. had placed it, to the footpath.—*CLARK v. CHAMBERS* (1878), 3 Q. B. D. 327; 47 L. J. Q. B. 427; 38 L. T. 454; 42 J. P. 438; 26 W. R. 613.

Annotations:—*Apld.* *McDowall v. G. W. Ry.*, [1902] 1 K. B. 618. *Distd.* *Ruoff v. Long*, [1916] 1 K. B. 148. *Consd.* *Weld-Blundell v. Stephens*, [1920] A. C. 956. *Reid.* *Tolhausen v. Davies* (1888), 59 L. T. 436; *A. G. v. Tod-Heatly & Brownrigg* (1897), 76 L. T. 174; *Bull v. Shore-ditch Corp.* (1903), 67 J. P. 37; *Cory v. France, Fenwick*, [1911] 1 K. B. 114. *Mentd.* *The Bernina* (2) (1887), 12 P. D. 58; *Coldrick v. Partridge, Jones* (1909), 78 L. J. K. B.

of the collision, pltf. jumped down from the buggy & owing to this she alleged she had a miscarriage two weeks later. In an action for damages by pltf.:—*Held*: she could recover damages for the nervous shock due to the collision.—*LAPORTE v. CHAMPAGNE* (1921), 64 D. L. R. 520.—*CAN.*

p. ———.]—A merchant whose store was burnt as the result of the negligence of a firm of carriers, received injuries through falling from a roof on to which he had climbed with a hose for the purpose of extinguishing the fire. In an action at his instance against the carriers:—

452; *Latham v. Johnson & Nephew*, [1913] 1 K. B. 398; *Glasgow Corp. v. Taylor*, [1922] 1 A. C. 44; *The San Onofre*, [1922] P. 243.

275. ———.]—*COBB v. GREAT WESTERN RY. CO.*, No. 172, *ante*.

276. ———.]—There is no rule of law to prevent a master being liable for negligence of his servant whereby opportunity was given for a third person to commit a wrongful or negligent act immediately producing the damage complained of. Whether the original negligence was an effective cause of the damage is a question of fact in each case.

Deft. employed a man to drive a cart, with instructions not to leave it, & a lad, who had nothing to do with the driving, to go in the cart & deliver parcels to the customers of deft. The driver left the cart, in which the lad was, & went into a house. While the driver was absent the lad drove on & came into collision with pltf.'s carriage. In an action to recover for the damage caused by the collision:—*Held*: the negligence of the driver in so leaving the cart was the effective cause of the damage, & deft. was liable.—*ENGELHART v. FARRANT & CO.*, [1897] 1 Q. B. 240; 66 L. J. Q. B. 122; 75 L. T. 617; 45 W. R. 179; 13 T. L. R. 81, C. A.

Annotations:—*Consd.* *McDowall v. G. W. Ry.*, [1903] 2 K. B. 331; *Ricketts v. Tilling*, [1915] 1 K. B. 644; *Weld-Blundell v. Stephens*, [1920] A. C. 956. *Reid.* *Harris v. Fiat Motors* (1906), 22 T. L. R. 556; *Jefferies & Atkey v. Derbyshire Farmers* (1920), 36 T. L. R. 825. *Mentd.* *Latham v. Johnson & Nephew*, [1913] 1 K. B. 398; *Norman v. G. W. Ry.*, [1914] 2 K. B. 153.

277. ———.]—A railway co. is not responsible for injury to a person using a highway caused by a brake-van which the interference of trespassers has sent running down an inclined siding on to the highway, where the danger of such interference, as a probable cause of injury to persons using the highway, was not known to the railway co., & where, independently of such interference, the brake-van was in a position & condition not at the time dangerous.

I do not think that counsel for applt. in his argument was wrong when he said that in those cases in which part of the cause of the accident was the interference of a stranger or a third person you do not find defts. responsible unless that which they do, or omit to do, the negligence to perform a particular duty, is itself the effective cause of the accident. Bearing that in mind, it seems to me that in every case in which the circumstances are such that any one of common sense would recognise the danger of that happening which would be likely to injure others, it is the duty of the person having such custody or control to take reasonable care to avoid such injury (*VAUGHAN WILLIAMS, L.J.*).—*McDOWALL v. GREAT WESTERN RY. CO.*, [1903] 2 K. B. 331; 72 L. J. K. B. 652; 88 L. T. 825; 19 T. L. R. 552; 47 Sol. Jo. 603, C. A.

Annotations:—*Apld.* *Wheeler v. Morris* (1915), 84 L. J. K. B. 1435. *Consd.* *Weld-Blundell v. Stephens*, [1920] A. C. 956. *Reid.* *Ruoff v. Long*, [1916] 1 K. B. 148. *Mentd.* *Cooke v. Mid. G. W. Ry. of Ireland*, [1909] A. C. 229; *Clinton v. Lyons*, [1912] 3 K. B. 198; *Latham v. Johnson & Nephew*, [1913] 1 K. B. 398; *Everett v. Griffiths*, [1920] 3 K. B. 163.

278. ———.]—*DE LA BERE v. PEARSON, LTD.*, No. 267, *ante*.

279. ———.]—To sustain an action for

Held: these injuries were too remote to found a claim for damages.—*MACDONALD v. MACBRAYNE, LTD.*, [1915] S. C. 716.—*SCOT.*

q. *Failure by defendant's builder to construct proper roof—Damage by storm to property of third party.*—

negligence it must be shown that the negligence found by the jury is the proximate cause of the damage. Where the proximate cause is the malicious act of a third person against which precautions would have been inoperative, deft. is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen & provided against it.—*RICKARDS v. LOTHIAN*, [1913] A. C. 263; 82 L. J. P. C. 42; 108 L. T. 225; 29 T. L. R. 281; 57 Sol. Jo. 281, P. C.

Annotations:—*Reid*, *Ruoff v. Long*, [1916] 1 K. B. 148; *Edwards v. Birmingham Canal Navigations* (1923), 40 T. L. R. 88. *Mentd.* *Charing Cross, West End & City Electricity Supply Co. v. London Hydraulic Power Co.*, [1913] 3 K. B. 442; *Hanley v. Edinburgh Corpn.* (1913), 77 J. P. 233.

280. ———.]—By reason of a collision, due to the negligence of those in charge of another vessel, plffs.' vessel was obliged to go into dry dock to repair the damage sustained, & whilst there, delay occurred owing to a strike of workmen. On objection, on the ground of remoteness, to the allowance by the registrar of an item in plffs.' claim in respect of this delay:—*Held*: the item, covering the loss of the use of the vessel during the period of the strike, was properly allowed in accordance with the principles of the common law, for the loss flowed directly, naturally, & in the usual or ordinary course of things from the proximate cause, namely, the negligence of defts. in bringing about a collision with plffs.' vessel, & thereby rendering it necessary to dry-dock her for the purpose of repair.—*H.M.S. LONDON*, [1914] P. 72; 83 L. J. P. 74; 109 L. T. 960; 30 T. L. R. 196; 12 Asp. M. L. C. 405.

Annotations:—*Reid*, *The Charles Le Borgne* (1918), [1920] P. 15, n. 1; *The Kafuc* (1919), 123 L. T. 559. *Mentd.* *The Amerika*, [1914] P. 167; *Re Polemis & Furness, Withy*, [1921] 3 K. B. 560.

281. ———.]—Plff. was walking along a highway under a sun-blind outside deft.'s shop, when two men jumped up from the pavement to one of the iron supports, & mischievously pulled the blind down on deft., with the result that he was injured. The blind was properly constructed & in a good state of repair:—*Held*: there was no evidence on which the ct. could properly hold that there was a duty on deft. to have the blind fixed & secured so as to prevent its being brought down on plff. by the action of the two men, & plff. was not entitled to damages.—*WHEELER v. MORRIS* (1915), 84 L. J. K. B. 1435; 113 L. T. 644, C. A.

Annotation:—*Consd.* *Ruoff v. Long*, [1916] 1 K. B. 148.

282. ———.]—A person lawfully leaving his property unattended in a highway must take reasonable means to prevent such mischief as he ought to contemplate as likely to arise from his user of the highway. He is not liable for damage caused by his property through such interference of third persons as he is not bound to anticipate.

Defts.' servants momentarily left stationary but unattended in a highway, a steam motor lorry. In order to start the lorry it was necessary to withdraw a hand-pin from the gear lever & then to move that & two other levers. Two soldiers seeing the lorry mounted it. One tried but failed to set it in motion. The other succeeded in starting it backwards so that it ran into plff.'s shop front & did damage for which the action was brought:—*Held*: (1) there was in the circum-

stances no evidence of negligence in leaving the lorry unattended; (2) assuming that there was negligence, there was no evidence that it caused the damage.—*RUOFF v. LONG & CO.*, [1916] 1 K. B. 148; 85 L. J. K. B. 364; 114 L. T. 186; 80 J. P. 158; 32 T. L. R. 82; 60 Sol. Jo. 323, D. C.

283. ———.]—Workmen employed by defts., a gas co., for the purpose of carrying out repairs to a gas main in a highway, placed a fire pail, on which was a ladle containing molten lead, on unenclosed land adjacent to the highway. Plff., a young child, was playing with other children near the fire when a passer-by accidentally knocked over the fire pail, & the molten lead was spilled on plff., causing her injury. In an action by plff. to recover damages the county ct. judge found that defts. were guilty of negligence in leaving the fire unattended & unguarded with the knowledge that it was surrounded by children, & that it was being used for molten lead:—*Held*: there was evidence on which the county ct. judge could find that defts. were negligent; & defts. were also liable on the ground that what they were doing was a nuisance in that it was dangerous unless precautions were taken to guard persons using the highway from the danger.—*CRANE v. SOUTH SUHRBAN GAS CO.*, [1916] 1 K. B. 33; 85 L. J. K. B. 172; 114 L. T. 71; 80 J. P. 51; 32 T. L. R. 74; 60 Sol. Jo. 222; 14 L. G. R. 382, D. C.

284. ———.]—Defts., an urban authority, acting under the provisions of Public Health Acts Amendment Act, 1890 (c. 43), planted trees in certain of their highways, & surrounded each tree with an iron-spiked guard. Subsequently to the erection of the guards an order was promulgated by the chief constable, acting under the Defence of the Realm regs., by which all street lights in defts.' area were ordered to be extinguished at a certain hour. Plff., who was crossing a road at night in the darkness, came into contact with one of the guards & suffered very serious injury. In an action to recover damages for negligence, the jury found that the guard was dangerous in the circumstances of the darkness that existed, & that defts. had not taken reasonable measures to neutralise the danger; the judge entered judgment for plff.:—*Held*: after the promulgation of the lighting order there was a continuing duty on defts. to take reasonable measures to prevent the guard from being a danger to the public lawfully using the road, & plff. was entitled to maintain his action.—*MORRISON v. SHEFFIELD CORPN.*, [1917] 2 K. B. 866; 86 L. J. K. B. 1456; 117 L. T. 520; 81 J. P. 277; 33 T. L. R. 492; 61 Sol. Jo. 611; 15 L. G. R. 667, C. A.

Annotations:—*Consd.* *Baldock v. Westminster City Council* (1918), 88 L. J. K. B. 502. *Reid*, *Sheppard v. Glossop Corpn.*, [1921] 3 K. B. 132.

285. ———.]—Under Metropolis Management Act, 1855 (c. 120), s. 108, defts. had power to erect street refuges, & under sect. 130 they had a duty to light the streets within their district. Owing to the restriction of the lighting system, due to war conditions, & because it was difficult to maintain electric pressure, a light on a street refuge erected by defts. had become erratic. On the night of Mar. 20, 1917, the light was at some times 'burning' & at others extinguished, & at a

The roof of deft.'s house was blown off in a storm & fell on plff.'s house. The house had been constructed for deft. by a builder, but was built negligently, the roof not being sufficiently strong:—*Held*: deft. was liable.—*LAMB v. PHILLIPS* (1911), 11 S. R. N. S. W. 109.—*AUS.*

r. Fright occasioning illness—Re-

sulting from original wrongful act of defendant.—In an action of damages for physical injuries & nervous shock, the pursuer averred that defender's cow was driven from the market to defender's farm by a boy; that the boy set a dog at the cow with the result that it was frightened & entered plff.'s house; that the pursuer was

thrown into a state of terror & sustained a very severe nervous shock; & that as the effect of the fright, her health had suffered. Defender having objected to the relevancy of these averments the ct. repelled the objection, & approved an issue for the trial of the cause.—*GILLIGAN v. ROBB*, [1910] S. C. 856.—*SCOT.*

Sect. 5.—Remoteness and intervening cause. Sect. 6. Part IV. Sect. 1: Sub-sect. 1.]

time when it was extinguished the driver of pltf.'s taxicab, without negligence, drove his cab on to the refuge & the cab sustained damage. A jury found that the damage was due to negligence on the part of defts., & that the negligent act or omission was the failure to maintain a danger lamp on the refuge:—*Held*: there was evidence of negligence.—**BALDOCK v. WESTMINSTER CITY COUNCIL** (1918), 88 L. J. K. B. 502; 120 L. T. 470; 83 J. P. 98; 35 T. L. R. 188; 17 L. G. R. 190, C. A.

Annotations:—*Consd.* *Carpeniter v. Finsbury B. Co.*, [1920] 2 K. B. 195. *Refd.* *Sheppard v. Glossop Corp.*, [1921] 3 K. B. 132.

286. ———.]—**WELD-BLUNDELL v. STEPHENS**, No. 237, *ante*.

See, further, NEGLIGENCE.

287. ———.]—The mere fact that a tramway car has been started from an optional stopping place through the bell being pulled by a passenger in the absence of the conductor does not render the tramway owners responsible for injury thereby occasioned, unless it is shown that in the circumstances the non-control of the bell by the conductor amounted to negligence.—**WAGNER v. WEST HAM CORPN.** (1920), 37 T. L. R. 86, D. C.

288. Damage caused by act of God—Where no default in defendant.—A liability imposed by statute is subject, no less than a liability at common law, to the exception that in the absence of express words, no duty is imposed upon a person to make good a loss or damage occasioned without his default, by causes which human agency is powerless to control.—**RIVER WEAR COMRS. v. ADAMSON** (1877), 2 App. Cas. 743; 47 L. J. Q. B. 193; 37 L. T. 543; 42 J. P. 244; 26 W. R. 217; 3 Asp. M. L. C. 521, H. L.; *affg.* S. C. *sub nom.* **WEAR COMRS. v. ADAMSON** (1876), 1 Q. B. D. 546, C. A.; *reversg.* S. C. *sub nom.* **RIVER WEAR COMRS. v. ADAMSON** (1873), 29 L. T. 530.

Annotations:—*Refd.* *The Merle* (1874), 31 L. T. 447; *Eglinton v. Norman* (1877), 46 L. J. Q. B. 557. *Mentd.* *Stoomvaart Maatschappij Nederland v. Peninsular & Oriental Steam Navigation Co.* (1880), 5 App. Cas. 876; *Western Counties Ry. v. Windsor & Annapolis Ry.* (1882), 7 App. Cas. 178; *Arrow Shipping Co. v. Tyne Improvement Comrs.*, *The Crystal*, [1894] A. C. 508; *Eastman Photographic Materials Co. v. Comptroller General of Patents, Designs, & Trade-Marks*, [1898] A. C. 571; *A.-G. v. Gas Light & Coke Co.* (1902), 18 T. L. R. 517; *Metropolitan Water Board v. New River Co.* (1904), 20 T. L. R. 687; *Badische Anilin und Soda Fabrik v. Hickson*, [1906] A. C. 419; *Re Gibbs, Martin v. Harding*, [1907] 1 Ch. 465; *Jackson v. Blanche S.S.*, [1908] A. C. 126; *Jones v. Hulton*, [1909] 2 K. B. 444; *Butterley Co. v. New Hucksall Colliery Co.*, [1910] A. C. 381; *Hollinshead v. Hazleton*,

[1916] 1 A. C. 428; *O'Grady v. Wilmut*, [1916] 2 A. C. 231; *Broken Hill Proprietary Co. v. Peninsular & Oriental Steam Navigation Co.*, [1917] 1 K. B. 688; *Davies v. Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 488; *G. W. Ry. & Mid. Ry. v. Bristol Corp.* (1918), 87 L. J. Ch. 414; *Valentine v. Hyde*, [1919] 2 Ch. 129; *Hudson's Bay Co. v. MacKay* (1920), 36 T. L. R. 469; *Nicolle v. Nicolle*, [1922] 1 A. C. 284; *Rhondda's Claim*, [1922] 2 A. C. 339; *Re Burnyeat, Burnyeat v. Ward*, [1923] 2 Ch. 52.

289. ——— **Where default in defendant.**—A dock co. were authorised by their special Act to make & maintain a dock & works connected therewith according to the levels defined in certain plans & sections deposited with the clerk of the peace. The dock communicated with the River Thames by an artificial channel, through which the water was admitted. The sections showed the retaining bank of the dock & channel at an uniform height of four feet above Trinity high-water mark. The level of the surrounding country was some feet below Trinity high-water mark, the river being kept from overflowing by means of a river wall 4 ft. 2 ins. above Trinity high-water mark. The co. allowed their retaining bank to be at one point several inches below the level of four feet. In Nov. 1875, an extraordinarily high tide took place, & the river rose to 4 ft. 5 ins. above Trinity high-water mark, in consequence of which the water in the dock overflowed the bank & damaged the property of a neighbouring landowner. The tide had never been known to rise so high before, but in Mar. 1874, it had risen to four feet above Trinity high-water mark. On that occasion there was a small overflow from the dock, but no damage was done to the neighbouring landowner. Previously to that the tide had never risen above 3 ft. 4 ins., & the water had never overflowed from the dock:—*Held*: the extraordinary high tide of Nov. 1875, although an act of God, did not excuse defts. from their liability; but they ought to have an opportunity of showing that the damage done by the act of God & the damage done through their negligence ought to be apportioned.—**NITRO-PHOSPHATE & ODIAM'S CHEMICAL MANURE CO. v. LONDON & ST. KATHARINE DOCKS CO.** (1878), 9 Ch. D. 503; 39 L. T. 433; 27 W. R. 267, C. A.

Annotations:—*Apld.* *Baldwin v. Halifax Corp.* (1916), 85 L. J. K. B. 1769. *Refd.* *Dixon v. Metropolitan Board of Works* (1881), 7 Q. B. D. 418; *Hurt v. Victoria Graving Dock Co. & London & St. Katharine's Dock Co.* (1882), 47 L. T. 378.

SECT. 6.—UNDERTAKING FOR DAMAGES.

See INJUNCTION.

Part IV.—Aggravation and Mitigation.

SECT. 1.—AGGRAVATION.

SUB-SECT. 1.—IN CONTACT.

290. Question for jury.—Declaration on an agreement to employ pltf. as a courier, from a day subsequent to the date of the writ; averment, that pltf., from the time of the agreement, till the refusal by deft. after mentioned, was ready & willing to perform his part of the contract; breach, that, before the day for the commencement of the employment, deft. refused to perform the agreement, & discharged pltf. from performing it, & wrongfully wholly put an end to the agreement:—*Held*: in assessing damages in such a case, the jury were justified in looking at all that had happened or was likely to happen down to the

day of trial, to increase or mitigate pltf.'s loss.—**HOCHSTER v. DE LA TOUR** (1853), 2 E. & B. 678; 22 L. J. Q. B. 455; 22 L. T. O. S. 171; 17 Jur. 972; 1 C. L. R. 846; 118 E. R. 922.

Annotations:—*Refd.* *Avery v. Bowden* (1855), 5 E. & B. 714; *Re Agra Bank, Ex p. Tondeur* (1867), L. R. 5 Eq. 160; *Brown v. Muller* (1872), L. R. 7 Exch. 319; *Roper v. Johnson* (1873), L. R. 8 C. P. 167; *Roth v. Tayson, Townsend* (1896), 1 Com. Cas. 306; *Tredegar Iron & Coal Co. v. Hawthorn* (1902), 18 T. L. R. 716; *Sapwell v. Bass* (1910), 102 L. T. 811; *Re Rubel Bronze & Metal Co. & Vos*, [1918] 1 K. B. 315. *Mentd.* *Burton v. G. N. Ry.* (1854), 9 Exch. 507; *Lewis v. Clifton* (1854), 14 C. B. 245; *Reid v. Hoskins* (1856), 26 L. J. Q. B. 5; *Croockewit v. Fletcher* (1857), 1 H. & N. 893; *Hall v. Wright* (1859), E. B. & E. 765; *Roberts v. Brett* (1859), 6 C. B. N. S. 611; *Danube, etc., Ry. v. Xenos* (1861), 11 C. B. N. S. 152; *Jonassohn v. Young* (1863), 4 B. & S. 296; *Bartholomew v. Markwick* (1864), 15 C. B. N. S. 711; *Hughes v. Graeme*

1864), 4 New Rep. 190; *Churchward v. R.* (1865), L. R. 1 Q. B. 173; *Unwin v. Clarke* (1866), L. R. 1 Q. B. 417; *Wilkinson v. Verity* (1871), L. R. 6 C. P. 206; *Frost v. Knight* (1872), L. R. 7 Exch. 111; *Metcalfe v. Britannia Ironworks Co.* (1877), 2 Q. B. D. 423; *Soc. Générale de Paris v. Milders* (1883), 49 L. T. 55; *Mersey Steel & Iron Co. v. Naylor, Benson* (1884), 9 App. Cas. 434; *Johnstone v. Milling* (1886), 16 Q. B. D. 460; *Gueret v. Audouy* (1893), 62 L. J. Q. B. 633; *Synge v. Synge*, [1894] 1 Q. B. 466; *Donkin v. Hastie* (1897), 61 J. P. 568; *Jamies v. Evans* (1897), 77 L. T. 78; *Ellis v. Pond*, [1898] 1 Q. B. 426; *Rhymney Ry. v. Brecon & Merthyr Tydfil Junction Ry.* (1900), 69 L. J. Ch. 813; *Curtis v. B. U. R. T. Co.* (1912), 28 T. L. R. 353; *Fratelli Sorrentino v. Buerger*, [1915] 3 K. B. 367; *Veithardt & Hall v. Rylands* (1917), 86 L. J. Ch. 604; *Bradley v. Newsom*, [1919] A. C. 16; *Consorzio Veneziano di Armamento E. Navigazione v. Northumberland Shipbuilding Co.* (1919), 88 L. J. K. B. 1194.

291. General rule.—(1) The damages in actions for breach of contract are ordinarily confined to losses which are capable of being appreciated in money. With the exception of the case of a breach of promise of marriage, damages that are not capable of being so estimated, such as injury to feelings, or vexation, are not allowed; *aliter* in actions of tort.

(2) The principle is, that if the party does not perform his contract, the other may do so for him as near as may be & charge him for the expense incurred in doing so (*ALDERSON, B.*).—*HAMLIN v. GREAT NORTHERN RY. CO.* (1856), 1 H. & N. 408; 26 L. J. Ex. 20; 28 L. T. O. S. 104; 5 W. R. 76; 156 E. R. 1261; *sub nom. HAMBLIN v. GREAT NORTHERN RY. CO.*, 2 Jur. N. S. 1122.

Annotations.—*As to* (1) *Consd.* *Hobbs v. L. & S. W. Ry.* (1875), L. R. 10 Q. B. 111. *As to* (2) *Apprvd. & Apld.* *Le Blanche Colliery v. N. W. Ry.* (1876), 1 C. P. D. 286. *Apld.* *Erie County Natural Gas & Fuel Co. v. Carroll*, [1911] A. C. 106. *Refd.* *Bright v. Peninsular & Oriental Steam Navigation Co.* (1897), 2 Com. Cas. 106; *Re Jewell's Settlement*, *Watts v. Public Trustee*, [1919] 2 Ch. 161. *Generally, Refd.* *Randall v. Roper* (1858), 27 L. J. Q. B. 266; *Lockyer v. International Sleeping Car & European Express Trains Co.* (1892), 61 L. J. Q. B. 501.

292. ———. *—*—*I do not see how the existence of misconduct can alter the rule of law by which damages for breach of contract are to be assessed* (*BLACKBURN, J.*).—*SIKES v. WILD* (1861), 1 B. & S. 587; 30 L. J. Q. B. 325; 5 L. T. 422; 7 Jur. N. S. 1280; 121 E. R. 832; *affd.* (1863), 4 B. & S. 421, Ex. Ch.

Annotations.—*Consd.* *Addis v. Gramophone Co.*, [1909] A. C. 488. *Refd.* *Lock v. Furze* (1866), L. R. 1 C. P. 441; *Engel v. Fitch* (1868), L. R. 3 Q. B. 314; *Godwin v. Francis* (1870), L. R. 5 C. P. 295; *Bain v. Fothergill* (1874), L. R. 7 H. L. 158.

293. ———. *—*—*ADDIS v. GRAMOPHONE CO., LTD.*, No. 1, *ante*.

294. ———. *Wrongful dismissal.*—*MAW v. JONES*, No. 127, *ante*.

295. ———. *—*—*ADDIS v. GRAMOPHONE CO., LTD.*, No. 1, *ante*.

296. Exceptions to rule.—*ADDIS v. GRAMOPHONE CO., LTD.*, No. 1, *ante*.

297. ———. *Breach of promise of marriage.*—*HAMLIN v. GREAT NORTHERN RY. CO.*, No. 291, *ante*.

298. ———. *—*—*Upon a motion for a new trial in an action for breach of promise of marriage, on the ground of surprise & excessive damages:—Held: ct. would not interfere with the discretion of the jury as to the amount of damages, unless there has been some obvious error or misconception on their part, or it is made apparent that they have been actuated by undue motives.*

In this action, though in form *ex contractu*, yet, it being impossible from the nature of the case to fix any rule or measure of damages, the jury are allowed to take into their consideration all the circumstances. Provided their conduct is not marked by prejudice, passion, or corruption, they are permitted to exercise an absolute discretion over the amount of compensation (*WILLES, J.*).—

SMITH v. WOODFINE (1857), 1 C. B. N. S. 660; 140 E. R. 272.

Annotations.—*Fold.* *Berry v. Da Costa* (1866), L. R. 1 C. P. 331. *Consd.* *Finlay v. Chirney* (1888), 20 Q. B. D. 494.

299. ———. *—*—*In estimating the damages for breach of promise of marriage where deft. has seduced pltf., the jury may take into consideration that pltf.'s prospect of marrying has become less by reason of such seduction, & the mortification to her feelings in ceasing to be a respected member of her family. The ct. will not interfere with the discretion of the jury as to the amount of damages, if they have not acted in error, or from misconception, or from undue motives.*—*BERRY v. DA COSTA* (1866), L. R. 1 C. P. 331; *Har. & Ruth.* 291; 35 L. J. C. P. 191; 12 Jur. N. S. 588; 14 W. R. 279.

Annotations.—*Apprvd.* *Millington v. Loring* (1880), 6 Q. B. D. 190. *Refd.* *Quirk v. Thomas*, [1916] 1 K. B. 516.

300. ———. *—*—*The statement of claim in an action for breach of promise of marriage stated the promise & breach, & alleged in paragraph 4 that pltf. relying on the agreement, permitted deft. to debauch & carnally know her, whereby deft. infected pltf. with a venereal disease:—Held: the allegation could properly be pleaded under Ord. 19, r. 4.*

I am of opinion that both matters stated as facts in paragraph 4 might be properly given in evidence at the trial, as showing the particular mode in which deft. acted with respect to the promise & the breach; that the injury to pltf. was more grievous by reason of deft.'s mode of acting; & that the promise was broken in an aggravated manner which entitles the jury to consider his conduct in giving damages (*BRETT, L.J.*).—*MILLINGTON v. LORING* (1880), 6 Q. B. D. 190; 50 L. J. Q. B. 214; 43 L. T. 657; 45 J. P. 268; 29 W. R. 207, C. A.

Annotations.—*Apld.* *Whitney v. Molnigard* (1890), 24 Q. B. D. 630. *Refd.* *Lumb v. Beaumont* (1884), 49 L. T. 772; *Wood v. Durham* (1888), 21 Q. B. D. 501; *Quirk v. Thomas*, [1916] 1 K. B. 516. *Mentd.* *Rassam v. Budge*, [1893] 1 Q. B. 571.

301. ———. *—*—*In an action for breach of promise of marriage, not only are damages always given in respect of the personal injury to pltf., but also damages arising from & occasioned by the personal conduct of deft. Evidence of the conduct of both parties is allowed to be given in mitigation or aggravation* (*LORD ESHER, M.R.*).—*FINLAY v. CHIRNEY* (1888), 20 Q. B. D. 494; 57 L. J. Q. B. 247; 58 L. T. 664; 36 W. R. 534, C. A.

Annotations.—*Refd.* *Quirk v. Thomas*, [1916] 1 K. B. 516. *Mentd.* *Davies v. Hood* (1903), 88 L. T. 19; *United Collieries v. Simpson*, [1909] A. C. 383; *Admiralty Comrs. v. S.S. Amerika*, [1917] A. C. 38.

302. ———. *—*—*In such an action the injury is treated as a personal one, & damages are awarded in respect of the personal injury to pltf. occasioned by the personal conduct of deft. The conduct of both parties may be taken into account in assessing damages, & circumstances of mitigation or aggravation may be given in evidence. Damages may be given of a vindictive & uncertain kind, not merely to repay pltf. for temporary loss, but to punish deft. in an exemplary manner* (*SWINFEN EADY, L.J.*).—*QUIRK v. THOMAS*, [1916] 1 K. B. 516; 85 L. J. K. B. 519; 114 L. T. 308; 32 T. L. R. 197, C. A.

Annotations.—*Mentd.* *Yorke v. Yorkshire Insce.*, [1918] 1 K. B. 662; *The Adams* (1919), 88 L. J. P. 129; *Jackson v. Anglo-American Oil Co.*, [1923] 2 K. B. 601.

See, further, HUSBAND & WIFE.

303. ———. *Vendor of real estate failing to make title.*—*FLUREAU v. THORNHILL* (1776), 2 Wm. Bl. 1078; 96 E. R. 635.

Annotations.—*Distd.* *Hopkins v. Grazebrook* (1826), 6 B. & C. 31. *Consd.* *Robinson v. Harman* (1848), 1 Exch.

Sect. 1.—Aggravation: Sub-sects. 1 & 2.]

850. *Folld. Pounsett v. Fuller* (1856), 17 C. B. 660. *Apld. Sikes v. Wild* (1863), 4 B. & S. 421. *Expld. Lock v. Furze* (1866), L. R. 1 C. P. 441. *Distd. Engell v. Fitch* (1869), L. R. 4 Q. B. 659. *Consd. Gray v. Fowler* (1873), L. R. 8 Exch. 249. That case has been the subject of frequent comment: but it has been acted upon for so long that it must be taken to be law & to possess as I expressed it in *Bain v. Fothergill* (No. 304, *post*), the force of an Act of Parliament (MARTIN, B.). *Apprvd. Bain v. Fothergill* (1874), L. R. 7 H. L. 158. *Distd. Wall v. City of London Real Property Co.* (1874), L. R. 9 Q. B. 249. *Apld. Gas Light & Coke Co. v. Towse* (1887), 35 Ch. D. 519; *Morgan v. Russell*, [1909] 1 K. B. 357. *Distd. Re Daniel, Daniel v. Vassall*, [1917] 2 Ch. 405; *Braybrooks v. Whaley*, [1919] 1 K. B. 435. *Folld. Keen v. Mear*, [1920] 2 Ch. 574. *Refd. Walker v. Moore* (1829), 10 B. & C. 416; *Hodges v. Lichfield* (1833), 2 L. J. C. P. 133; *London & Greenwich Ry. v. Goodchild* (1844), 13 L. J. Ch. 224; *Godwin v. Francis* (1870), L. R. 5 C. P. 295; *Re Great Northern Salt & Chemical Works, Ex p. Fenwick* (1891), 36 Sol. Jo 42; *Day v. Singleton*, [1899] 2 Ch. 320; *Addis v. Gramophone Co.*, [1909] A. C. 488. *Mentd. Baynes v. Lloyd*, [1895] 2 Q. B. 610.

304. ———.]—Upon a contract for the sale & purchase of a real estate, if the vendor, without fraud, is incapable of making a good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain.—*BAIN v. FOTHERGILL* (1874), L. R. 7 H. L. 158; 43 L. J. Ex. 243; 31 L. T. 387; 39 J. P. 228; 23 W. R. 261, H. L.; *affg.* (1870), L. R. 6 Exch. 59, Ex. Ch.

Annotations:—Consd. Burrow v. Scammell (1881), 19 Ch. D. 175; *Rock Portland Cement Co. v. Wilson* (1882), 52 L. J. Ch. 274. *Apld. Gas Light & Coke Co. v. Towse* (1887), 35 Ch. D. 519; *Rowe v. London School Board* (1887), 36 Ch. D. 619. *Distd. Royal Bristol Permanent Building Soc. v. Bomash* (1887), 35 Ch. D. 390; *Day v. Singleton*, [1899] 2 Ch. 320. *Consd. Jones v. Gardiner*, [1902] 1 Ch. 191. *Apld. Morgan v. Russell*, [1909] 1 K. B. 357. *Distd. Re Daniel, Daniel v. Vassall*, [1917] 2 Ch. 405; *Braybrooks v. Whaley*, [1919] 1 K. B. 435; *Goffin v. Houlder* (1920), 90 L. J. Ch. 488. *Folld. Keen v. Mear*, [1920] 2 Ch. 574. *Refd. Gray v. Fowler* (1873), L. R. 8 Exch. 249; *Wall v. City of London Real Property Co.* (1874), L. R. 9 Q. B. 249; *Re Higgins & Hitchman* (1882), 30 W. R. 700; *Coombs v. Cook* (1883), Cab. & El. 75; *Re Hargreaves & Thompson's Contract* (1886), 32 Ch. D. 454; *Leo v. Soames* (1888), 36 W. R. 884; *Re Wilsons & Stevens' Contract*, [1894] 3 Ch. 546; *Baynes v. Lloyd*, [1895] 2 Q. B. 610; *Re Scott & Alvarez's Contract*, *Scott v. Alvarez*, [1895] 1 Ch. 596; *Pease v. Courtney*, [1904] 2 Ch. 603; *Hollivell v. Seacombe*, [1906] 1 Ch. 426; *Addis v. Gramophone Co.*, [1909] A. C. 488; *Grindell v. Bass*, [1920] 2 Ch. 487. *Mentd. Smith v. Green* (1875), 1 C. P. D. 92; *Synge v. Synge* (1893), 63 L. J. Q. B. 202.

See, further, SALE OF LAND.

305. ———.]—**Banker refusing to honour customer's cheque—Although money in hand.]—***MARZETTI v. WILLIAMS*, No. 21, *ante*.

306. ———.]—In an action against bankers for refusing to pay a trader's cheques, they having at the time of refusal sufficient assets of the trader, the latter may recover substantial damages without proof of actual damage.—*ROLIN v. STEWARD* (1854), 14 C. B. 595; 23 L. J. C. P. 148; 18 Jur. 536; 2 C. L. R. 959; 139 E. R. 245; *sub nom. ROLLIN v. STEWARD*, 23 L. T. O. S. 114; 2 W. R. 467.

Annotations:—Consd. Prehn v. Royal Bank of Liverpool (1870), L. R. 5 Exch. 92. *Apld. Larios v. Bonany y Gurety* (1873), L. R. 5 P. C. 346; *Wallis Chlorine Syndicate v. American Alkali Co.* (1901), 17 T. L. R. 656; *Wilson v. United Counties Bank*, [1900] A. C. 102. *Refd. Boyd v. Pitt* (1864), 11 L. T. 280; *Barnett v. Hart* (No. 1) (1903), 48 Sol. Jo. 14. *Mentd. Re General South American Co.* (1877), 47 L. J. Ch. 67.

See, further, BANKERS & BANKING, Vol. III., p. 123.

PART IV. SECT. 1, SUB-SECT. 2.

a. *General rule.*—In an action for assault the jury is bound to consider all the circumstances which may aggravate the damages.—*SLATER v. WATTS* (1911), 16 B. C. R. 36.—*CAN.*

t. ———.]—Injuries to property are only visited with damages proportioned to the actual pecuniary loss sustained in the absence of circumstances of aggravation.—*NAGY v.*

VENNE (1916), 34 W. L. R. 413.—*CAN.*

a. *Circumstances of aggravation—Storm waters containing sewage coming on plaintiff's lands.*—If a municipal council brings storm waters upon pltf.'s land, he is entitled to aggravated damages by reason of the fact that the storm waters contain sewage & offensive matter, causing increased injury.—*HALSTED v. WILLOUGHBY*

307. ———.]—**Agent refusing to honour cash orders of principal—Although money in hand.]—***LARIOS v. BONANY Y GURETY*, No. 25, *ante*.

See, further, AGENCY, Vol. I., p. 267.

SUB-SECT. 2.—IN TORT.

In actions of libel & slander, *see* LIBEL & SLANDER.

308. *General rule—Injury to feelings.]—**HAMLIN v. GREAT NORTHERN RY. CO.*, No. 291, *ante*.

309. ———.]—**Pain & suffering.]—***MEDIANA (OWNERS) v. COMET (OWNERS, ETC.)*, *THE MEDIANA*, No. 9, *ante*.

310. *Circumstances of aggravation—Exercise of illegal powers by Secretary of State.]—**WILKES v. WOOD* (1763), Lofft, 1 (preface); 98 E. R. 489; *sub nom. GENERAL WARRANTS CASE*, *WILKES v. WOOD*, 19 State Tr. 1153.

Annotations:—Refd. Feathers v. R. (1865), 12 L. T. 114. *Mentd. Entick v. Carrington* (1765), 19 State Tr. 1029.

311. ———.]—**Insult.]—Trespass for getting pltf.'s daughter with child per quod servitium amisit:—***Held: damages £50 not excessive, & a new trial would be refused.*

Actions of this sort are brought for example's sake, & although pltf.'s loss may not really amount to the value of 20s., yet the jury have done right in giving liberal damages. If much greater damages had been given we should not have been dissatisfied therewith, pltf. having received this insult in his own house where he civilly received deft. & permitted him to make his addresses to his daughter (*WILMOT, C.J.*).—*TULLIDGE v. WADE* (1760), 3 Wils. 18; 95 E. R. 909.

Annotations:—Consd. Woodward v. Walton (1807), 2 Bos. & P. N. R. 476. *Refd. Butterworth v. Butterworth & Englefield, etc.*, [1920] P. 126.

312. ———.]—This is one of certain cases wherein it is difficult to draw any line as to *quantum* of damages; one cannot trust one's feelings in matters of this nature, particularly where circumstances of aggravation are brought forward, & most of all such circumstances as levity & insolence; I am not therefore at liberty to say, that on the case before them, the jury have given too much damages (*RICHARDS, C.B.*).—*ELLIOTT v. NICKLIN* (1818), 5 Price, 641; 146 E. R. 719.

313. ———.]—If parish officers cut off the hair of a pauper in the poor-house, by force, & against the will of such pauper, this is an assault; & if it be done as matter of degradation, & not with a view to cleanliness, that will be an aggravation, & go to increase the damages.—*FORDE v. SKINNER* (1830), 4 C. & P. 239; 2 Man. & Ry. M. C. 294, N. P.

314. ———.]—In an action for wilful negligence, the jury may take into consideration the motives of deft., & if the negligence is accompanied with a contempt of pltf.'s rights & convenience, the jury may give exemplary damages.—*EMBLEM v. MYERS* (1860), 6 H. & N. 54; 30 L. J. Ex. 71; 2 L. T. 774; 8 W. R. 665; 158 E. R. 23.

Annotations:—Refd. Bell v. Mid. Ry. (1861), 10 C. B. N. S. 287; *Thompson v. Hill* (1870), L. R. 5 C. P. 564.

CORPN. (1916), 16 S. R. N. S. W. 146; 33 N. S. W. N. 68.—*AUS.*

b. ———.]—*Whether mere technical irregularity.]—*In an action against for damages for wrongful arrest:—*Held: though there was a technical irregularity, the fact of such irregularity did not entitle pltf. to more damages.*—*WINER v. GARCIA* (1908), 25 S. C. 576.—*S. AF.*

c. ———.]—*Seduction—Base circum-*

315. — — —.]—Where a wrongful act is accompanied by words of contumely & abuse, the jury are warranted in taking that into their consideration, & giving retributory damages (BYLES, J.).—*BELL v. MIDLAND RY. CO.* (1861), 10 C. B. N. S. 287; 30 L. J. C. P. 273; 4 L. T. 293; 7 Jur. N. S. 1200; 9 W. R. 612; 142 E. R. 462.

Annotations.—*Reid*. *Thompson v. Hill* (1870), L. R. 5 C. P. 564; *Addis v. Gramophone Co.*, [1909] A. C. 488. *Mentd.* *Beckett v. Mid. Ry.* (1867), L. R. 3 C. P. 82; *Powell Duffryn Steam Coal Co. v. Taff Vale Ry.* (1873), 29 L. T. 575; *Mott v. Shoolbred* (1875), 44 L. J. Ch. 380; *Mayfair Property Co. v. Johnston*, [1894] 1 Ch. 508.

316. — *Persistence in criminal charge.*—Trespass for breaking & entering pltf.'s dwelling-house may be well laid to have been done under a false charge & assertion that pltf. had stolen property in her house, *per quod* she was injured in her credit, etc., for that is laid only as matter of aggravation; & the jury may give damages for the trespass as it is aggravated by such false charge.—*BRACEGIRDLE v. ORFORD* (1813), 2 M. & S. 77; 105 E. R. 311.

Annotation.—*Reid*. *Addis v. Gramophone Co.*, [1909] A. C. 488.

317. — — —.]—To an action of trespass for false imprisonment, deft. pleaded by way of justification that pltf. had committed a felony. At the trial, his counsel abandoned the plea, & exonerated pltf. from the charge.—*Held*: it was not a misdirection in the judge to tell the jury that the putting of such a plea on the record was a persisting in the charge, & was to be taken into account by them in estimating the damages contained in it.—*WARWICK v. FOULKES* (1844), 12 M. & W. 507; 1 Dow. & L. 638; 13 L. J. Ex. 109; 2 L. T. O. S. 331; 8 Jur. 85; 152 E. R. 1298.

Annotations.—*Reid*. *Wilson v. Robinson* (1845), 7 Q. B. 68; *Caulfield v. Whitworth* (1868), 16 W. R. 936. *Mentd.* *Boileau v. Rutlin* (1848), 2 Exch. 665; *Simpson v. Robinson* (1848), 12 Q. B. 511.

318. — *Persistence in wrongful act.*—Upon a declaration for breaking pltf.'s close, treading his grass, & hunting for game, & other wrongs.—*Held*: £500 were not excessive damages for a trespass in sporting, persevered in in defiance of notice, & accompanied with indecent & offensive demeanour.—*MEREST v. HARVEY* (1814), 5 Taunt. 442; 1 Marsh. 139; 128 E. R. 761.

Annotations.—*Consd.* *Fielden v. Cox* (1906), 22 T. L. R. 411. *Reid*. *Price v. Severno* (1831), 5 Moo. & P. 125; *Whitwham v. Westminster Brymbo Coal & Coke Co.*, [1896] 1 Ch. 894. *Mentd.* *Spence v. Rogers* (1843), 12 L. J. Ex. 252.

319. — — —.]—In actions for tort, the ct. will not interfere with the damages found by the jury, unless they appear to be grossly disproportioned to the injury sustained.

Where a landlord caused considerable injury to the crops of his tenant by selling, felling & removing timber, without applying for leave to enter, & the jury assessed the damages at £300.—*Held*: the ct. would not interfere, although the net value of the entire crops did not exceed £200.

If we were to hold that the jury are to be restrained to exactly the amount of injury sustained by pltf., it would in effect be placing a wrongdoer upon precisely the same footing as one who enters

with the owner's permission. Besides, this was not the case of a single act of trespass, but of a series of trespasses persisted in day after day & for several weeks (MAULE, J.).—*WILLIAMS v. CURRIE* (1845), 1 C. B. 841; 135 E. R. 774.

Annotation.—*Reid*. *Humphrey v. Nowland* (1862), 15 Moo. P. C. C. 343.

320. — *Trespass — & infection of plaintiff's cattle with disease.*—*ANDERSON v. BUCKTON* (1719), 1 Stra. 192; 11 Mod. Rep. 303; 93 E. R. 467.

Annotations.—*Consd.* *Theyer v. Purnell*, [1918] 2 K. B. 333. *Reid*. *Daubney v. Cooper* (1830), 10 B. & C. 830; *Wright v. Hetton Downs Co-op. Soc.* (1883), Cab. & El. 200. *Mentd.* *Woodward v. Walton* (1807), 2 Bos. & P. N. R. 476.

321. — — —.]—Deft.'s sheep trespassed on pltf.'s land, where, in the course of a few days they developed scab, in consequence of which they were interned in a circumscribed area on pltf.'s land under a notice of detention given under the Sheep-scab Order, 1905, made in pursuance of Diseases of Animals Act, 1894 (c. 57), the notice extending also to sheep belonging to pltf. which had been in contact with the trespassing sheep. In an action by pltf. to recover damages for the trespass.—*Held*: pltf. was entitled to recover all such damages as were the natural consequence of the presence of deft.'s sheep on his land & as well after as before the date of the notice of detention.—*THEYER v. PURNELL*, [1918] 2 K. B. 333; 88 L. J. K. B. 203; 119 L. T. 285; 16 L. (G. R. 840, D. C.

322. — — — & *seduction.*—A father brought an action of trespass for breaking his house, & debauching his daughter, *per quod servitium amisit*. The jury gave a verdict for pltf. with £200 damages. On a motion being made to set aside this verdict because the damages were excessive.—*Held*: the rule would be discharged.—*BENNETT v. ALLCOTT* (1787), 2 Term Rep. 166; 100 E. R. 90.

Annotations.—*Reid*. *Stammers v. Yearsley* (1833), 10 Bing. 35; *Allen v. Flood*, [1898] A. C. 1. *Mentd.* *Anon.* (1804), 1 Smith. K. B. 333; *Woodward v. Walton* (1807), 2 Bos. & P. N. R. 476; *Ditcham v. Bond* (1814), 2 M. & S. 436; *Parker v. Bailey* (1824), 4 Dow. & Ry. K. B. 215; *Grinnell v. Wells* (1844), 2 Dow. & L. 610; *Newton v. Holford* (1845), 4 L. T. O. S. 358; *Thompson v. Ross* (1859), 29 L. J. Ex. 1.

See, generally, MASTER & SERVANT.

323. — — — & *theft.*—Trespass for breaking & entering the dwelling-house of pltf. & taking away certain goods therein not alleging them to be pltf.'s goods. Plea not guilty by statute. The judge at the trial having directed the jury to find a verdict for pltf. with nominal damages, for the trespass to the house.—*Held*: pltf. was not entitled to damages also for the value of the goods, as they were not alleged to be the property of pltf.

I am of opinion that pltf. is not entitled to a rule to increase the damages; he could not maintain an action for taking the goods, without proving that they were his property, but here there is no allegation that they belonged to him, nor any admission to that effect on the record (PARKE, B.).—*PRITCHARD v. LONG* (1842), 9 M. & W. 666; 1

stances.—In an action for seduction.—*Held*: in assessing damages the jury might consider the circumstances that the infant was living & in pltf.'s house.—*FLYNN v. CONNELL*, [1919] 2 I. R. 427.—*IR.*

d. — *Assault — Breach of caution bond.*—B., who had taken out letters of law burrows against L. as a consequence of which L. had had to find caution, was assaulted by L. B. raised an action of contravention of law burrows claiming the penalty in

the bond of caution & he raised a supplementary summons of damages alleging that the conclusions of the first action were inadequate to afford due reparation. These actions were tried conjointly.—*Held*: the jury might assess the damages according to sound discretion having regard to all the circumstances.—*BALL v. LONGLAND* (1834), 12 Sh. (Ct. of Sess.) 934.—*SCOT.*

e. — *Nature of defence.*—In

assessing damages for a tort the ct. is justified in taking into account as an aggravating circumstance the nature of deft.'s defence.—*WHITTAKER v. ROOS*, *MORANT v. ROOS* (1912), App. D. 92.—*S. AF.*

f. — *Malicious prosecution — Triviality of charge.*—Exemplary damages may be awarded where deft. maliciously prosecuted pltf. for a trivial theft.—*BEUKES v. RAAT*, [1918] C. P. D. 168.—*S. AF.*

Sec. 1.—Aggravation: Sub-sect. 2. Sect. 2: Sub-sect. 1, A. & B.]

Dowl. N. S. 883; 11 L. J. Ex. 306; 6 Jur. 562; 152 E. R. 281.

Annotation:—*Mentd.* Curlewis v. Laurie (1848), 12 Q. B. 640.

See Part V., Sect. 1, sub-sect. 2., *post*.

Joint tort-feasors.]—See Part VII., Sect. 3, sub-sect. 4, *post*.

SECT. 2.—MITIGATION.

SUB-SECT. 1.—IN CONTRACT.

A. In General.

324. Question for jury.]—HOCHSTER v. DE LA TOUR, No. 290, *ante*.

325. Circumstances of mitigation—Negligent performance of contract by plaintiff.]—If an auctioneer employed to sell an estate is guilty of negligence, whereby the sale becomes nugatory, he is entitled to recover any compensation for his services from the vendor.—DENEW v. DAVERELL (1813), 3 Camp. 451, N. P.

Annotations:—*Refd.* Pike v. Wilson (1854), 1 Jur. N. S. 59. *Mentd.* Souter v. Drake (1834), 3 L. J. K. B. 31.

326. Breach of promise of marriage.]—In action for breach of promise of marriage, if on the part of deft. it is proved that pltf. is a loose & immodest woman, & that he broke his promise on that account, it goes in bar of the action; but if it also appear that, when he made the promise, he was aware of these circumstances, it is no defence. In such an action deft. may, in mitigation of damages, go into evidence that his relations disapproved of the match; & if his father is an incompetent witness on account of his having employed the attorney to conduct the defence, a witness will be allowed to prove that he has heard the father express to deft. his dislike to the marriage.—IRVING v. GREENWOOD (1824), 1 C. & P. 350, N. P.

Annotations:—*Mentd.* Young v. Murphy (1836), 6 L. J. C. P. 180; Hall v. Wright (1858), E. B. & E. 746; Beachey v. Brown (1860), E. B. & E. 706.

See, further, HUSBAND & WIFE.

327. Breach of warranty.]—A person who purchases a horse warranted sound, sells it again, & then repurchases it, cannot, on discovering that the horse was unsound when first sold, require the original vendor to take it back again. Nor can he, by reason of the unsoundness, resist an action by such vendor for the price. But he may give the breach of warranty in evidence in reduction of damages.—STREET v. BLAY (1831), 2 B. & Ad. 456; 109 E. R. 1212.

Annotations:—*Consd.* Allen v. Cameron (1833), 1 Cr. & M. 832; Dawson v. Collis (1851), 10 C. B. 523. *Refd.* Chappel v. Hicks (1833), 4 Tyr. 43; Mondel v. Steel (1841), 1 Dowl. N. S. 1; Parsons v. Sexton (1847), 4 C. B. 899; Syers v. Jonas (1848), 2 Exch. 111; Azémar v. Casella (1867), L. R. 2 C. P. 431; Bright v. Rogers, [1917] 1 K. B. 917. *Mentd.* Gompertz v. Denton (1832), 1 Cr. & M. 207; Pateshall v. Tranter (1835), 3 Ad. & El. 103; Elliott v. Thomas (1838), 1 Horn. & H. 38; Sieveking v. Dutton (1846), 3 C. B. 331; Murray v. Mann (1848), 2 Exch. 538; Woodgate v. Wetton (1854), 24 L. T. O. S. 158; Clarke v. Dickson (1858), 4 Jur. N. S. 832; Bannerman v. White (1861), 10 C. B. N. S. 844; Behn v. Burness (1862), 5 L. T. 670; Horsfall v. Thomas (1862), 1 H. & C. 90;

PART IV. SECT. 2, SUB-SECT. 1.—A.

325 I. Circumstances of mitigation—Negligent performance of contract by plaintiff.]—In actions upon quantum meruit for work & labour, defective workmanship may be proved in mitigation of damages.—SMITH v. STRANGE (1885), 2 Man. L. R. 101.—CAN.

327 I. Breach of warranty—

Plaintiff retaining article warranted.]—In an action of breach of warranty of machines:—*Held:* as pltf. retained the machines, defts. were entitled to a deduction from the damages to which pltf. might be found entitled.—NEISS v. CANADIAN PORT HURON CO. (1911), 16 W. L. R. 542.—CAN.

327 II. Negligence of solicitor

Azémar v. Casella (1867), L. R. 2 C. P. 677; Kennedy v. Panama, etc., Mail Co. (1867), L. R. 2 Q. B. 580; Hellbutt v. Hickson (1872), L. R. 7 C. P. 438; Phosphate Sewage Co. v. Hartmont (1877), 5 Ch. D. 394; Re Green, & Balfour, Williamson (1890), 63 L. T. 97.

328. Non-performance of part of contract by plaintiff.]—A. contracted to sell & plant a quantity of trees on B.'s land, & also that he should & would, at his own costs & charges well & sufficiently keep in order the trees for two years after the planting & that such as should die during that period, should be replaced by him. In an action to recover the price:—*Held:* evidence of non-performance by A. of any part of the contract on his part was admissible in reduction of damages.—ALLEN v. CAMERON (1833), 1 Cr. & M. 832; 3 Tyr. 907; 2 L. J. Ex. 263; 149 E. R. 635.

Annotations:—*Consd.* Baillie v. Kell (1838), 4 Bing. N. C. 638. *Refd.* Dawson v. Collis (1851), 10 C. B. 523; Charles v. Altin (1854), 15 C. B. 46.

329. Amount of costs of prior action—Included in present claim for damages.]—The condition of a bond reciting a deed of dissolution of partnership between pltf. and I., was, that I., & deft., or one of them, should indemnify pltf. against the payment of the partnership debts & all costs, etc., & all actions to be brought in respect thereof. To a declaration on this bond, which set out the condition, & a breach of it in non-payment of a debt due from the partnership to M., who in consequence sued pltf. & I. for it:—*Held:* deft. could not show, in reduction of damages, that the costs of I.'s defence to the action brought by M., were much less than the costs incurred by pltf.—WHITE v. ANSDALL (1836), 1 M. & W. 348; Tyr. & Gr. 785; 5 L. J. Ex. 180; 150 E. R. 467.

330. Matter amounting to a bar to action—Wrongful dismissal.]—To an action of *assumpsit* for discharging pltf. before the expiration of his service, the only plea was, payment of money into ct.:—*Held:* deft. could not prove, in mitigation of damages, that he was justified in discharging pltf. on the ground of drunkenness.

A defence which, if pleaded would be a bar to the action is not admissible in evidence in reduction of damages.—SPECK v. PHILLIPS (1830), 5 M. & W. 279; 7 Dowl. 470; 8 L. J. Ex. 249, 277; 3 J. P. 421; 151 E. R. 119.

Annotation:—*Mentd.* Watt v. Watt, [1905] A. C. 115.

331. Breach by plaintiff subsequent to action.]—A breach by pltf. of the contract sued upon, since action brought, cannot be pleaded or given in evidence in reduction of damages, to avoid circuitry of action.—BARTLETT v. HOLMES (1853), 13 C. B. 630; 22 L. J. C. P. 182; 21 L. T. O. S. 104; 17 Jur. 858; 1 W. R. 334; 1 C. L. R. 159; 138 E. R. 1347.

Previous payment by drawer of bill of exchange—Action against acceptor.]—See BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS, Vol. VI., p. 344, No. 2286.

332. Payment by defendant—Necessity for specially pleading.]—Payments to pltf., although not pleaded by deft., may be received in evidence in reduction of damages.—SHIRLEY v. JACOBS (1835), 2 Bing. N. C. 88; 7 C. & P. 3; 4 Dowl. 136; 1 Hodg. 214; 2 Scott, 157; 132 E. R. 35; *sub nom.* JACOBS v. SHIRLEY, 4 L. J. C. P. 298.

Annotations:—*Consd.* Richardson v. Roberts (1836), Tyr. &

in investigating title—Ability of plaintiff to get in outstanding interests.]—In an action against an attorney for negligence in permitting pltf. to complete a purchase when the title was defective the jury may reduce the damages on the ground that portion of the interests outstanding have been or can be got in by pltf.—HARRIS v. CARRUTHERS (1902), 2 S. R. N. S. W. 100.—AUS.

Gr. 279, n.; *Belbin v. Butt* (1837), 2 M. & W. 422. **Refd.** *Goldsmid v. Raphael* (1836), 3 Scott, 385. **Mentd.** *Brown v. Daubeney* (1836), 1 Har. & W. 646.

333. ————]—In *assumpsit*, payments which do not amount to a bar to the action, but merely go to reduce pltf.'s demand, need not be specially pleaded, but may be given in evidence in mitigation of damages, under a plea of *non-assumpsit*.—**LEDIARD v. BOUCHER** (1835), 7 C. & P. 1, N. P.

Annotations:—**Consd.** *Richardson v. Roberts* (1836), Tyr. & Gr. 279, n. **Refd.** *Goldsmid v. Raphael* (1836), 3 Scott, 385; *Wright v. Skinner* (1836), Tyr. & Gr. 277.

334. ————]—*Qu.*: whether evidence of payment, either before or after action brought, is admissible in evidence in reduction of damages, the only plea being *non-assumpsit*.—**RICHARDSON v. ROBERTSON** (1836), 1 M. & W. 463; 4 Dowl. 742, n.; 5 Dowl. 82; 2 Gale, 80; Tyr. & Gr. 279, n., 762; 5 L. J. Ex. 163; 150 E. R. 516. **Annotation:**—**Refd.** *Wright v. Skinner* (1836), 4 Dowl. 741.

335. ————]—In an action of debt, where there is no plea of payment, deft. cannot give evidence of payment in reduction of damages.—**BELBIN v. BUTT** (1837), 2 M. & W. 422; 5 Dowl. 604; Murph. & H. 70; 6 L. J. Ex. 120; 1 Jur. 479; 150 E. R. 822.

336. ————]—**Profits made by plaintiff—Consequent on breach.**—*Re TYNE TUG & STEAMBOAT FEDERATION CO., LTD.* (1917), 142 L. T. Jo. 239.

337. ————]—**On other contracts.**—In an action for damages for breach of a contract to deliver raw material, whereby pltf. were prevented from executing orders which they had obtained, evidence is admissible to show that pltf. were in consequence enabled to execute other orders, whereby they made profits which might be taken into consideration in reduction of the damages which they had sustained by defts.' breach of contract.

The person who sues for the breach of a contract such as this, is entitled to be placed, so far as money is concerned, in as good a position as if the contract had been performed. He can, therefore, *prima facie* claim what would have been his profit. But he is none the less bound by another principle, which imposes on him the duty of taking all reasonable steps to mitigate the loss to himself consequent on the breach (**LORD HALDANE**).—**HILL & SONS v. SHOWELL (EDWIN) & SONS, LTD.** (1918), 87 L. J. K. B. 1106; *sub nom.* **HALL (JOHN) & SON, LTD. v. SHOWELL (EDWIN) & SONS, LTD.**, 119 L. T. 651; 62 Sol. Jo. 715, H. L.

See, further, Part VII., Sects. 1 & 2, *post*.

338. Collateral matters not considered.—Payment received by plaintiff under insurance policy.—Pltf. sued defts. for damaging his ship by

338 i. Collateral matters not considered.—Payment received by plaintiff under insurance policy.—In an action for damages caused to pursuers' vessel by collision with defenders' vessel, the jury found for pursuers & assessed damages; but added to their verdict, that pursuers had already been paid £350 under a policy of insurance in respect of the damage sustained:—**Held:** pursuers were entitled to decree for the full amount of the damages assessed without deducting the sum paid under the insurance.—**MORISON & MILNE v. BARTOLOMEO & MASSA** (1867), 5 Macph. (Ct. of Sess.) 848; 39 Sc. Jur. 474.—**SCOT.**

n.—**Delivery of logs as part consideration for a sum paid as the price of a mill.**—In an action for breach of a written contract, whereby deft., in consideration of £500 paid to him by pltf., agreed to convey to pltf. a mill at P., as soon as he obtained a grant thereof:—**Held:** deft. could not

collision:—**Held:** defts. were not entitled to deduct from the amount of damages to be paid by them a sum of money paid to pltf. by insurers in respect of such damage.—**YATES v. WHYTE** (1838), 4 Bing. N. C. 272; 1 Arn. 85; 5 Scott, 640; 7 L. J. C. P. 116; 132 E. R. 793.

Annotations:—**Fold.** *Bradburn v. G. W. Ry.* (1874), 31 L. T. 464. **Consd.** *Jebson v. East & West India Dock Co.* (1875), L. R. 10 C. P. 300; *Simpson v. Thomson* (1877), 3 App. Cas. 279. **Mentd.** *Morgan v. Price* (1849), 4 Exch. 615; *Kemp v. Halliday* (1866), 6 B. & S. 723; *Dickenson v. Jardine* (1868), L. R. 3 C. P. 639; *Stringer v. English & Scottish Marine Inace.* (1869), L. R. 4 Q. B. 876; *Hall v. Nashville & Chattanooga Railroad Co.* (1871), 27 L. T. 182; *Midland Insee. v. Smith* (1881), 6 Q. B. D. 561; *Jamal v. Moolla Dawood Sons*, [1916] 1 A. C. 175; *Hill v. Showell* (1918), 87 L. J. K. B. 1106.

339. ————]—In an action for injuries caused by defts.' negligence, a sum received by pltf. on an accidental insurance policy cannot be taken into account in reduction of damages.—**BRADBURN v. GREAT WESTERN RY. CO.** (1874), L. R. 10 Exch. 1; 44 L. J. Ex. 9; 31 L. T. 464; 23 W. R. 48.

Annotations:—**Consd.** *Jebson v. East & West India Dock Co.* (1875), L. R. 10 C. P. 300; *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Rys. Co. of London*, [1912] A. C. 673. **Refd.** *The Marpessa*, [1891] P. 403; *The Modiana* (1899), 68 L. J. P. 26; *Admiralty Comrs. v. S.S. Amerika*, [1917] A. C. 38; *Baker v. Dalgleish S.S. Co.* (1921), 126 L. T. 482. **Mentd.** *Jamal v. Moolla Dawood Sons*, [1916] 1 A. C. 175; *Hill v. Showell* (1918), 119 L. T. 651.

See, further, **INSURANCE**.

340. ————]—**Profit made on substituted contract—By some of joint plaintiffs.**—In an action for breach of a contract for the quick discharge of a ship made with several persons jointly, where some of pltf. had made profits by reason of such breach of contract which they would not otherwise have made, through another ship in which they were interested having been substituted for the purpose for which the former ship was required:—**Held:** the amount of the joint damages could not be reduced by the profits so made by some of pltf. individually.—**JEBSEN v. EAST & WEST INDIA DOCK CO.** (1875), L. R. 10 C. P. 300; 44 L. J. C. P. 181; 32 L. T. 321; 23 W. R. 624; 2 Asp. M. L. C. 505.

Annotations:—**Refd.** *The Marpessa*, [1891] P. 403; *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Rys. Co. of London*, [1912] A. C. 673; *City Tailors v. Evans* (1921), 91 L. J. K. B. 379. **Mentd.** *Jamal v. Moolla Dawood Sons*, [1916] 1 A. C. 175; *Hill v. Showell* (1918), 119 L. T. 651.

B. Duty of Plaintiff to mitigate Damages.

341. General rule.—Deft. promised to marry pltf. so soon as his deft.'s father should die. During the father's lifetime deft. refused absolutely to marry pltf. Pltf. sued for breach of the promise, deft.'s father being still alive:—**Held:** the principle of

claim:—**Held:** there could be no recovery for damage which might have been prevented by reasonable efforts on deft.'s part. Deft. was bound, as soon as he discovered the defects complained of, to take the necessary steps to remedy them, & could not recover anything for damages beyond what he would have sustained had he pursued that course.—**MAWHINNEY v. PORTOUS** (1907), 17 Man. L. R. 184.—**CAN.**

341 ii. ————]—Pltf. having received seed from deft., became aware while it was growing that vetches were coming up with it, but did not inform deft.:—**Held:** he could not recover damages for an injury which his own conduct was responsible for.—**STEWART v. SCULTHORPE** (1894), 25 O. R. 544.—**CAN.**

341 iii. ————]—In assessing damages for breach of contract a jury will take into account whatever pltf. has done

show in reduction of damages that at the time the agreement was entered into he had delivered a quantity of logs to the pltf. as a part of the consideration for the bargain.—**SMITH v. MILLIDGE** (1844), 2 Kerr. 408.—**CAN.**

341 iv. ————]—**Non-delivery of goods—Whether plaintiff making equal profit out of the sale of goods in stock instead of the goods ordered.**—Where the measure of damages for a failure to deliver goods is the loss of profit, which the buyer would have made by delivering them under a contract which he had entered into, it is not material that the buyer by delivering under that contract other goods which he had in stock has made as much profit as he would have made if there had been no failure to deliver to him.—**MUHAMMAD ULLAH v. BIRD** (1921), L. R. 48 Ind. App. 175.—**IND.**

PART IV. SECT. 2, SUB-SECT. 1.—B. 341 i. General rule.—In a counter-

Sect. 2.—Mitigation: Sub-sect. 1, B.]

Hochster v. De la Tour, No. 290, *ante*, was applicable to the case of such a promise to marry, & a breach of contract had been committed on which pltf. could sue.

In assessing the damages for breach of performance, a jury will of course take into account whatever pltf. has done, or has had the means of doing, & as a prudent man, ought in reason to have done, whereby his loss has been or would have been, diminished (COCKBURN, C.J.).—**Frost v. Knight** (1872), L. R. 7 Exch. 111; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471, Ex. Ch.

Annotations.—**Consd.** Roper v. Johnson (1873), L. R. 8 C. P. 167; **Credito Italiano v. Swiss Bankverein** (1916), 85 L. J. K. B. 1477; **Payzu v. Saunders**, [1919] 2 K. B. 581. **Reid.** Brown v. Muller (1872), L. R. 7 Exch. 319; **Dunkirk Colliery Co. v. Lever** (1879), 41 L. T. 633; **Brace v. Calder** (1895), 64 L. J. Q. B. 582; **Roth v. Taysen, Townsend & Grant** (1895), 73 L. T. 628; **Michael v. Hart**, [1902] 1 K. B. 482; **Millett v. Van Heek**, [1921] 2 K. B. 369. **Mentd.** Cherry v. Thompson (1872), L. R. 7 Q. B. 573; **Metcalf v. Britannia Ironworks Co.** (1876), 1 Q. B. D. 613; **Soc. Générale de Paris v. Milders** (1883), 49 L. T. 55; **De Waal v. Adler** (1886), 12 App. Cas. 141; **Johnstone v. Milling** (1886), 16 Q. B. D. 460; **Gueret v. Audouy** (1893), 62 L. J. Q. B. 633; **Synge v. Syngue**, [1894] 1 Q. B. 466; **Re South African Trust & Finance Co., Ex p. Hirsch** (1896), 74 L. T. 769; **Ellis v. Pond**, [1898] 1 Q. B. 426; **Palaco Shipping Co. v. Calne**, [1907] A. C. 386; **Wilson v. Carnley**, [1908] 1 K. B. 729; **Sapwell v. Bass** (1910), 102 L. T. 811; **Curtis v. B. U. R. T. Co.** (1912), 28 T. L. R. 353; **Veithardt & Hall v. Ryland** (1917), 86 L. J. Ch. 604; **Conorzio Veneziano di Armamento e Navigazione v. Northumberland Shipbuilding Co.** (1919), 88 L. J. K. B. 1194.

342. —.]—The damages for the breach of a contract to accept goods for which there is no market, is the full amount of the damage actually sustained, the person who broke the contract not being put to additional cost by reason of the other party not doing what he ought to do, as a reasonable man, & he on the other hand not being bound to do otherwise than in the ordinary course of his business.—**DUNKIRK COLLIERY CO. v. LEVER** (1879), 41 L. T. 633, C. A.; *on appeal, sub nom. ELLIS LEVER & CO. v. DUNKIRK COLLIERY CO.* (1880), 43 L. T. 706, H. L.; *previous proceedings, sub nom. DUNKIRK COLLIERY CO. v. LEVER* (1878), 9 Ch. D. 20, C. A.

Annotations.—**Reid.** Biddell v. E. Clemens Horst (1911), 104 L. T. 577; **British Westinghouse Electric & Manufacturing Co. v. Underground Electric Rys. Co. of London**, [1912] A. C. 673; **Hill v. Showell** (1918), 87 L. J. K. B. 1106; **Payzu v. Saunders**, [1919] 2 K. B. 581; **Montevideo Gas & Drydock Co. v. Clan Line Steamers** (1921), 37 T. L. R. 544. **Mentd.** Burrard v. Calisher (1882), 19 Ch. D. 644; **Cooke v. Newcastle & Gateshead Water Co.** (1882), 10 Q. B. D. 332; **Walker v. Bunkell** (1883), 22 Ch. D. 722; **Jones v. Andrews** (1887), 57 L. T. 843; **Re Taylor, Turpin v. Pain** (1890), 44 Ch. D. 128.

343. —.]—In assessing damages for breach of contract the fundamental basis is compensation for pecuniary loss naturally flowing from the breach, but this is qualified by pltf.'s duty to take all reasonable steps to mitigate the loss consequent on the breach, & he cannot claim any part of the damage which is due to his neglect to take such steps. If the action which he has taken has actually diminished his loss, such diminution may be taken into account, even though there was no duty on him to act.—**BRITISH WESTINGHOUSE**

or has had the means of doing & as a prudent man ought in reason to have done whereby his loss has been or would have been diminished.—**FOLEY BROTHERS v. McILWEE** (1916), 33 W. L. R. 928, P. C.—**CAN.**

341 iv. —.]—One entitled to damages is bound, as far as reasonably possible, to minimise his loss.—**TARRABAIN v. FERRING**, [1917] 2 W. W. R. 381.—**CAN.**

341 v. —.]—A pltf. who sues for damages must do all in his power to mitigate the loss.—**COCKBURN v.**

TRUSTS & GUARANTEE CO. (1917), 38 O. L. R. 396; 55 S. C. R. 264.—**CAN.**

341 vi. —.]—In a breach of contract it is pltf.'s duty to minimise the loss.—**CANADIAN SANDER MANUFACTURING CO. v. CANADIAN GENERAL ELECTRIC CO., LTD.** (1921), 50 O. L. R. 186.—**CAN.**

341 vii. —.]—In a breach of contract it is the duty of pltf. as a prudent man to take measures to reduce the damages as far as possible.—**KARIBASAVANA GOWD v. VERRABHADRAPPA** (1913), 1 L. R. 36 Mad. 580.—**IND.**

ELECTRIC & MANUFACTURING CO., LTD. v. UNDERGROUND ELECTRIC RYS. CO. OF LONDON, LTD., [1912] A. C. 673; 81 L. J. K. B. 1132; 107 L. T. 325; 56 Sol. Jo. 734, H. L.

Annotations.—**Apld.** Hill v. Showell (1918), 87 L. J. K. B. 1106; **Payzu v. Saunders**, [1919] 2 K. B. 581. **Reid.** Williams v. Agius, [1914] A. C. 610; **Taylor v. Bank of Athens**, Pinnock v. Same (1922), 91 L. J. K. B. 776. **Mentd.** *Re King & Duveen*, [1913] 2 K. B. 32; **May v. Mills** (1914), 30 T. L. R. 287; *Re Wulff & Dreyfus* (1917), 86 L. J. K. B. 1368; *Re Olympia Oil & Cake Co. & MacAndrew Moreland*, [1918] 2 K. B. 771; *Re Parsons & Brixham Fishing Smack Insce. Soc.* (1918), 62 Sol. Jo. 384; **Westcott v. Hahn**, [1918] 1 K. B. 495; **S.S. Lord v. Newsum Sons** (1920), 36 T. L. R. 875; **Champsey Bhara v. Jivraj Balloo Spinning & Weaving Co.**, [1923] A. C. 480; **Kelantan Government v. Duff Development Co.**, [1923] A. C. 395.

344. —.]—It is undoubted law that a pltf. who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach, & cannot claim as damages any sum which is due to his own neglect (LORD WRENBURY).—**JAMAL v. MOOLLA DAWOOD, SONS & CO.**, [1916] 1 A. C. 175; 85 L. J. P. C. 29; 114 L. T. 1; 32 T. L. R. 79; 60 Sol. Jo. 139, P. C.

Annotations.—**Consd.** Hill v. Showell (1918), 87 L. J. K. B. 1106. **Mentd.** Lebeaupin v. Crispin, [1920] 2 K. B. 714.

345. —.]—Pltfs. & defts., who were both bankers, on May 25, 1914, made a contract whereby pltfs. sold to defts. roubles payable in St. Petersburg on Aug. 31, 1914, against cash, British currency, in London. On Aug. 6, 1914, war having meanwhile broken out, a moratorium proclamation was issued, under Postponement of Payments Act, 1914 (c. 11), relating to payments which would become due & payable on any day before the beginning of Sept. 4, 1914, in respect of any contract made before that time, & it postponed payment until Sept. 14, or until a month after the day on which the payment became due, whichever was the later date, & also provided for the payment of interest. Shortly before the postponed time for payment pltfs. informed defts. that they were ready to deliver the roubles, but defts. claimed to avail themselves of the proclamation, & postponed payment of the sovereigns.

The moratorium was extended by two subsequent proclamations, the later of which provided that the month's moratorium could only be obtained if within three days after the date to which the payment had already been postponed interest was paid up to that date. Very shortly after the second postponed date defts. paid over the sovereigns & pltfs. the roubles, the rouble at that time being worth less in terms of sovereigns than on the contract date.—**Held**: the contract did not come within the moratorium proclamations, & pltfs. were entitled to recover damages for breach of contract.—**CREDITO ITALIANO v. SWISS BANK-VEREIN** (1916), 85 L. J. K. B. 1477; 114 L. T. 776; 32 T. L. R. 429, C. A.

346. —.]—**HILL & SONS v. SHOWELL (EDWIN) & SONS, LTD.**, No. 337, *ante*.

347. —.]—At common law the owner of a ship while under a duty to act reasonably to reduce damages is under no obligation to destroy his own

341 viii. —.]—A pltf. who sues for damages is bound to take all reasonable steps to mitigate the loss consequent on the breach.—**JAMAL v. MOOLLA DAWOOD, SONS & CO.** (1916), 1 L. R. 43 Calc. 493.—**IND.**

341 ix. —.]—It is the duty of the sufferer by a breach of contract to take all legal steps to mitigate the loss consequent on the breach.—**VICTORIA FALLS & TRANSVAAL POWER CO., LTD. v. CONSOLIDATED LANGLAAGT MINES, LTD.** (1915), App. D. 1.—**S. AF.**

b. Trespass to land—Loss of pigs

property to reduce the damages payable by the wrongdoer (SCRUTTON, L.J.).—**ELLIOTT STEAM CO. v. LTD. v. SHIPPING CONTROLLER**, [1922] 1 K. B. 127; 91 L. J. K. B. 204; 126 L. T. 158; 15 sp. M. L. C. 400, C. A.

Annotations.—**Mentd.** Dominion Coal Co. v. Maskinonge S.S. Co., [1922] 2 K. B. 132; Federated Coal & Shipping Co. v. R., [1922] 2 K. B. 42; Moss S.S. Co. v. Board of Trade (1923), 40 T. L. R. 137.

348. Plaintiff not bound to enter into new contract—Fluctuating market.—Deft. contracted with pltf. to deliver to him a certain quantity of goods by instalments at several fixed times. Before the time for delivering the first instalment deft. gave pltf. notice of repudiation. Pltf. waited till the period had arrived for delivering the last instalment, & then bought in the market the same quantity of goods, & brought this action to recover the difference between the contract price & the price he had paid:—**Held**: pltf. was not bound to buy, or make a similar contract elsewhere, when he received the notice, & that the true measure of damages was the aggregate of the differences between the contract price & the market price at the several times fixed for delivery.

It has been argued with much ingenuity that the damages ought to be estimated at a lower figure if it appear that when deft. announced his intention of not delivering, or at all events when the first breach took place, & it became apparent that the contract could never be performed at all, pltf. might have entered into a new contract to the same effect as the old one for the months of Oct. & Nov. on as favourable terms, & if pltf., on learning he would never get delivery, was bound to go & obtain, if he could, the new contract suggested, then, no doubt, assuming that he might have made such a contract, the damages ought to be limited to his loss at that time. But there was, in my opinion, no such obligation. He was not bound to enter into such a contract, which might be either to his advantage or detriment, according to the market might fall or rise (**KELLY, C.B.**).—**BROWN v. MULLER** (1872), L. R. 7 Exch. 319; 1 L. J. Ex. 214; 27 L. T. 272; 21 W. R. 18.

Annotations.—**Apld.** Roper v. Johnson (1873), L. R. 8 C. P. 167. **Consd.** Roth v. Taysen, Townsend & Grant (1895), 73 L. T. 628; Melachrine v. Nickoll & Knight, [1920] 1 K. B. 693. **Refd.** Dunkirk Colliery Co. v. Lever (1879), 41 L. T. 633; Johnstone v. Milling (1886), 16 Q. B. D. 460; Shaw's Brow Iron Co. v. Birchgrove Steel Co. (1889), 6 T. L. R. 50; The South African Trust & Finance Co., *Ex p.* Hirsch (1896), 74 L. T. 769; Michael v. Hart, [1902] 1 K. B. 482. **Mentd.** Borghelm v. Blaenavon Iron & Steel Co. (1875), 44 L. J. Q. B. 92; Sawwell v. Bass (1910), 102 L. T. 811.

349. A question of fact.—The question what steps pltf. in an action for breach of contract should take towards mitigating the damage is a question of fact & not of law.—**PAYZU, LTD. v. SAUNDERS**, [1919] 2 K. B. 581; 89 L. J. K. B. 17; 21 L. T. 563; 35 T. L. R. 657, C. A.

350. Wrongful dismissal.—Defts., a partnership consisting of four members, agreed to employ pltf. as manager of a branch of their business for a certain period. Pltf. entered into their service under the agreement, but, before the period had expired, two of the partners retired, & the business was transferred to & carried on by the other two. The continuing partners were willing to employ pltf. on the same terms as before for the remainder of the period, but he declined to serve them:—**Held**: the dissolution of partnership operated as a wrongful dismissal of pltf. by defts. from their service, but inasmuch as pltf. might have obtained similar employment upon similar terms from the two remaining partners, he was only entitled to nominal damages.—**BRACE v. CALDER**, [1895] 2

Q. B. 253; 64 L. J. Q. B. 582; 72 L. T. 829; 59 J. P. 693; 11 T. L. R. 450; 14 R. 473, C. A.

Annotations.—**Consd.** Payzu v. Saunders, [1919] 2 K. B. 581. **Mentd.** Jaeger's Sanitary Woollen System Co. v. Walker (1897), 77 L. T. 180; Ogdens v. Nelson, Ogdens v. Telford, [1903] 2 K. B. 287; Midland Counties District Bank v. Attwood, [1905] 1 Ch. 357.

See, further, MASTER & SERVANT.

351. Sale of goods—Refusal to deliver.—Deft. in April agreed to sell & pltf. to buy 3,000 tons of coal, at 8s. 6d. per ton, to be taken during the months of May, June, July, & August. No coal having been taken by pltf. in May, deft. wrote on May 31, desiring pltf. to consider the contract cancelled. Pltf. did not assent to this; but on June 11, deft. definitely refused to deliver any coal, & on July 3, pltf. brought an action for this breach:—**Held**: in the absence of evidence on the part of deft. that pltf. could have obtained a new contract on such terms as to mitigate their loss, the true measure of damages was the sum of the differences between the contract price & the market price at the several periods for delivery.—**ROPER v. JOHNSON** (1873), L. R. 8 C. P. 167; 42 L. J. C. P. 65; 28 L. T. 296; 21 W. R. 384.

Annotations.—**Consd.** Roth v. Taysen, Townsend & Grant (1895), 73 L. T. 628; Melachrine v. Nickoll & Knight, [1920] 1 K. B. 693. **Refd.** Tyers v. Rosedale & Ferryhill Iron Co. (1875), L. R. 10 Exch. 195; Dunkirk Colliery Co. v. Lever (1879), 41 L. T. 633; Johnstone v. Milling (1886), 16 Q. B. D. 460; Shaw's Brow Iron Co. v. Birchgrove Steel Co. (1889), 6 T. L. R. 50; The South African Trust & Finance Co., *Ex p.* Hirsch (1896), 74 L. T. 769; Michael v. Hart, [1902] 1 K. B. 482. **Mentd.** Borghelm v. Blaenavon Iron & Steel Co. (1875), 44 L. J. Q. B. 92; Sawwell v. Bass (1910), 102 L. T. 811.

352. — Refusal to accept.—**TREDEGAR IRON & COAL CO., LTD. v. HAWTHORN BROTHERS & CO.** (1902), 18 T. L. R. 716, C. A.

353. — — — — ——Deft. in breach of his contract refused to accept two machines which he had hired from pltf. for three years at a weekly rent. Pltf., whose business it was to let out machines, made no attempt to relet these machines. At all times material to this contract they had more than two machines in stock:—**Held**: the measure of damages was not the aggregate of the three years' weekly rents, but, the amount of the weekly rents from the time when they became payable under the contract, that is the date when the machines were tendered, until the expiration of such reasonable time as pltf. would have required thereafter in order to relet the machines on hire, the cost of transport of the machines, & the commission to the agent who procured the contract if payable notwithstanding breach.—**BRITISH AUTOMATIC CO. v. HAYNES**, [1921] 1 K. B. 377; 90 L. J. K. B. 271.

354. — Anticipatory breach.—When a contract for the sale of goods is repudiated by the purchaser before the time for delivery has arrived, the vendor, if he treats such repudiation as a breach & brings an action, must take reasonable steps to mitigate the loss.—**ROTH (L.) & CO., LTD. v. TAYSEN, TOWNSEND & CO. & GRANT & GRAHAM** (1896), 12 T. L. R. 211; 1 Com. Cas. 306, C. A.

Annotations.—**Refd.** Tredegar Iron & Coal Co. v. Hawthorn (1902), 18 T. L. R. 716. **Mentd.** Nickoll & Knight v. Ashton, Edridge, [1900] 2 Q. B. 298.

355. — — — — ——Where there is an anticipatory breach by a seller of a contract to deliver at a fixed date goods for which there is a market, the true rule as to the measure of damages is that the buyer, without buying against the seller, may bring his action at once, but if he does so his

rough overcrowding—Duty of plaintiff reduce number of pigs.—In an action for damages for loss of pigs by reason of deft.'s trespass upon pltf.'s land, in which he was prevented from

extending the boundaries of his corral:—**Held**: the obvious course for pltf. to adopt was to reduce the number of his pigs to the number which he had kept in the previous year, in the

same place, without loss, & without the necessity of extending the boundaries of his corral.—**MARSON v. GRAND TRUNK PACIFIC RY. CO.** (1912), 20 W. L. R. 161.—**CAN.**

Sect. 2.—Mitigation: Sub-sect. 1, B.; sub-sect. 2. Sect. 3.]

damages must be assessed with reference to the market price of the goods at the time when they ought to have been delivered under the contract. To this rule there is one exception for the benefit of the defaulting seller, namely, that if he can show that the buyer acted unreasonably in not buying against him, the date to be taken is the date at which the buyer ought to have gone into the market to mitigate damages.—*MELACHRINO v. NICKOLL & KNIGHT*, [1920] 1 K. B. 693; 89 L. J. K. B. 906; 122 L. T. 545; 36 T. L. R. 143; 25 Com. Cas. 103. *Annotation*.—*Reid*. *Millett v. Van Heek*, [1921] 2 K. B. 369.

356. ———.]—Where the breach of the contract for sale is an anticipatory breach by repudiation before the time for performance has arrived, the measure of damages is the difference between the contract price & the market or current price at the time when the contract ought to have been performed, subject to abatement so far as the party claiming damages could have mitigated his loss.—*MILLETT v. VAN HECK & Co.*, [1921] 2 K. B. 369; 90 L. J. K. B. 671; 125 L. T. 51; 37 T. L. R. 411, C. A.

See, further, SALE OF GOODS.

357. Loading & discharging cargo.]—By a charterparty it was stipulated that a ship should proceed to L. with her then present cargo, & there take a cargo of oats for L., at a freight of 2s. 8d. a quarter, six days being allowed for lading at L. Before the expiration of the six days, the freighter's agent offered the captain a cargo at 2s. 6d., & said, that the freighter's broker would pay the difference. The captain refused to take anything not according to the terms of the charterparty:—*Held*: as the contract had not been broken by deft., the captain was not bound to accept this offer, but, if the contract had been broken by the freighter not putting any cargo on board within the six days, it would have been the captain's duty to have taken a cargo at the most he could get, so that the damages to be paid by the freighter should be reduced as much as possible.—*HARRIES v. EDMONDS* (1845), 1 Car. & Kir. 686, N. P.

358. ———.]—In an action on a charterparty for not loading a cargo, the loading ports were R. or B., & the captain, having been to R., & there received orders to go to B., three days' sail, where no cargo could be obtained, & he was requested to go back to R. or elsewhere, in hopes of obtaining a cargo. He declined to do so, & remained inactive at R. until the time for loading had elapsed:—*Held*: the jury were not bound to give pltf. the full amount of freight, but if they deemed the master's conduct unreasonable they might diminish the damages on that account.—*WILSON v. HICKS* (1857), 26 L. J. Ex. 242.

Annotations.—*Reid*. *Payzu v. Saunders* (1919), 35 T. L. R. 657. *Mentd.* *Nichol v. Bestwick* (1858), 28 L. T. Ex. 4; *Roth v. Taysen, Townsend & Grant* (1895), 73 L. T. 628.

359. ———.]—A man may not increase damages

by unreasonable conduct. He is bound to act not only in his own interests, but in the interests of the party who would have to pay the damages, & he must therefore keep them down, so far as it is reasonable & proper, by acting reasonably in the matter (*CHANNEL, J.*).—*SMAILES & SON v. HANS DESSEN & Co.* (1905), 94 L. T. 492; 54 W. R. 471; 10 Asp. M. L. C. 225; 11 Com. Cas. 74; *on appeal* (1906), 95 L. T. 809, C. A.

360. ———.]—The owners of a ship chartered her to pltf. for a particular voyage under a charterparty which stipulated for freight at the rate of 21s. per ton, & provided that in a certain event, which happened, pltf. should be at liberty to cancel the charterparty. Pltf. sub-chartered the ship to defts. for the same voyage at a freight of 28s. 6d. per ton. Defts., in breach of their contract, refused to load. The rate of freight obtainable in the market for a similar ship at the date of the breach had fallen to 17s. per ton:—*Held*: as the contract related to the hire of a specific ship which pltf. were entitled to get rid of at a saving to themselves of 21s. per ton, the measure of damages was the difference between 28s. 6d., & 21s., & not the difference between 28s. 6d. & 17s., the market rate.—*WEIR (ANDREW) & Co. v. DOBELL & Co.*, [1916] 1 K. B. 722; 85 L. J. K. B. 873; 115 L. T. 387; 13 Asp. M. L. C. 496; 21 Com. Cas. 296.

See, further, SHIPPING.

361. Breach of promise of marriage.—*FROST v. KNIGHT*, No. 341, ante.

See, further, HUSBAND & WIFE.

SUB-SECT. 2.—IN TORT.

In actions of libel & slander.]—*See* LIBEL & SLANDER.

362. Circumstances of mitigation—Precedents of exercise of powers.]—*WILKES v. WOOD* (1763), Lofft, 1 (Preface); 98 E. R. 489; *sub nom.* *GENERAL WARRANTS CASE, WILKES v. WOOD*, 19 State Tr. 1153.

Annotations.—*Reid*. *Feathers v. R.* (1865), 12 L. T. 114. *Mentd.* *Entick v. Carrington* (1765), 19 State Tr. 1029.

363. ——— **Poverty of defendant.]**—The ct. will not grant a rule for setting aside an inquisition after judgment by default, on the ground, that the under-sheriff directed the jury to consider the poverty of deft. in mitigation of damages.—*KINGSTON v. HAYCHURCH* (1819), 1 Chit. 644.

364. ——— **Provocation — To assault — By libel.]**—In an action for an assault, defts., in mitigation of damages, were allowed to give in evidence a series of libellous articles, published respecting defts. in pltf.'s newspaper, one of them having been published on the day of the assault.—*JUDGE v. BERKELEY* (1825), 7 C. & P. 371, n.

365. ——— ———.]—A. having written a novel, B. published a libel on A. & his family in the form of a critique on the novel, for which A. beat him. B. brought an action for

PART IV. SECT. 2, SUB-SECT. 2.

g. Duty of plaintiff to mitigate damages.]—The person damaged is not entitled to lie by & let the damage result; he must take all reasonable steps to prevent or diminish it as far as possible.—*O'CONNOR v. BANK OF NEW SOUTH WALES* (1887), 13 V. L. R. 820.—*AUS.*

364 i. Circumstances of mitigation—Provocation.]—In trespass for assault & battery, deft. offered in mitigation of damages, that pltf. had used very slanderous expressions concerning deft.'s wife, whereupon he assaulted

pltf. This evidence was refused, & the jury gave a verdict with £140 damages. The ct. set aside the verdict, to give an opportunity to elicit the whole circumstances of the transaction.—*SHORT v. LEWIS* (1834), 3 O. S. 385.—*CAN.*

364 ii. ———.]—In an action of damages for assault, defender alleged that pursuer had given him gross provocation. Pursuer had made reflections on defender as if he were the father of a bastard:—*Held*: verbal provocation could diminish the damages.—*FALCONER v. COCHRAN* (1837), 15 Sh. (Ct. of Sess.) 891.—*SCOT.*

364 iii. ———.]—In an action for damages for assault committed at a public meeting, where defender's speech was interrupted by pursuer in an offensive manner:—*Held*: verbal provocation was cause for mitigation of damages.—*THOM v. GRAHAM* (1835), 13 Sh. (Ct. of Sess.) 1129.—*SCOT.*

k. ——— Escape from sheriff—Insolvency of debtor.]—In an action for a voluntary escape from the sheriff:—*Held*: deft. might show in mitigation of damages the insolvency of the debtor.—*KINLOCH v. HALL* (1865), 25 U. C. R. 141.—*CAN.*

the assault, & A. a cross action for the libel:—*Held*: in the action for the assault, the libel might be given in evidence in mitigation of damages, although it was the subject of another action; but that being so, deft. ought not to derive much advantage from it in diminishing the damages.—*FRASER v. BERKELEY* (1836), 7 C. & P. 621; 2 Mood. & R. 3, N. P.

Annotations.—*Refd.* *Thomas v. Powell* (1837), 7 C. & P. 807; *Pearson v. Lemaitre* (1843), 5 Man. & G. 700.

366. ——— *Damage by dog.*—The owner of sheep in a field which had been worried by a dog, shot the dog when in another field at some distance off. In an action by the owner of the dog:—*Held*: deft. was not justified in the act of shooting, as it was not done in protection of his property.

Though there could not be a verdict for deft., the habits of the dog might be considered in mitigation of damages (*ALDERSON, J.*).—*WELLS v. HEAD* (1831), 4 C. & P. 508; 2 Man. & Ry. M. C. 517, N. P.

367. Reasonable & probable cause—Action for false imprisonment.—Evidence of reasonable suspicion of felony may be given in mitigation of damages in an action of false imprisonment.—*CHINN v. MORRIS* (1820), 2 C. & P. 361; Ry. & M. 424, N. P.

Annotations.—*Refd.* *Linford v. Lake* (1858), 3 H. & N. 270. *Mentd.* *Perkins v. Vaughan* (1842), 5 Scott, N. R. 881.

368. ——— *Trespass was brought against three defts. for assault committed in Bristol. Two of them were constables of Oxford and had come down & taken pltf. at Bristol, thus committing the assault, on suspicion of his having stolen a horse belonging to the other deft. in Oxfordshire. The declaration set out all the trespasses to have been done without reasonable or probable cause. The two constables pleaded not guilty only:—Held*: they might give the special matter in evidence in mitigation of damages to show that there was reasonable & probable cause.

Semle: having acted out of their jurisdiction they were not entitled as constables under 21 Jac. 1, c. 12, s. 5, to give the special matter in evidence under the general issue as a defence of the trespasses.—*ROWCLIFFE v. MURRAY* (1842), Car. & M. 513, N. P.

369. ——— *Damage increased by plaintiff's act.*—The true measure of damages in an action on the case against the sheriff, under Prisons Act, 1842 (c. 98), s. 31, for the escape of a prisoner taken on a *ca. sa.* is, "the value of the custody of the debtor at the moment of the escape; & no deduction is to be made on account of anything which pltf.

might have obtained by diligence after the escape"; but, if pltf. has done anything to aggravate the loss occasioned by the sheriff's neglect, or has prevented the sheriff from re-taking the debtor, the damages will be materially affected by such conduct.—*ARDEN v. GOODACRE* (1851), 11 C. B. 371; 2 L. M. & P. 383; 20 L. J. C. P. 184; 15 Jur. 776; 138 E. R. 516; *sub nom.* *ARDING v. GOODACRE*, 17 L. T. O. S. 158.

Annotations.—*Refd.* *Hemming v. Hale* (1859), 7 C. B. N. S. 487; *Macrae v. Clarke* (1866), L. R. 1 C. P. 403.

370. ——— *Although pltf., in a suit for an injury done, really has a right of action against deft., the jury are entitled to look at all the circumstances of the case, & at the conduct of both parties, & if they think that in going on with the action pltf. has acted in an obstinate & perverse manner, they may take that into consideration when estimating the damages.*—*DAVIS v. LONDON & NORTH WESTERN RY. CO.* (1858), 32 L. T. O. S. 148; 4 Jur. N. S. 1303; 7 W. R. 105.

371. ——— *A person who is suffering from the effects of an accident, in respect of which he is claiming damages, is not entitled to do everything that an ordinary person might reasonably do. He need not act with perfect knowledge & ideal wisdom, but he cannot claim damages for such injuries as are really due to wanton, needless, or careless conduct on his own part. If, however, what he does reasonably & carefully augments the injuries, that may be regarded as a natural consequence of the accident.* (*LUSH, J.*).—*JONES v. WATNEY, COMBE, REID & CO., LTD.* (1912), 28 T. L. R. 396.

— *Payments by executor de son tort.*—See EXECUTORS & ADMINISTRATORS.

SECT. 3.—PLEADING AND PRACTICE.

See, generally, Part VII., *post*, ss. 1 & 2.

In actions of libel & slander.]—See LIBEL & SLANDER.

372. Matters in aggravation—Whether necessary to plead.—Circumstances which go only in aggravation of damages need not be stated in the declaration.—*PIGOT v. ROGERS* (1620), Cro. Jac. 561; 79 E. R. 481.

Annotations.—*Mentd.* *Mathews v. Spicer* (1728), 1 Barn K. B. 57; *Johnson v. Smith* (1760), 2 Burr. 950.

373. ——— *What may be pleaded—Matters admissible in evidence at trial.*—R. S. C., Ord. 19, r. 4.]—*MILLINGTON v. LORING*, No. 300, *ante*.

374. ——— *A paragraph in a statement of claim in an action for a libel published*

369 i. ——— *Damage increased by plaintiff's act.*—In an action for damages for detention of cattle:—*Held*: pltf. was not entitled as he could have had them at any time on sending for them & paying for the wintering.—*STILL v. WATSON* (1908), 7 W. L. R. 466.—CAN.

l. ——— *Whether evidence of general bad character—Action for malicious prosecution.*—Evidence of pltf.'s general bad character is not admissible in mitigation of damages in actions for malicious prosecution.—*FOWLER v. MCARTHUR*, 1 J. R. N. S. 54.—N.Z.

m. ——— *New building—Damage caused by imperfections in building affected.*—In an action for damages caused by a new building the amount may be mitigated in respect of imperfections in the old buildings.—*MCINTOSH v. SCOTT & CO.* (1859), 21 Dunl. (Ct. of Sess.) 363.—SCOT.

PART IV. SECT. 3.

n. *Matters in aggravation—What* J.—VOL. XVII.

may be pleaded—Seduction in breach of promise action.—*MORRIS v. CHURCHWARD* (1913), 10 D. L. R. 191.—CAN.

o. ——— *Whether defendant's conduct as shown by his pleadings.*—An allegation in a statement of claim in aggravation of damages that, "pltf. further relies upon the conduct of deft. as shown in his pleadings" was struck out as irrelevant.—*HALLREN v. HOLDEN* (1914), 29 W. L. R. 802.—CAN.

p. ——— *Admissibility of evidence of malicious prosecution.*—On the trial of an action for malicious prosecution & false imprisonment, pltf. gave evidence that at the time of arrest the constable, who was not a party to the suit, told him "his orders were to look for fees".—*Held*: improperly admitted.—*DOWLING v. MCNEILLY* (1879), 19 N. B. R. 42.—CAN.

q. ——— *Breach of promise & seduction—Whether misdirection to jury—To consider feelings of plaintiff's*

family & friends.—In an action for breach of promise & seduction, it is misdirection to tell the jury that in estimating damages they might consider the feelings of pltf.'s family & friends.—*BELL v. GIBBERSON* (1890), 30 N. B. R. 10.—CAN.

r. *Matters in mitigation—Breach of promise—Cross-examination of plaintiff's witnesses as to bad character of plaintiff.*—In an action for breach of promise of marriage, deft. is entitled, in mitigation of damages, to cross-examine pltf.'s own witness respecting the general bad character of pltf.—*MCGREGOR v. MCARTHUR* (1856), 5 C. P. 493.—CAN.

s. *What may be pleaded—Goods not delivered at specified time—Whether defendant's subsequent acceptance prevents his pleading non-delivery in time.*—Where it is agreed that goods shall be delivered at a certain time, & deft. subsequently to the time agreed upon accepts delivery, he cannot set

Sect. 3.—Pleading and Practice. Part V. Sect. 1:
Sub-sect. 1.]

in a newspaper stated that deft. knew that the words published would be, & the same in fact were, repeated & published in other editions of the same newspaper:—*Held*: evidence of the facts stated in this paragraph would be admissible at the trial, & therefore the paragraph was properly pleaded under above order & ought not to be struck out.—*WHITNEY v. MOIGNARD* (1890), 24 Q. B. D. 630; 59 L. J. Q. B. 324; 6 T. L. R. 274, D. C.

375. Matters in mitigation—Necessity for pleading—Assault & battery.]—In trespass for assault & battery & not guilty pleaded, the jury are not at liberty to take into consideration the circumstances of the assault & battery, with a view to reduce the verdict below the amount of the damage actually sustained, if those circumstances could have been pleaded.—*WATSON v. CHRISTIE* (1800), 2 Bos. & P. 224; 126 E. R. 1248.

Annotations:—*Reid*, Linford v. Lake (1858), 3 H. & N. 276; *Watt v. Watt*, [1905] A. C. 115. *Mentd.* The Lowther Castle (1825), 1 Hag. Adm. 384.

376. ——— To be admissible as evidence.]—In an action for a libel alleging that pltf., a theatrical critic, had endeavoured to extort money by threatening to publish defamatory matter concerning a deceased actress:—*Held*: (1) evidence of rumours before the publication of the libel that pltf. had committed the offences charged in it, & evidence of particular facts & circumstances tending to show the misconduct of pltf. as a theatrical critic, could not be admitted in reduction of damages; (2) assuming such evidence to be material, it was rightly rejected, for the particular facts & circumstances were not stated or referred to in the pleadings as required by R. S. C., Order 19, r. 4.—*SCOTT v. SAMPSON* (1882), 8 Q. B. D. 491; 51 L. J. Q. B. 380; 46 L. T. 412; 46 J. P. 408; 30 W. R. 541, D. C.

Annotations:—*As to* (1) *Reid*, Wood v. Cox (1888), 4 T. L. R. 652; *Scalfie v. Kemp* (1892), 61 L. J. Q. B. 515; *Mangena v. Wright*, [1909] 2 K. B. 958. *As to* (2) *Reid*, Wood v. Durham (1888), 21 Q. B. D. 501.

377. ———.]—*WOOD v. COX* (1888), 4 T. L. R. 652; *on appeal* (1889), 5 T. L. R. 272, C. A.

Annotations:—*Mentd.* Moore v. Gill (1888), 4 T. L. R. 676; *O'Connor v. Star Newspaper Co.* (1893), 9 T. L. R. 233.

378. ——— What may be pleaded—Not matters relied on merely in mitigation—Not constituting defence to action.]—Pltf., a professional jockey, sued to recover damages for a libel charging him with unfairly & dishonestly riding the horses in a particular stable. Deft. pleaded a justification, & afterwards applied to amend his defence by adding a paragraph alleging that at the date of the publication pltf. was commonly reputed to have been in the habit of unfairly & dishonestly riding horses in races, so as to prevent them from winning:—*Held*: as general evidence of pltf.'s bad reputation, if admissible, could only be given in reduction of damages, & not in answer to the action, the paragraph did not contain a statement of material facts on which deft. relied for his defence, within the meaning of R. S. C., Ord. 19, r. 4, or a ground of defence which must be raised under R. S. C., Ord. 19, r. 15, but was a denial or defence as to damages claimed or their amount, within the meaning of R. S. C., Ord. 21, r. 4, & therefore ought not to be pleaded, & leave to amend must be refused.—*WOOD v. DURHAM (EARL)* (1888), 21 Q. B. D. 501; 57 L. J. Q. B. 547; 59 L. T. 142; 37 W. R. 222; 4 T. L. R. 778.

379. ——— Admissibility of evidence of—
R. S. C. O. 36, r. 37.]—The common law rule as to the admission of evidence in mitigation of damages as laid down in *Scott v. Sampson*, No. 376, *ante*, has not been altered by R. S. C., Ord. 36, r. 37.—*MANGENA v. WRIGHT*, [1909] 2 K. B. 958; 78 L. J. K. B. 879; 100 L. T. 960; 25 T. L. R. 534.
Annotation:—*Mentd.* Adam v. Ward (1915), 31 T. L. R. 299.

See, also, No. 376, *ante*.

——— Payment by defendant—Must be specially pleaded.]—*See* Nos. 332–335, *ante*.

Interrogatories.]—*See* DISCOVERY, INSPECTION & INTERROGATORIES.

Part V.—Measure of Damages.

SECT. 1.—GENERALLY.

SUB-SECT. 1.—IN CONTRACT.

Directness & remoteness.]—*See* Part III., *ante*.

Aggravation & mitigation.]—*See* Part IV., *ante*.

Particular instances.]—*See* Sect. 2, *post*.

380. General rule.]—*WILSON v. NEWPORT DOCK Co.*, No. 109, *ante*.

381. ———.]—The true measure of damages is the pecuniary amount of the difference between the position of pltf. upon the breach of contract &

up the non-delivery at the specified time in reduction of damages.—*MOFFAT v. LUNT* (1879), 18 N. B. R. 678.—*CAN.*

i. ——— Contributory negligence.]—In an action for injury through the bursting of a water pipe on A.'s premises to the goods of B. stored in an adjoining warehouse; & plea of contributory negligence:—*Held*: pleadable in mitigation of damages.—*MOFFAT & Co. v. PARK* (1877), 5 R. (Ct. of Sess.) 13.—*SCOT.*

a. ——— Admissibility of evidence of—Payment by defendant of smaller sum than that pleaded.]—A party pleading payment of a larger sum may give evidence of payment of a smaller sum in reduction of damages.—*GOODERHAM v. CHALKMERS* (1844), 1 U. C. R. 172.—*CAN.*

b. ——— Breach of warranty—Unsoundness of article.]—In an action for the price of fish, warranted sound deft. may give the unsoundness of the fish in evidence in mitigation of

damages.—*SMITH v. DUNHAM* (1845), 2 Kerr. 630.—*CAN.*

c. ——— Worthlessness of article.]—C. sued A. for breach of warranty, & recovered damages. A. subsequently sued C. for the price of the article & C. offered evidence in mitigation of damages that the article was worthless:—*Held*: admissible.—*CHURCH v. ABELL* (1877), 1 S. C. R. 442.—*CAN.*

d. ———.]—In an action of trespass for assault & battery, deft. cannot, under the general issue, give in evidence, by way of mitigation of damages, matter of defence which, if pleaded, would amount to a justification.—*PUJOLAS v. HOLLAND* (1841), 3 L. R. 533.—*IR.*

PART V. SECT. 1, SUB-SECT. 1.

380 i. General rule.]—The true measure of damages is the loss actually sustained by a pltf. by reason of the non-performance of a contract.—

AUSTRALIAN SMELTING CO., LTD. v. BRITISH BROKEN HILL PROPRIETARY CO., LTD. (1896), 22 V. L. R. 190.—*AUS.*

380 ii. ———.]—Five days after making a contract with pltf., for the manufacture of goods, to be delivered monthly for a period of twenty months, defts. notified pltf., that they would not carry out the contract. Pltf. has incurred no expense:—*Held*: pltf. should not be allowed as damages the full amount of their expected profit, but that allowance should be made for the many contingencies which might have happened before the time for fulfilment.—*ONTARIO LANTERN CO. v. HAMILTON BRASS MANUFACTURING CO.* (1900), 27 A. R. 346.—*CAN.*

380 iii. ———.]—In an action for breach of contract the measure of damages is the profit which pltf. might reasonably look for in performing his contract, had he not been prevented from doing so.—*LOWE v. ROBE*

what it would have been if the contract had been performed.—*WIGSELL v. SCHOOL FOR INDIGENT BLIND*, No. 402, *post*.

382. —[*J*.]—*MARSHALL v. MACKINTOSH* (1898), 78 L. T. 750; 46 W. R. 580; 14 T. L. R. 458; 42 Sol. Jo. 553.

383. — Where other party makes good default at own expense.—*HAMLIN v. GREAT NORTHERN RY. Co.*, No. 291, *ante*.

384. —[*J*.]—The principle is, that if one party does not perform his contract, the other may do so for him as reasonably near as may be, & charge him for the reasonable expense incurred in so doing.—*LE BLANCHE v. LONDON & NORTH WESTERN RY. Co.* (1876), 1 C. P. D. 286; 45 L. J. Q. B. 521; 34 L. T. 667; 40 J. P. 580; 24 W. R. 808, C. A.

Annotations.—*Consd. Erie County Natural Gas & Fuel Co. v. Carroll*, [1911] A. C. 105. *Refd. G. W. Ry. v. Lowerfeld* (1892), 8 T. L. R. 330; *Bright v. Peninsular & Oriental Steam Navigation Co.* (1897), 2 Com. Cas. 106. *Mentd. Roberts v. Mid. Ry.* (1877), 25 W. R. 323; *Millen v. Brash* (1881), 8 Q. B. D. 35; *Woodgate v. G. W. Ry.* (1884), 51 L. T. 828; *McCartan v. N. E. Ry.* (1885), 54 L. J. Q. B. 441; *Fox v. Cambrian Rys.* (1896), 60 J. P. Jo. 745; *Duckworth v. L. & Y. Ry.* (1901), 84 L. T. 774; *Re Jewell's Settltmt.*, *Watts v. Public Trustee*, [1919] 2 Ch. 161.

385. —[*J*.]—By agreement & conveyance executed in Apr. 1891, by plffs. & one of two applt. cos., & afterwards in 1894 assigned to the other of them, plffs., who carried on an extensive business of quarrying stone & burning lime on their property, sold, & the two cos. successively acquired, various gas leases, gas grants, & gas wells theretofore held by plffs. These gas leases conferred on the holder the exclusive right to explore & drill the lands to which they related, but which were not demised thereby, for subterranean or natural gas which had been discovered to be useful both as an illuminant & as fuel, & to set up & use the necessary machinery for reducing the gas into their possession & control. The transaction included the following clause:—"It is understood that the parties of the first part reserve gas enough to supply the plant now operated or to be operated by them on said property." Shortly after the assignment of 1894 the assignee co. cut off the supply of gas theretofore enjoyed by plffs. under the said reservation clause & refused further supply; & plffs. thereupon procured the gas required for their plant by the acquisition from independent sources of other gas leases & by the construction of works necessary to obtain the same.

In an action for damages caused by the deprivation of gas against both cos.:—*Held*: the measure of damages recoverable by plffs. was the cost of procuring the gas to which they were entitled & not

the price at which the substituted gas when procured could have been sold; & as they had sold the leases & works used in procuring the substituted gas for more than they cost, they were entitled only to nominal damages.—*ERIE COUNTY NATURAL GAS & FUEL Co., LTD. v. CARROLL*, [1911] A. C. 105; 80 L. J. P. C. 59; 103 L. T. 678, P. C.

Annotations.—*Refd. British Westinghouse Electric & Manufacturing Co. v. Underground Electric Ry. of London*, [1912] A. C. 873; *Hill v. Showell*, *Edwin* (1918), 87 L. J. K. B. 1108.

386. — Reasonable sum.—*Deft.* in consideration of half a crown given him by pltf. agreed to give pltf. two grains of rye on Monday following & so on every Monday double, by progression, for one year:—*Held*: pltf. was entitled to reasonable damages for breach.—*THORNBOROW v. WHITACRE* (1705), 2 Ld. Raym. 1164; 6 Mod. Rep. 305; 3 Salk. 97; 92 E. R. 270.

Annotations.—*Refd. Hall v. Wright* (1859), E. B. & E. 765. *Mentd. Cockell v. Taylor* (1852), 15 Beav. 103.

387. — Whatever prearranged terms —If agreement not under seal.—Whatever may be the terms of an agreement with regard to the sum to be paid on the non-performance of it, the party suing, if the agreement is not under seal, is entitled only to such damages as a jury, under all the circumstances, shall think fit to award.

Whether the term penalty or liquidated damages be used in the agreement, a party who claims compensation for a default shall only be allowed to recover what damage he has really sustained (*ABBOTT, C.J.*).—*RANDALL v. EVEREST* (1827), 2 C. & P. 577; *Mood & M.* 41, N. P.

Annotation.—*Refd. Crisdee v. Bolton* (1827), 3 C. & P. 240.

388. — Sum fixed & agreed upon between the parties.—(1) There is a difference between covenants in general, & covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election. He may either bring an action of debt for the penalty, & recover the penalty, after which recovery of the penalty, he cannot resort to the covenant, because the penalty is to be a satisfaction for the whole; or, if he does not choose to go for the penalty, he may proceed upon the covenant, & recover more or less than the penalty, *loties quoties* (*LORD MANSFIELD, C.J.*).

(2) Where the precise sum is not the essence of the agreement, the quantum of the damages may be assessed by the jury, but, where the precise sum is fixed & agreed upon between the parties, that very sum is the ascertained damage, & the jury are confined to it (*LORD MANSFIELD, C.J.*).—*LOWE v. PEERS* (1768), 4 Burr. 2225; 98 E. R.

ENGINEERING Co. (1904), 37 N. S. R. 326.—CAN.

380 iv. —[*J*.]—In an action for breach of an agreement in writing:—*Held*: the measure of damages was the loss of profits which pltf. would have made if deft. had not broken his contract.—*PROVINCIAL FOX Co. v. TENNANT* (1915), 48 N. S. R. 555.—CAN.

380 v. —[*J*.]—In an action claiming damages for short delivery:—*Held*: plffs. were entitled to recover the estimated loss directly & naturally resulting in the ordinary course of events from sellers breach of contract.—*BOCHNER v. SMITH* (1916), 49 N. S. R. 435.—CAN.

380 vi. —[*J*.]—The measure of damages for breach of contract is determined by the knowledge, actual or constructive, which the parties had of the probable consequences of the breach.—*RIVERS v. WHITE (GEORGE) & SONS Co., LTD.*, [1919] 2 W. W. R. 189.—CAN.

380 vii. —[*J*.]—Damages for defts. procuring the breaking of contracts may include, in addition to damages which have been actually proved, also a further allowance for such further damages as must have arisen by reason of defts. wrongful acts although such damages may not have been proved.—*TORONTO TYPE FOUNDRY Co., LTD. v. PUBLISHERS NEWS SERVICE, LTD.* (1920), 3 W. W. R. 339.—CAN.

380 viii. —[*J*.]—The measure of damages is the loss actually sustained by the specific breach complained of up to the time of action brought; & the jury cannot take into consideration the possible injury pltf. may have sustained as such damages are not damages in the ordinary cause of things flowing from the breach.—*PARKER v. CATHCART* (1866), 17 I. C. L. R. 778.—IR.

380 ix. —[*J*.]—Substantial damages are recoverable for breach of an agreement, though such damages arise from loss of prospective & speculative

profits.—*STOUT & Co., LTD. v. WOODROFFE & Co.* (1901), 20 N. Z. L. R. 506.—N.Z.

380 x. —[*J*.]—If a party to a contract fails to perform his obligations in the manner stipulated in the contract he is liable for any damage directly resulting to the other party from his breach of the contract.—*LOEWENSTEIN v. ROBINSON* (1913), App. D. 111.—S. AF.

386 i. — Reasonable sum.—In an action for damages for breach of contract the proper rule is to ascertain what would under ordinary circumstances be fair remuneration for the breach.—*KING v. IVANHOE GOLD CORPN., LTD.* (1908), 7 C. L. R. 617.—AUS.

386 i. — Sum fixed & agreed upon between parties.—Where a sum is fixed by the contract pltf. need not prove his damage but the measure of damages will be such sum.—*THOMPSON v. LEACH* (1868), 18 C. P. 141.—CAN.

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160; *affd.* on other grounds (1770), Wilm. 364, Ex. Oh.

Annotations:—*As to (1) Consd. Wall v. Rederaktiebolaget Luggude*, [1915] 3 K. B. 68. *Refd. Hurst v. Hurst* (1849), 4 Exch. 571. *As to (2) Refd. Fletcher v. Dyche* (1877), 2 Term Rep. 32; *Astley v. Weldon* (1801), 2 Bos. & P. 346; *Galworthy v. Strutt* (1848), 1 Exch. 659; *Mercer v. Irving* (1858), 27 L. J. Q. B. 291. *Generally, Mentd. Gibson v. Dickie* (1815), 3 M. & S. 463; *Morley v. Renoldson*, *Morley v. Linkson* (1843), 2 Hare, 570; *Godfrey v. Hughes* (1847), 5 Notes of Cases 499; *Hilton v. Eokersley* (1856), 8 E. & B. 66; *Hall v. Wright* (1858), E. B. & E. 765; *Davis v. Bomford* (1860), 6 H. & N. 245; *Lagh v. Lillie* (1860), 6 H. & N. 165; *Newton v. Marsden* (1862), 2 John. & H. 356; *Deverill v. Burnell* (1873), 42 L. J. C. P. 214; *Southill Upper U. C. v. Wakefield R. C.*, [1905] 2 Ch. 516; *Re Hewett, Eldridge v. Hes*, [1918] 1 Ch. 458.

389. — Intention of parties.]—To ascertain what are the damages payable on a breach of contract, it is to be ascertained what is the object of the contract contemplated by the parties.—*DUCKWORTH v. EWART* (1863), 2 H. & C. 129; 33 L. J. Ex. 24; 9 L. T. 297; 10 Jur. N. S. 214; 12 W. R. 608; 159 E. R. 54.

390. Contract to grant a lease—On forbearance to execute judgment—Value of lease.]—Pltf. having recovered judgment against W., deft. promised that if pltf. would forbear to issue execution against W., she would, on or before a certain day, erect a house, & cause a lease of the same to be granted to pltf. Pltf. promised that such lease, when granted, should be in full satisfaction of the judgment. In an action against deft. for not erecting the house & causing the lease to be granted:—*Held*: the measure of damages was the value of the lease, & not the difference between the value of the judgment & the value of the lease.—*STRUTT v. FARLAR* (1847), 16 M. & W. 249; 16 L. J. Ex. 84; 153 E. R. 1181.

391. Contract to do one of two things—Loss by failure to do that least beneficial.]—Where a man is bound by covenants to do one of two things, & does neither, there in an action by the covenantee, the measure of damage is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most, beneficial to the covenantee (LORD CRANWORTH, L.J.).—*ROBINSON v. ROBINSON* (1851), 1 De G. M. & G. 247; 21 L. J. Ch. 111; 18 L. T. O. S. 293; 16 Jur. 255; 42 E. R. 547, L. J.J.

Annotations:—*Refd. Re Campbell, Campbell v. Campbell* (1893) 3 Ch. 468; *McIlquham v. Taylor*, [1895] 1 Ch. 53. *Mentd. Morgan v. Morgan* (1851), 14 Beav. 72; *Knott v. Cottee* (1852), 16 Beav. 77; *Aspland v. Watte* (1855), 20 Beav. 474; *Mortimore v. Mortimore* (1859), 4 De G. & J. 472; *Bradley v. Cartwright* (1867), L. R. 2 C. P. 511; *Fisher v. Gilpin* (1869), 38 L. J. Ch. 230; *De Cordova v. De Cordova* (1879), 4 App. Cas. 692; *Cavendish v. Cavendish* (1885), 30 Ch. D. 227; *Re Christmas, Martin v. Lacon* (1885), 30 Ch. D. 544; *Re Massingberd's Settlement, Re Clark's Settlement, Clark v. Trelawny* (1889), 59 L. J. Ch. 107; *Re Godwin's Settlement, Godwin v. Godwin* (1918), 87 L. J. Ch. 645.

392. — — —.]—A declaration stated that pltf. having shipped certain goods to a place abroad drew against the shipment & entrusted the drafts to deft. for presentment, for reward to deft., on the terms that deft. should return the drafts if not paid after acceptance to pltf., or pay pltf. the amount of them, & that all conditions were performed, etc., necessary to entitle pltf. to a return of the drafts or to payment of the amount of them, yet deft. did not return the drafts nor pay the amount of them:—*Held*: the damages on the contract alleged in the declaration must be the amount of the bills.

The contract as alleged in the declaration being a contract in the alternative, it might be performed by performance of either branch of the alternative at the election of deft., & therefore the damages might be the value of the bills, if of less

value than the amount for which they were drawn (BOVILL, C.J.).—*DEVERILL v. BURNELL* (1873), L. R. 8 C. P. 475; 42 L. J. C. P. 214; 28 L. T. 874.

Annotations:—*Refd. McIlquham v. Taylor*, [1895] 1 Ch. 53; *Re National Standard Life Assce. Corp'n.* (1911), 27 T. L. R. 271; *Abrahams v. Relach* (1922) 1 K. B. 477. *Mentd. Dollar v. Blood Holman* (1920) 36 T. L. R. 843.

393. Non-payment of money—Interest.]—No matter what the amount of inconvenience sustained by pltf., in the case of non-payment of money, the measure of damages, is, the interest of the money only (WILLES, J.).—*FLETCHER v. TAYLEUR* (1855), 17 C. B. 21; 25 L. J. C. P. 65; 26 L. T. O. S. 60; 139 E. R. 973.

Annotations:—*Expld. Duckworth v. Ewart* (1863), 33 L. J. Ex. 24. WILLES, J., in *Fletcher v. Tayleur* must be there speaking only of an ordinary debt, for it cannot apply to a covenant to pay money (MARTIN, B.). *Refd. British Columbia Saw-Mill Co. v. Nettleship* (1868), L. R. 3 C. P. 499; *Sapwell v. Bass* (1910) 2 K. B. 486. *Mentd. Gee v. L. & Y. Ry.* (1860) 30 L. J. Ex. 11; *Wilson v. L. & Y. Ry.* (1861), 9 C. B. N. S. 632; *Wilson v. Newport Dock Co.* (1866), 14 L. T. 230; *Hobbs v. L. & S. W. Ry.* (1875), 32 L. T. 252; *Gracie (Owners) v. Argentino (Owners)*, *The Argentino* (1889), 61 L. T. 706; *Credito Italiano v. Swiss Bankverein* (1916), 114 L. T. 776.

As to interest under Civil Procedure Act, 1833 (c. 42), s. 28, & damages in lieu of such interest.]—See MONEY & MONEY LENDING.

394. — Amount of money due.]—It is of course elementary that as a general rule the amount of damages for non-payment of money is only the amount of the money itself (ROWLATT, J.).—*URQUHART LINDSAY & CO., LTD. v. EASTERN BANK, LTD.*, [1922] 1 K. B. 318; 91 L. J. K. B. 274; 126 L. T. 534; 27 Com. Cas. 124.

Annotation:—*Mentd. Prosperity v. Lloyds Bank* (1923), 39 T. L. R. 372.

395. Contract to lend money—Special contract to honour drafts out of moneys placed to credit—Substantial damages—Not merely principal & interest.]—*LARIOS v. BONANY Y GURETY*, No. 25, ante.

396. — Loss sustained by breach—Substantial or nominal damages.]—C. proposed to H., the general manager of the M. & O. Bank, that the bank should advance him £8,300, to enable him to conclude a contract for the purchase of an unpaid vendor's interest in a colliery. H. had authority to make the advance. An agreement between C. & the bank, providing for the loan of the money by the bank, & the mtge. of the interest in the colliery to be purchased to the bank to secure repayment of the loan & charges, was prepared by a solr. on H.'s instructions, & signed by C. H. then declined to make the agreement without consulting the directors, & obtained C.'s signature to a document to the effect that the agreement was subject to the approval of the directors. On the same day, after a meeting of the directors, H. told C. that the directors approved, & that the bank would advance the money. The agreement was never signed by any one on behalf of the bank. Subsequently H. told C. he ought to be more firmly bound to take the money from the bank, & induced him to sign a document to the effect that, in consideration of the bank's agreeing to carry out the arrangements mentioned in the agreement, he agreed to pay the bank charges named therein, whether the bank carried through the transaction or not. In fact, the directors did not approve of the agreement, & H. acted under the erroneous impression that they did. The bank refused to find the money, & C. was, in consequence, unable to complete his contract:—*Held*: notwithstanding it was an agreement to lend money, C. was, under the circumstances, entitled to substantial, & not

merely nominal damages.—**MANCHESTER & OLD-HAM BANK, LTD. v. COOK (W. A.) & Co.** (1883), 49 L. T. 674.

397. — — — — —.]—On a contract to make a loan of money, the measure of damages is the loss sustained by the breach, & the damages may be merely nominal. For instance, if A. agrees to lend B. £100 at interest for a week, & makes default, & B. within a few minutes after the time at which the £100 ought to have been lent, obtains from his bankers a loan of £100 at the same rate of interest & for the same period of time, the damages would be merely nominal (**CHITTY, J.**).—**WESTERN WAGON & PROPERTY Co. v. WEST**, [1892] 1 Ch. 271; 61 L. J. Ch. 244; 66 L. T. 402; 40 W. R. 182; 8 T. L. R. 112; 36 Sol. Jo. 91.

Annotations.—**Reid, May v. Lane** (1894), 43 W. R. 58; **South African Territories v. Wallington**, [1897] 1 Q. B. 692; **Erie County Natural Gas & Fuel Co. v. Carroll**, [1911] A. C. 105. **Mentl. Blake v. Halse** (1892), 36 Sol. Jo. 733; **Torkington v. Magee**, [1902] 2 K. B. 427.

See, further, MONEY & MONEY LENDING.

Agreement by banker to accept bills—Bills dishonoured after acceptance—Liability of acceptor for charges paid.—*See BANKERS & BANKING, Vol. III., p. 296, No. 942 et seq.*

398. Agreement to subscribe for debentures—Actual loss caused by breach—Not amount of unpaid instalments.—The rule that specific performance cannot be granted in respect of a contract to lend money applies to a contract to lend to a co. money, payable by instalments, upon the security of debentures to be issued by the co. Where the lender makes default in payment, the moneys due for unpaid instalments do not constitute a debt to the co., & the co. are only entitled to damages for the actual loss caused by the breach of contract.—**SOUTH AFRICAN TERRITORIES v. WALLINGTON**, [1898] A. C. 309; 67 L. J. Q. B. 470; 78 L. T. 426; 46 W. R. 545; 14 T. L. R. 298; 42 Sol. Jo. 361, H. L.

Annotations.—**Reid, Jarrah Timber & Wood Paving Corp'n. v. Samuel**, [1903] 2 Ch. 1; **Kuala Pah Rubber Estates v. Mowbray** (1914), 111 L. T. 1072; **Re Smelting Corp'n., Seaver v. The Co.**, [1915] 1 Ch. 472.

399. — — — — — **Difference between rate of interest offered & that actually paid—Not amount of money promised as loan.**—**BAHAMAS (INAGUA) SISAL PLANTATION, LTD. v. GRIFFIN** (1897), 14 T. L. R. 139.

400. — — — — — **General not merely nominal damages.**—Defts. agreed with pltf. syndicate to purchase debentures of pltf. syndicate. Defts. failed to carry out the agreement:—**Held**: pltf. syndicate was entitled to recover from defts. general, & not merely nominal, damages, for deft.'s breach of contract.—**WALLIS CHLORINE SYNDICATE, LTD. v. AMERICAN ALKALI CO., LTD.** (1901), 17 T. L. R. 656; 45 Sol. Jo. 654.

401. Contract to sink pit in search of coal—Loss of opportunity of finding coal.—Defts. covenanted with pltf., that if he would surrender to his lessor a certain lease, they would within two years, or within such period as should be agreed in a new lease, which the lessor had agreed to grant to them, sink upon the demised premises a pit to the depth of 130 yards in search of coal, & in case a marketable vein of coal should be reached, pay to pltf. £2,500. Pltf. having sued defts. for a breach of this covenant gave evidence to show that if defts. had sunk the pit, marketable coal might have been found:—**Held**: pltf. was entitled to more than nominal damages, & the true measure of damage was the amount which he had lost by being deprived of the opportunity of finding marketable coal.—**PELL v. SHEARMAN** (1855), 10 Exch. 766; 156 E. R. 650.

Annotations.—**Consd. Wiggell v. School for Indigent Blind**

(1882), 8 Q. B. D. 357. **Reid, Joyner v. Weeks**, [1891] 2 Q. B. 31.

See, further, MINES, MINERALS & QUARRIES.

402. Covenant to build dividing wall—Not cost of building—Injury to land.—The grantees of certain land had covenanted with the grantor, since deceased, that the land, except as to the entrance to be made by them towards an intended new road, should be & be kept enclosed on all the sides abutting on the land of the grantor with a brick wall seven feet high. The grantees not having erected a wall in pursuance of the covenant, an action was brought against them by the exors. & devisees of the grantor for damages for the breach of covenant. It appeared that, in the events that had happened, the value of the adjoining land of pltf. was not decreased by the non-erection of the wall to anything like the amount which it would have cost to build the wall:—**Held**: the true measure of damages being the pecuniary amount of the difference between the position of pltf. upon the breach of contract & what it would have been if the contract had been performed, under the circumstances of the case the amount that it would cost to build the wall was not the correct measure of the damages.—**WIGSELL v. SCHOOL FOR INDIGENT BLIND** (1882), 8 Q. B. D. 357; 51 L. J. Q. B. 330; 46 L. T. 422; 30 W. R. 474.

Annotations.—**Apld. Marshall v. Mackintosh** (1898), 46 W. R. 580. **Reid, Joyner v. Weeks**, [1891] 2 Q. B. 31.

403. Contract to allot land—Highest value acquired by land.—In an action brought by way of petition of right against the Colonial Govt. for not granting an allotment of land pursuant to contract, it was proved that the governor, in order to induce D., to settle there, promised him a grant of land at W., & that D. gave up his claim to an allotment at W. in consideration of a promise to grant an allotment at H., which latter was not carried out:—**Held**: the measure of damages for breach of such a contract is the highest value which such land as had not been allotted had acquired.—**ROBERTSON v. DUMARESQ** (1864), 2 Moo. P. C. C. N. S. 66; 3 New Rep. 587; 10 L. T. 110; 13 W. R. 280; 15 E. R. 827, P. C.

404. Transfer of securities pledged—Substantial damages if pledge in hands of second pawnee—Or owner prejudiced by delay in redemption.—To a declaration in detinue for debentures, deft. pleaded that before the alleged detention pltf. deposited the debentures with S. as security for the repayment at maturity of the bill of exchange indorsed by pltf., & discounted by S., & upon the agreement that S. should have power to sell or otherwise dispose of the debentures if the bill was not paid when it became due; that the bill was not paid, but was dishonoured; that before the alleged detention & the commencement of this suit S. deposited the debentures with deft., to be by him kept as a security for & until the repayment by S. to deft. of certain sums of money advanced by him to S. upon the securities of the debentures, which sums of money have been & remain wholly unpaid to deft.:—**Held**: the transfer of a pledge under such circumstances amounts only to a breach of contract, upon which the owner may bring an action for nominal damages, if he has sustained no substantial damage, or for substantial damages if the thing pledged is damaged in the hands of the second pawnee, or if the owner has been prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged.—**DONALD v. SUCKLING** (1866), L. R. 1 Q. B. 585; 7 B. & S. 783; 35

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L. J. Q. B. 232; 14 L. T. 772; 30 J. P. 565; 12 Jur. N. S. 795; 15 W. R. 13.

Annotations.—*Reid*, Halliday v. Holgate (1868), L. R. 3 Exch. 299; Mulliner v. Florence (1878), 3 Q. B. D. 484; Cox v. Liddell (1896), 2 Mans. 213. *Mentl*, Webb v. Whinnery (1868), 18 L. T. 523; Burdick v. Sewell (1883), 10 Q. B. D. 363; Deverges v. Sandeman, Clark, [1902] 1 Ch. 579; Ponsford, Baker v. Union of London & Smiths Bank (1908), 76 L. J. Ch. 724; The Odessa, The Woolston, [1916] 1 A. C. 145; Whiteley v. Hilt, [1918] 2 K. B. 808.

See, further, PAWNS & PLEDGES.

405. Covenant not to carry on business—Injury suffered by assignee of covenantor.—Defts. assigned to pltf. a business they carried on in partnership on certain premises. In the deed of assignment they covenanted not to carry on the business within a certain area, nor to do any act, whereby pltf., his exors., administrators, or assigns, or any other person or persons, claiming or to claim under him or them, should or might be injured or damaged in the trade or business. Subsequently pltf. assigned to A. & B. "the business in its entirety & the goodwill thereof as carried on by pltf. upon the premises," & engaged that he would not, after the transfer of the said business, carry on a similar business within a certain area. There was not, however, any express assignment of the benefit of defts.' covenant to A. & B., but the memorandum containing the terms of the assignment stipulated that all proper deeds & documents should be prepared & signed by the necessary parties. After the assignment to A. & B. defts. committed a breach of their covenant with pltf. by carrying on business within the specified area:—*Held*: pltf. was entitled to recover substantial, & not merely nominal damages, as a trustee for A. & B., his assignees.—*WRIGHT v. CHAPPEL* (1869), 20 L. T. 369; 17 W. R. 655.

406. Contract for sale of business—Market value unascertainable.—In a breach of contract where a vendor is entitled to recover nothing as purchase-money, but is entitled to compensation for the loss & injury he has sustained by the breach of contract, the measure of the damage is the difference between the price fixed by the contract & the market value at the time of the breach. But when the market value is unascertainable, & a serious loss & injury is proved, the ct., acting on the principle that no wrong done is to remain without redress, awards substantial damages. Such damages must not be greater in amount than the amount the vendor would have been entitled to under the contract if it had been punctually carried out.—*Re LAFFITTE & Co., LAFFITTE'S CLAIM* (1874), 23 W. R. 379; *subsequent proceedings* (1875), 10 Ch. App. 316. L. J.J.

407. Contract to devise house for life—Value of contingent life estate.—A., as inducement to B. to marry him, promised in writing to leave a house to her for life. B. consented & married A. A. conveyed the house by deed to a third party:—*Held*: as A. had put it out of his power to perform the contract, an immediate right of action accrued to B. & the measure of damages was the value of the possible life estate to which B. would be entitled if she survived A.—*SYNGE v. SYNGE*, [1894] 1 Q. B. 466; 63 L. J. Q. B. 202; 70 L. T. 221; 58 J. P. 396; 42 W. R. 309; 10 T. L. R. 194; 9 R. 265, C. A.

Annotations.—*Reid*, *Re Cavendish Browne's Settltmt. Trusts*, *Horner v. Rawle* (1916), 61 Sol. Jo. 27. *Mentl*, *Central Trust & Safe Deposit Co. v. Snider*, [1916] 1 A. C. 266.

408. Contract to give option on shares of company—Sale of assets of company—Price paid by purchasing company.—Where a co. having agreed to give to certain persons an option or call upon certain of its shares at a specified price per share,

extending to a particular date, subsequently & before the expiration of the stipulated period entered into a contract with another co. for the sale & transfer of its assets to that co., thereby causing a breach of the contract creating the option:—*Held*: in estimating the damages, if any, sustained by the option holders by reason of such breach of contract, the price paid for the assets by the purchasing co. ought alone to be taken into account, & not the assets comprised in the contract with that co.—*Re SOUTH AFRICAN TRUST & FINANCE Co., LTD., Ex p. HIRSCH & Co.* (1898), 74 L. T. 769; 12 T. L. R. 493; 40 Sol. Jo. 599, C. A.

409. Contract to divide net profits & lump sum—Liquidation of company—Loss of share of lump sum.—In Mar. 1902, the I. Co. offered a bonus to those who would enter into exclusive relations with it. Deft. co. issued in reply its bonus scheme, & on May 24, 1902, pltf. signed it. By this contract pltf. agreed not to sign the I. bonus scheme or any other similar scheme containing any condition which would prevent him from buying, etc., deft.'s goods or the goods of any other manufacturer. Deft. co. on its part undertook for four years to distribute among such customers as purchased direct from the co. its entire net profits on the goods sold by it in the United Kingdom, & in addition to distribute during the four years commencing Apr. 2, 1902, the sum of £200,000 *per annum*. Deft. co. in nine months made a trading loss of nearly half a million sterling. On Sept. 27, 1902, deft. co. sold its business to the I. Co., & then went into voluntary liquidation. In Dec. 1902, after this purchase, pltf. signed a bonus agreement of the I. Co. which differed from their bonus agreement of Mar. 1902, in that it contained no clause limiting pltf. in his choice of manufacturers, & his signing did not violate any term of deft. co.'s bonus scheme. Under this scheme of Dec. 1902, pltf. received £520, £62 of which was in respect of deft.'s goods sold by the I. Co.:—*Held*: pltf. could not recover damages under the head of a loss of a share of the net profits, but that he was entitled to damages for the failure to distribute the £200,000 *per annum*, & the amount he received from the I. Co. under their scheme of Dec. 1902, ought not to be taken into consideration in assessing them except as to the £62.—*NATHAN v. OGDENS, LTD.* (1906), 95 L. T. 458.

410. Clause fixing liquidated damages—Subsequent alteration of terms of contract.—Before the war deft. agreed to perform twice every evening as a comedian at pltf.' music-hall for one week beginning on Oct. 12, 1914, at a salary of £150. The contract provided that "in case the artist shall, except through illness, or accident, fail to perform at any performance, he should pay to the management as & for liquidated damages a sum equal to the sum which the artist would have received for such performance, in addition to costs & expenses incurred by the management through the default of the artist." After the outbreak of war an arrangement was come to between the managements of the various music-halls & the artists, including deft., that the gross receipts of the halls during the war should be divided into two equal parts, of which the management should take one part & the performers at the hall the other part, sharing that part in the proportion of their respective salaries. Deft. having failed to perform at pltf.' hall, they brought an action for damages against him:—*Held*: in order to ascertain the measure of damages the sum fixed in the contract had to be altered in view of the subsequent arrangement, & pltf. were entitled to recover such pro.

portion of the artists' share in the receipts which would probably have been received if deft. had performed his agreement, as deft. would have been entitled to.—*GOLDER'S GREEN AMUSEMENT & DEVELOPMENT CO., LTD. v. RELPH* (1915), 31 T. L. R. 848.

411. Contract to print & publish book—Loss of sale of such number as might reasonably be sold.]—A firm of publishers agreed with the authors of a series of articles to print & publish the articles, first in a magazine on certain terms, & after that in the form of a book on the terms of paying the authors 4d. for every copy of the book sold. The form & price of the book, the number of copies to be printed, & the date of the publication were left to the discretion of the publishers. They printed & published the articles in the magazine upon the agreed terms, but refused to print or publish them in the form of a book. In an action by the authors for damages for breach of the contract:—*Held*: defts. could not limit the damages to 4d. a copy upon the smallest number of copies that could be described as a publication of the book. They were bound to publish such a number as was reasonable in all the circumstances, & the damages were to be measured by the amount pltf. lost through defts.' refusal to do this.—*ABRAHAM v. REIACH (HERBERT), LTD.*, [1922] 1 K. B. 477; 91 L. J. K. B. 404; 126 L. T. 546; 66 Sol. Jo. 390, C. A.

412. Contract to advertise.]—MARCUS v. MYERS & DAVIS, No. 177, ante.

Contract for sale of goods.]—See SALE OF GOODS.

Contract for sale of land.]—See SALE OF LAND.

Particular contract.]—See particular titles passim.

Requisition of ship by Admiralty—Under Defence of the Realm Act.]—See CONSTITUTIONAL LAW, Vol. XI., p. 550, No. 524.

SUB-SECT. 2.—IN TORT.

See, generally, TORT.

Directness & remoteness.]—See Part III., ante.

Aggravation & mitigation.]—See Part IV., ante.

Particular instances.]—See Sect. 2, post.

413. General rule.]—There must be some reasonable relation between the wrong done & the solatium applied (HAMILTON, L.J.).—GREENLANDS LTD. v. WILMSHURST & LONDON ASSOCN. FOR PROTECTION OF TRADE, [1913] 3 K. B. 507; 83 L. J. K. B. 1; 109 L. T. 487, C. A.; *reversd.* on

other grounds, *sub nom.* LONDON ASSOCN. FOR PROTECTION OF TRADE v. GREENLANDS, LTD., [1916] 2 A. C. 15, H. L.

Annotations:—*Mentl.* Hobson v. Leng, [1914] 3 K. B. 1245; Wiffen v. Bailey & Romford U. D. C. (1914), 112 L. T. 274; Adam v. Ward, [1917] A. C. 309; Thomas v. Moore, [1918] 1 K. B. 555; Pratt v. British Medical Asscn., [1919] 1 K. B. 244.

414. Court or jury must consider all circumstances.]—In an action of trespass *quare clausum fregit*, it was proved that deft. had let his land to pltf. under terms reduced into writing. One stipulation was, that pltf. should have a right to take two-thirds of the corn sown, & left by him growing on the land at his leaving it at Lady-day, the custom of the country being that he should have the whole. Deft. had refused to let pltf. cut the corn, but had turned his labourers off the land, & cut & carried all into his own barns. The value of the corn was about £285. The jury found a verdict for pltf., with £315 damages:—*Held*: the excess was not so large as not to be covered by the circumstances of the trespass as proved, & it was certainly no ground for disturbing the verdict, the jury being entitled to take into consideration the nature of the case, & were not bound to a minute calculation of value.—*COX v. DUGDALE* (1823), 12 Price, 708; 147 E. R. 853.

415. —.]—A. hired a steamboat for the day, to convey himself & others, not exceeding fifty in number, on an excursion. The captain, steward, & crew, were the servants of & paid by the proprietor. A stranger, not of the party, was allowed to come on board by the captain, & being desired to quit, refused, whereupon A., with the assistance of others, removed him by force:—*Held*: A. had not such possession of the vessel as justified them in so doing.

You must, in considering the damages, take all the circumstances into your consideration, & if you think that defts. were in substance justified, then you should find your verdict for a farthing damages. But, if you think that they were not in substance justified, then you will give such damages as you think pltf. is entitled to (*ALDERSON, J.*).—*DEAN v. HOGG* (1833), 6 C. & P. 54; *subsequent proceedings* (1834), 10 Bing. 345.

Annotations:—*Mentl.* Fenton v. City of Dublin Steam Packet Co. (1838), 8 Ad. & El. 835; R. v. Sherard (1863), 33 L. J. M. C. 5; The Great Eastern (1868), L. R. 2 A. & E. 88; Roads v. Trumpington Overseers (1870), L. R. 6 Q. B. 58.

416. —.]—MOLD v. WHEATCROFT, No. 50, ante.

417. —.]—In estimating damages, the nature of the property & position of the parties is to be considered.—KREHL v. PARK (1874), 31 L. T. 325;

PART V. SECT. 1, SUB-SECT. 2.

413 i. General rule.]—The measure of damages is full compensation for the loss actually sustained. The person is to be put in the same position, so far as money will do it, as if the wrongful act had not been done.—REGISTRAR OF TITLES v. SPENCER (1909), 9 C. L. R. 641.—AUS.

413 ii. —.]—The principle upon which damages in actions for torts are given is to place the injured person in the same situation so far as money can do it as he would have been in had the occurrence which affected him adversely not taken place.—PORTEOUS v. CHOTEM, [1920] 2 W. W. R. 1.—CAN.

414 i. Court or jury must consider all the circumstances.]—In action of tort, the jury are not limited to the actual damage sustained by pltf.—ROSE v. BELTEA (1867-8), 1 Han. 109.—CAN.

414 ii. —.]—In assessing damages

caused by the death of a husband & father to his widow & children, a jury is not restricted to a consideration of the wage-earning capacity of deceased; they are justified in making a further allowance for any material aid & assistance, apart from money, which pltf. might have expected from him, had he lived.—*DUMPHY v. MONTREAL LIGHT, HEAT & POWER CO.* (1905), Q. R. 28 S. C. 18.—CAN.

414 iii. —.]—In estimating the damages the likely consequences of the injury should be taken into account.—MCLEOD v. MEEK (1908), 6 Terr. L. R. 431.—CAN.

414 iv. —.]—The jury is bound to consider all the circumstances which may aggravate or mitigate the damages.—SLATER v. WATTS (1911), 16 B. C. R. 36.—CAN.

414 v. —.]—In estimating the amount of damages to be awarded to a pltf. for an injury the jury should

take into consideration the chances & accidents of life & other elements.—*PICKERING v. GRAND TRUNK PACIFIC RY. CO.* (1913), 26 W. L. R. 77.—CAN.

414 vi. —.]—In ascertaining the proper amount of compensation for injuries the jury should take into account the accidents of life & other matters, & the fact that pltf. had not been completely disabled, if such be the case.—ANDERSON v. FORRESTER (1914), 30 W. L. R. 378; 7 W. W. R. 1039.—CAN.

414 vii. —.]—Pltf. in an action for personal injuries is entitled to a fair compensation, having regard to his health, habits, occupation, to the fact that they will not be as great in later years, that he may voluntarily retire from his profession, or may be overtaken by sickness or other inevitable accident.—MORGAN v. EDMONTON CITY, [1917] 2 W. W. R. 591.—CAN.

Sect. 1.—Generally: Sub-sect. 2. Sect. 2. Part VI.
Sect. 1: Sub-sects. 1 & 2.]

32 W. R. 477, L. J.J.; *subsequent proceedings* (1875), 10 Ch. App. 334, L. J.J.

Annotation:—Mentd. Re Lavey, Cohen v. Cohen, [1920] 3 K. B. 625.

418. —.]—(1) Where plff. has obtained a verdict in an action for libel, the ct. will not grant a new trial on the ground of excessive damages, unless they think that, having regard to all the circumstances of the case, the damages are so large that no jury could reasonably have given them. (2) In assessing damages the jury are entitled to take into consideration the whole conduct of deft. in the matter from the time the libel was published down to the time their verdict is given.—**PRAED v. GRAHAM** (1889), 24 Q. B. D. 53; 59 L. J. Q. B. 230; 38 W. R. 103, C. A.

Annotations:—As to (1) Consd. Johnston v. G. W. Ry., [1904] 2 K. B. 250. Refd. Chattell v. Daily Mail Publishing Co. (1901), 18 T. L. R. 155. As to (2) Follid. Anderson v. Calvert (1908), 24 T. L. R. 399. Refd. Parnell v. Walter (1890), 38 W. R. 270; Sorrell v. Smith, [1923] 2 Ch. 32.

419. —.]—JOHNSTON v. GREAT WESTERN Ry., No. 751, *post*.

420. —.]—Plff.'s are not limited to actual pecuniary damages suffered by them. The ct. or jury, once actual financial loss be proved, may award a sum appropriate to the whole circumstances of the tortious wrong inflicted (McCARDIE, J.).—**PRATT v. BRITISH MEDICAL ASSOCN.**, [1919] 1 K. B. 244; 88 L. J. K. B. 628; 120 L. T. 41; 35 T. L. R. 14.

Annotations:—Mentd. Valentine v. Hyde, [1919] 2 Ch. 129; Davies v. Thomas, [1920] 1 Ch. 217; Hodges v. Webb, [1920] 2 Ch. 70; Sald v. Butt, [1920] 3 K. B. 497; Ware & De Freville v. Motor Trade Asscn., [1921] 3 K. R. 40; British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. Co., [1922] 2 K. B. 260.

421. Refusal to assign judgment debt—Value of assets which would have been available for judgment.]—In an action for damages for wrongfully refusing to assign a judgment debt, plff. is, *primâ facie*, entitled to recover as damages the value of specific assets which would have been available for execution under the judgment, if assigned.—**ODDY v. HALLETT** (1885), 1 Cab. & El. 532.

SECT. 2.—IN PARTICULAR INSTANCES.

Auctioneer—Breach of duty by.]—See AUCTION & AUCTIONEERS, Vol. III., p. 45, No. 319.

Bailment—In regard to.]—See BAILMENT, Vol. III., pp. 88, 97, 98, 99, 113, 114, Nos. 213–216, 262, 267, 274, 370–375.

Bank paying cheque contrary to agreement.]—See BANKERS & BANKING, Vol. III., p. 187, No. 375.

Bankruptcy.]—See BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 257, 312, Nos. 2444, 2923; Vol. V., pp. 825, 957, 981, 982, Nos. 7005, 7006, 7851, 8029–8033.

Bills of Exchange.]—See BILLS OF EXCHANGE, PROMISSORY NOTES, & OTHER NEGOTIABLE INSTRUMENTS, Vol. VI., pp. 325–340, 347, 356, Nos. 2156–2259, 2307, 2308, 2351.

Bills of Sale.]—See BILLS OF SALE, Vol. VII., pp. 133–135, Nos. 756–760.

Boundaries.]—See BOUNDARIES, FENCES & PARTY WALLS, Vol. VII., p. 293, No. 198.

Building Contracts.]—See BUILDING CONTRACTS, Vol. VII., p. 387, 389–391, Nos. 224, 226–230.

Carriers.]—See CARRIERS, Vol. VIII., pp. 106–108, 137–143, Nos. 708–727, 901–946.

Cheques dishonoured by bank.]—See BANKERS & BANKING, Vol. III., p. 217, 218, Nos. 549–554.

Collision.]—See ADMIRALTY, Vol. I., p. 145, Nos. 519–523; SHIPPING & NAVIGATION.

Compulsory purchase of land.]—See COMPULSORY PURCHASE OF LAND & COMPENSATION, Vol. XI., pp. 124 *et seq.*, Nos. 156 *et seq.*

Copyright.]—See COPYRIGHT, Vol. XIII., p. 220, Nos. 576, 577.

Cultivation—Breach of covenant in regard to.]—See AGRICULTURE, Vol. II., p. 15, No. 67.

Damage to or by animals.]—See ANIMALS, Vol. II., pp. 222, 253, 271, 272, 296, Nos. 147, 148, 349, 486–496, 666, 667.

Lights—Wrongful obstruction of.]—See EASEMENTS & PROFITS A PRENDRE.

Maintenance.]—See ACTIONS, Vol. I., pp. 88, 89, Nos. 722–728.

Patent—Infringement of.]—See PATENTS & INVENTIONS.

Principal & Agent.]—See AGENCY, Vol. I., pp. 320, 486–488, 509, 542, 664–667, Nos. 395, 1648–1663, 1754, 1952–1956, 2791–2805.

Savings bank deposit book lost by bank.]—See BANKERS & BANKING, Vol. III., p. 137, No. 111.

Seduction.]—See MASTER & SERVANT.

Trespass.]—See TRESPASS.

Undertaking as to damage.]—See INJUNCTION.

Witness—Failure to attend trial.]—See EVIDENCE.

In respect of particular relations, e.g. Landlord & Tenant; Libel & Slander; Master & Servant; Mines Minerals & Quarries; Money & Money Lending; Negligence; Nuisance; Sale of Goods; Sale of Land; Trespass; Trover & Conversion.]—See respective titles.

Part VI.—Liquidated Damages or Penalty.

SECT. 1.—HOW DETERMINED.

SUB-SECT. 1.—IN GENERAL.

422. Question of law for the Court.]—(1) A. & B. entered into the following agreement:—"In consideration that A. of M., surgeon & apothecary, will engage me, B., as assistant to him as a surgeon, etc., I, B., promise A., that I will not at any time practice as surgeon or apothecary at M., or within seven miles thereof, under a penalty of £500; & I, A., do hereby agree with B. to engage B. as an assistant to me as a surgeon, etc., on the terms

aforesaid." In *assumpsit* by A. against B. for a breach of this agreement:—**Held:** the £500 was not a penalty, but liquidated damages.

(2) It is now settled, that, whether the sum mentioned in an agreement to be paid for a breach, is to be treated as a penalty or as liquidated & ascertained damages, is a question of law to be decided by the judge upon a consideration of the whole instrument (WILDE, C.J.).

(3) Although the word "penalty," which would *primâ facie* exclude the notion of stipulated

PART VI. SECT. 1, SUB-SECT. 1.

423 1. Question of law for the court.]—Where in a contract a clause provides

for payment of a definite amount by one party on breach of the agreement, & thereafter, on breach of that party, the other sues for the recovery of that

sum, the ct. will decide from the terms of the agreement & the circumstances of the case whether or not the words provide for payment of the sum as

damages, is used here, yet we must look at the nature of the agreement & the surrounding circumstances, to see whether the parties intended the sum mentioned to be a penalty or stipulated damages (COLTMAN, J.).

(4) If there be only one event upon which the money was to become payable & there is no adequate means of ascertaining the precise damage that may result to pltf. from a breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation, in order to avoid the difficulty (CRESSWELL, J.).—*SAINTER v. FERGUSON* (1849), 7 C. B. 716; 18 L. J. C. P. 217; 13 L. T. O. S. 72; 13 Jur. 828; 137 E. R. 283. *Annotation*:—*As to* (1) *Folld. Mercer v. Irving* (1858), 27 L. J. Q. B. 291.

423. —.]—(1) Where a lease of a farm contained a covenant by the lessees not to sell hay or straw off the premises during the last twelve months of the term, but to consume the same on the premises & provided that an additional rent of £3 a ton should be payable by way of penalty for every ton of hay or straw so sold, & it appeared that there was a substantial difference between the manurial value of hay & that of straw:—*Held*: the sum so made payable was a penalty & not liquidated damages.

(2) The question in this case is whether the sum of £3 per ton, is, upon the true construction of the lease, a penalty or liquidated damages. That question is one of construction, which is for the judge alone (LORD ESHER, M.R.).

(3) A succession of judges have held that the use of the term "penalty" or "liquidated damages" is not conclusive; but no case decides that the term used by the parties themselves is to be altogether disregarded, & where the parties themselves call the sum made payable a "penalty," the *onus* lies on those who seek to show that it is to be payable as liquidated damages (LORD ESHER, M.R.).

(4) Where a sum is made payable by a contract to secure performance of several stipulations, the damages for the breach of which respectively must be substantially different, or, in other words, the performance of stipulations of varying degrees of importance, that sum is *prima facie* to be regarded as a penalty & not as liquidated damages (A. L. SMITH, L.J.).—*WILSON v. LOVE*, [1896] 1 Q. B. 626; 65 L. J. Q. B. 474; 74 L. T. 580; 44 W. R. 450, C. A.

Annotations:—*As to* (1) *Distd. Diestal v. Stevenson*, [1906]

2 K. B. 345. *Consd. Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A. C. 79. *Reid. Bradley v. Walsh* (1903), 88 L. T. 737. *As to* (3) *Consd. Re White & Arthur* (1901), 84 L. T. 594.

SUB-SECT. 2.—PRE-ESTIMATE BY PARTIES.

424. *General rule.*—(1) The Spanish Govt. contracted with applts. for the building of four torpedo boats, delivery to be within periods varying from 6½ months to 7½ months from the date of the contracts. The contracts provided that "the penalty for later delivery shall be at the rate of £500 per week for each vessel." The vessels having been delivered many months after the stipulated period & the price paid, the Spanish Govt. claimed from applts. payment of £500 for each week of late delivery:—*Held*: the sum of £500 a week was to be regarded as liquidated damages & not as a penalty, & the Spanish Govt. were entitled to recover.

(2) This clause, sought to be enforced, is not a general penalty clause, but a specific agreement that sums of money, graduated according to time, shall be paid as penalties for delays in delivering these vessels. Now the ct. can only refuse to enforce performance of this pecuniary obligation if it appears that the payments specified were "merely stipulated in *terrorem*" & could not possibly have formed a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation" (LORD ROBERTSON).

(3) The ct. must proceed according to what is the real nature of the transaction & the mere use of the word "penalty" on the one side or "damages" on the other, would not be conclusive as to the rights of the parties (LORD HALSBURY, C.).—*CLYDEBANK ENGINEERING & SHIPBUILDING CO. v. YZQUIERDO Y CASTANEDA* (DON JOSE RAMOS), [1905] A. C. 6; 74 L. J. P. C. 1; 91 L. T. 686; 21 T. L. R. 58, H. L.

Annotations:—*As to* (1) *Appld. Diestal v. Stevenson*, [1906] 2 K. B. 345. *Consd. Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A. C. 79. *As to* (3) *Appld. Public Works Comr. v. Hills*, [1906] A. C. 368. *Reid. Diestal v. Stevenson*, [1906] 2 K. B. 345; *Webster v. Bosanquet*, [1912] A. C. 394. *Generally, Mentd. Kilmer v. British Columbia Orchard Lands*, [1913] A. C. 319.

liquidated damages or as a penalty.—*MANN & HARRIS v. COHEN*, [1902] T. H. 261.—S. AF.

422 II. —.]—*CHAFFER & TASSIE v. RICHARDS* (1905), 26 N. L. R. 207.—S. AF.

PART VI. SECT. 1, SUB-SECT. 2.

424 I. *General rule.*—The question whether a sum fixed in a contract to be paid by the person committing a breach of its provisions is to be treated as a penalty or liquidated damages depends upon whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation.—*LAMSON STORE SERVICE CO., LTD. v. RUSSELL WILKINS & SONS, LTD.* (1906), 4 C. L. R. 672.—AUS.

424 II. —.]—Defts. agreed in writing to supply plfts. with a boiler to be delivered not later than Mar. 1, 1910, failing which defts. agreed to pay plfts. \$25 for each & every working day after that date as & for liquidated damages & not as a penalty. The boiler was not delivered within the stipulated period:—*Held*: the sum named was to be deemed a pre-

assessment of the damages in case of a breach, & not a penalty.—*PELEE ISLAND NAVIGATION CO. v. DOTY ENGINE WORKS* (1911), 23 O. L. R. 402.—CAN.

424 III. —.]—Defts. agreed in the event of failure to make a good title by a fixed time to pay pltf. the sum of \$25,500, "being the amount agreed upon as the value" of the lands:—*Held*: the stipulation was, at the time it was made, a genuine pre-estimate by the parties of the probable or possible loss in consequence of a breach by defts.—*REIMER v. ROSEN*, [1919] 1 W. W. R. 429; 45 D. L. R. 1.—CAN.

424 IV. —.]—A proviso for retrospective enhancement of interest, in default of payment of the interest at a due date, is generally a penalty which should be relieved against; but a proviso for enhanced interest in the future cannot be considered as a penalty unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties.—*UMEDKHAM MAHA-MADEKHAN DESHMUKH v. SALEKHAN* (1892), 1 L. R. 17 Bom. 106.—IND.

424 V. —.]—The test is, was the agreement to pay damages for the breach of contract unconscionable & extravagant in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract.—*KHAGARAM DAS v. RAMSANKAR DAS PRAMANIK* (1914), 1 L. R. 42 Calc. 652.—IND.

424 VI. —.]—A firm of timber merchants entered into a contract with a landed proprietor whereby they bought the standing timber under condition to clear it away by Apr. 1, 1918, under a penalty of 10s. a day until such was done. In Apr. 1919, the wood not having been cleared away, the proprietor brought an action against the timber merchants for payment of one year's penalty at the stipulated rate:—*Held*: although the sum of 10s. was described in the contract as a penalty, yet, as it was *ex facto* a reasonable pre-estimate of the loss, & not a mere random figure, & was not availed by defr. to be exorbitant, is free to be regarded as liquidated damages & not as a penalty.—*CAMERON-HEAD v. CAMERON & CO.*, [1919] S. C. 627.—SCOT.

Sect. 1.—How determined: Sub-sects. 2 & 3.]

425. —[—(1) Under a stipulation in a contract the criterion whether a sum described either as penalty or liquidated damages is truly liquidated damages, & as such not to be interfered with by a ct., or a penalty which covers, but does not assess the damage, lies in the ascertainment whether the sum stipulated for can or cannot be regarded as a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation, or is a sum liable to fluctuation in amount according to circumstances.

(2) It is well-settled law that the mere expression, "penalty" or "liquidated damages" does not conclude the matter. Indeed the form of expression here, "forfeited as & for liquidated damages," if literally taken, may be said to be self-contradictory, the word "forfeited" being peculiarly appropriate to penalty & not to liquidated damages (*LORD DUNEDIN*).—*PUBLIC WORKS COMB. v. HILLS*, [1906] A. C. 368; 75 L. J. P. C. 69; 94 L. T. 833, P. C.

Annotation:—As to (2) Rejd. Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co., [1915] A. C. 79.

426. —[—(1) Where a single sum is agreed to be paid as liquidated damages on the breach of a number of stipulations of varying importance, & the damage is the same kind for every possible breach & is incapable of being precisely ascertained, the stipulated sum, provided it be a fair pre-estimate of the probable damage & not unconscionable, will be regarded as liquidated damages & not as a penalty.

(2) The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms & inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not at the time of the breach (*LORD DUNEDIN*).—*DUNLOP PNEUMATIC TYRE CO., LTD. v. NEW GARAGE & MOTOR CO., LTD.*, [1915] A. C. 79; 83 L. J. K. B. 1574; 111 L. T. 862; 30 T. L. R. 625, H. L.

Annotations:—As to (1) Apld. Ford Motor Co. (England) v. Armstrong (1915), 31 T. L. R. 267. *Generally, Rejd. Watts v. Mitsui*, [1917] A. C. 227. *Mentid. Dunlop Pneumatic Tyre Co. v. Selfridge* (1915), 84 L. J. K. B. 1680. *See, also, No. 444, post.*

SUB-SECT. 3.—INTENTION OF PARTIES.

427. General rule.—[—(1) By arts. of agreement between pltf. & deft. it was agreed on the part of the former that he should pay the latter so much per week to perform at his theatres, with her travelling expenses of removing from one theatre to another except extra baggage; & on the part of deft., that she should perform at the theatres such things as she should be required by pltf., & attend at the theatre beyond the usual hours on any emergency & at rehearsals or be subject to such fines as are established at the theatres, & be at the theatre half an hour before the performance begin, & abide by the regulations of the theatres & pay all fines; & it was agreed by both parties that "either of them neglecting to perform that agreement should pay to the other £200." *Assumpsit* upon this agreement stating several breaches, & concluding to pltf.'s damage of £200:—*Held*: the sum mentioned in the agreement was in the nature of a penalty, not of liquidated damages.

(2) Where articles contain covenants for the performance of several things, & then one large sum is stated at the end to be paid upon breach of

performance, that must be considered as a penalty. But where it is agreed that if a party do such a particular thing such a sum shall be paid by him, there the sum stated may be treated as liquidated damages (*HEATH, J.*).

(3) There is one case in which the sum agreed for must always be considered as a penalty; & that is, where the payment of a smaller sum is secured by a larger. In this case it is impossible to garble the covenants & to hold that in one case pltf. shall recover only for damages sustained, & in another that he shall recover the penalty; the concluding clause applies equally to all the covenants. If anything is to be collected from this form of declaration, it should seem that pltf. meant to sue only for the damages actually sustained (*CHAMBER, J.*).—*ASTLEY v. WELDON* (1801), 2 Bos. & P. 346; 126 E. R. 1318.

Annotations:—As to (1) Consd. Reilly v. Jones (1823), 1 Bing. 302; *Wallis v. Smith* (1882), 21 Ch. D. 243. *Rejd. Barton v. Glover* (1815), Holt, N. P. 43; *Crisdee v. Bolton* (1827), 3 C. & P. 240; *Cotton v. Bennett* (1884), 51 L. T. 70; *Ward v. Monaghan* (1895), 59 J. P. 392. *As to (2) Consd. Kemble v. Farren* (1829), 6 Bing. 141; *Galsworthy v. Scrutt* (1848), 1 Exch. 659; *Re Newman, Ex p. Capper* (1876), 4 Ch. D. 724; *Wallis v. Smith* (1882), 21 Ch. D. 243; *Elphinstone v. Monkland Iron & Coal Co.* (1886), 11 App. Cas. 332. *Rejd. Edwards v. Williams* (1813), 5 Taunt. 247; *Denton v. Richmond* (1833), 1 Cr. & M. 734; *Beckham v. Drake* (1849), 2 H. L. Cas. 579; *Ranger v. G. W. Ry.* (1854), 5 H. L. Cas. 72; *Reynolds v. Bridge* (1856), 6 E. & B. 528; *Law v. Redditch L. B.*, [1892] 1 Q. B. 127. *As to (3) Rejd. Boys v. Ancell* (1839), 5 Bing. N. C. 390; *Wallis v. Smith* (1882), 21 Ch. D. 243. *Generally, Mentid. Harrison v. Wright* (1811), 13 East, 343; *Duke v. Forbes* (1847), 11 Jur. 951.

428. —[—(1) By a contract for the construction of sewerage works, it was provided that the works should be completed in all respects by a specified date; & in default of such completion, the contractor should forfeit & pay the sum of £100 & £5 for every seven days during which the works should be incomplete after the said date as & for liquidated damages:—*Held*: inasmuch as the sums agreed to be paid as liquidated damages were payable on a single event only, viz. non-completion of the works, they were to be regarded as liquidated damages, not as penalties.

(2) One rule which appears to be recognised in the cases as a canon of construction with regard to agreements of this kind is that, where the parties to a contract have agreed that, in case of one of the parties doing or omitting to do some one thing, he shall pay a specific sum to the other as damages, as a general rule such sum is to be regarded by the ct. as liquidated damages & not a penalty. One recognised exception to such rule is where a sum of money is to be payable upon the non-payment of a smaller specified sum, in this case the cts. have treated the larger sum as a penalty, not as liquidated damages (*LORD Esher, M.R.*).

(3) The distinction between penalties & liquidated damages depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages. There is a canon of construction, according to which, if the sum is payable on the happening of one event it is to be regarded as liquidated damages; but if, on the other hand, it is payable on the happening of several events, some of which would entail very trifling damage, then it is to be regarded as a penalty (*LOPES, L.J.*).—*LAW v. REDDITCH LOCAL BOARD*, [1892] 1 Q. B. 127; 61 L. J. Q. B. 172; 66 L. T. 76; 56 J. P. 292; 8 T. L. R. 90; 36 Sol. Jo. 90, C. A.

Annotations:—As to (1) Rejd. Stegmann v. O'Connor (1899),

80 L. T. 234. *As to (3) Consl. Re White & Arthur (1901), 84 L. T. 594. Reid. Ward v. Monaghan (1895), 39 Sol. Jo. 670.*

429. —.]—In deciding whether a sum made payable by way of compensation for breach of contract is to be treated as liquidated damages or as a penalty, the ct. must take all the circumstances into consideration, in order to ascertain the intention of the parties. The fact that the sum in question is to be paid on the breach of any one of a variety of stipulations of different degrees of importance does not necessarily oblige the ct. to treat it as a penalty, although it raises a presumption that that was the intention of the parties; nor does the fact that the sum in question had been deposited at the making of the contract compel the ct. to treat it as liquidated damages, although it forms a material element to be taken into consideration in ascertaining the intention of the parties.

As to the exact words used in agreements as to the sum being regarded as liquidated damages, & not as a penalty, it has been laid down that judges ought to disregard the expression liquidated damages, although it has been knowingly used by the parties. I am not going to shut my eyes to that, but I think the expression was only to be disregarded where the plain intention of the parties to be gathered from all the circumstances was that the sum was to be a penalty (BIGHAM, J.). —PYE v. BRITISH AUTOMOBILE COMMERCIAL SYNDICATE, LTD., [1906] 1 K. B. 425; 75 L. J. K. B. 270; 22 T. L. R. 287.

Annotation.—*Reid. Davies v. Chamberlain (1909), 25 T. L. R. 766.*

430. —.]—DUNLOP PNEUMATIC TYRE CO., LTD. v. NEW GARAGE & MOTOR CO., LTD., No. 426, ante.

431. —.]—(1) A contractor undertook to do certain works within a given term, or to pay certain fixed sums:—*Held*: the fact that a bond with a penalty had been given to secure the payment of them, was itself strong evidence to show that they were liquidated damages.

(2) Where the doing of any particular act is secured by a penalty a Ct. of Equity is, in general, anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, & not a sum of money really intended to be paid. On the other hand, it is open to parties who are entering into contracts to stipulate that, on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation (LORD CRANWORTH, C.).

All the circumstances relied on as distinguishing liquidated damages from penalties are to be found here. The injury to be guarded against was one incapable of exact calculation. The sum to be paid is not the same for every default; for that which should occasion small as for that which should cause great inconvenience, but one increasing as the inconvenience would become more & more pressing; & the payments are themselves secured by the penalty of a bond which is hardly consistent with the notion that the payments secured were themselves the very penal sums provided to secure something else. For these reasons these payments, though called penalties, are in truth

liquidated damages agreed on by the parties (LORD CRANWORTH, C.).—*RANGER v. GREAT WESTERN RY. CO. (1854), 5 H. L. Cas. 72; 24 L. T. O. S. 22; 18 Jur. 795; 10 E. R. 824, H. L.*

Annotations.—*As to (2) Reid. Thornhill v. Neats (1860), 8 C. B. N. S. 831. Generally, Mentd. Kirk v. Bromley Union Grdns. (1846), 11 Jur. 49; Waring v. M. S. & L. Ry. (1849), 7 Hare. 482; South Wales Ry. v. Wythes (1854), 1 K. & J. 186; Re London & Birmingham & Buckinghamshire Ry., Ex p. Curzon (1857), 6 W. R. 141; Scott v. Liverpool Corp'n. (1858), 3 De G. & J. 334; Re Royal British Bank Nicol's Case (1859), 3 De G. & J. 387; Pawley v. Turnbull (1861), 3 Giff. 70; New Brunswick & Canada Ry. & Land Co. v. Conybeare (1862), 8 H. L. Cas. 711; Thames Iron Works & Ship Building Co. v. Royal Mail Steam Packet Co. (1862), 13 C. B. N. S. 358; Hill v. South Staffordshire Ry. (1865), 12 L. T. 63; Wildes v. Russell (1866), Har. & Ruth. 689; Western Bank of Scotland v. Addie, Addie v. Western Bank of Scotland (1867), L. R. 1 Sc. & Div. 145; Phillips v. Eyre (1870), L. R. 6 Q. B. 1; Mackay v. Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394; Stegmann v. O'Connor (1899), 81 L. T. 627; Taft Vale Ry. v. Amalgamated Soc. of Railway Servants, [1901] A. C. 426; Foster & Dicksee v. Hastings Corp'n. (1903), 87 L. T. 736; Lodder v. Slowey, [1904] A. C. 442.*

432. Payment expressed as penalty—Conclusive.—If a party agree not to do some specified act under a "penalty" of £100, such sum cannot be considered in the nature of liquidated damages. —SMITH v. DICKENSON (1804), 3 Bos. & P. 630; 127 E. R. 330.

433. —.]—(1) Bkpt. undertook to supply a creditor, who was under pecuniary engagements for him, with five pieces of cloth per week or "to forfeit & pay £10 per piece for every piece deficient." Bkpt. made such default in the regular supply of the cloth that the penalties amounted to £3,870, which the creditor petitioned to prove, although no specific damage was alleged to have been sustained by him by the non-performance of the agreement & the only balance really due to him was £48 18s. 6d.:—*Held*: this was a claim for unliquidated damages founded on a penalty & was therefore not the subject of proof.

(2) It seems to me that the engagement of the bkpt. to "forfeit & pay the sum of £10 for cloth, as liquidated penalty," was intended to be as the word implies, nothing but a penalty (*per CUR.*). —*Re EVANS, Ex p. MACLEAN (1842), 2 Mont. D. & De G. 504; 6 Jur. 609, Ct. of R.*

434. —.]—A declaration in a covenant stated that deft. had assigned his practice of a surgeon & apothecary to pltf., & covenanted that he would not directly or indirectly, by himself, or in co-partnership with any person, carry on the practice of a surgeon or apothecary within a certain distance under a penalty of £500, & stated as a breach, the practising by deft. within that distance:—*Held*: there being no mention of the word "penalty," the parties meant liquidated damages & the sum £500 should be paid as such.

Semble: where two parties covenant by deed that one shall pay a certain sum as "liquidated damages" in event of a certain act being done by him, & the word penalty is not mentioned, the ct. will construe these words strictly.

Whenever the word penalty occurs in a deed, the ct. will adhere to that & not to the words "liquidated damages." Therefore, if parties want liquidated damages, they must exclude the word penalty from the deed (POLLOCK, C.J.). —*RAWLINSON v. CLARK (1845), 5 L. T. O. S. 38; subsequent*

PART VI. SECT. 1, SUB-SECT. 3.

432 i. Payment expressed as penalty—Conclusive.—A foreman tailor, in consideration of his employment at a certain salary, entered into a written agreement, under a penalty of £300, not to go into business in the tailoring trade within twenty miles of D., for one year after leaving or being dis-

charged from his employment; & at no time to use the name of M. in any form in connection with the tailoring trade. He was afterwards dismissed, & within a month of dismissal, opened a tailoring establishment in D., & described himself as from M., & as having been foreman outter of M. In an action for breach of contract, no special damage was

proved, & a verdict was found for pltf., with nominal damages. On motion by pltf. to increase the damages to £300:—*Held*: the sum of £300, mentioned in the agreement, was a penalty & not liquidated damages. In such cases pltf. cannot recover more than the actual damage shown to have been sustained. —*BROWNE v. PHILLIPS (1882), 10 L. R. Ir. 212.—IR.*

Sect. 1.—How determined: Sub-sect. 3.]

proceedings, 14 M. & W. 187; (1846), 15 M. & W. 292, Ex. Ch.

Annotations.—*Reid*, *Green v. Price* (1845), 14 L. J. Ex. 225; *Galsworthy v. Strutt* (1848), 1 Exch. 659. *Mentl. Re Hall* (1864), 11 L. T. 579.

435. ———.]—Where a contract concludes with a penalty, the intention of the parties is the sole guide as to its effect. The mere use of the term "penalty" or "liquidated damages" does not determine the intention, but the whole instrument must be looked at. One circumstance, however, is of great importance, *viz.* where there are many stipulations relating to matters of small value, there is the strongest ground for supposing that a penalty, & not liquidated damages, was intended.—*DIMECH v. CORLETT* (1858), 12 Moo. P. C. C. 199; 33 L. T. O. S. 21; 14 E. R. 887, P. C.

Annotations.—*Reid*, *Wall v. Rederiakt Luggude*, [1915] 3 K. B. 66. *Mentl. Behn v. Burness* (1863), 3 B. & S. 751; *Willson & Coventry v. Otto Thoresen's Linie*, [1910] 2 K. B. 405; *Fratelli Sorrentino v. Buerger*, [1915] 3 K. B. 367.

436. ———. **Not conclusive.**]—*SAINTER v. FERGUSON*, No. 422, *ante*.

437. ———.]—*RANGER v. GREAT WESTERN Ry. Co.*, No. 431, *ante*.

438. ———.]—*Pltf.*, a builder, contracted with *deft.* to do certain repairs & alterations to a house, to be completed within a specified time, "subject to a penalty of £20 per week that any of the works remained unfinished" after the stipulated time:—*Held*: the sum of £20 per week was in nature of liquidated damages.—*CRUX v. ALDRED* (1866), 14 W. R. 656.

439. ———.]—(1) An arbitrator awarded an annuity of £1,200 to be paid by A. to B. & to be secured by the purchase of a Govt. annuity; & in case it should not be secured within two months, a further sum of £100 to be paid monthly until it was secured as a penalty. A. paid the annuity & penalty for two years until his death. He died insolvent & a creditor's suit had been instituted for the administration of his estate:—*Held*: the annuitant could prove for the annuity & the penalty until the annuity should be secured.

(2) The award is in very plain terms, & although the word "penalty" may occur, that cannot be treated merely as creating a penalty, but it must be taken in the sense in which it is used & be made consistent with all the other provisions of the award (*BACON, V.C.*).—*PARFITT v. CHAMBER, Ex p. D'ALTEYRAC* (1872), L. R. 15 Eq. 36; 42 L. J. Ch. 6; 27 L. T. 750; 21 W. R. 50.

440. ———.]—By a contract for electric lighting installation it was provided that the work should be completed in all respects on or before Nov. 26, 1898, subject to a penalty of £15 per day, & the plant by Dec. 10, subject to a penalty of £3 per day for every day the work remains unfinished to the satisfaction of the authorities or engineers:—*Held*: although the word "penalties" was used, the amounts accrued owing to the default of the contractor were in fact "liquidated damages."

Primâ facie a person is to be taken to mean what he says, & if he used the word "penalty," he must be taken to have meant "penalty," & if he used

"liquidated damages," the term is to be taken *primâ facie* as liquidated damages. If, on the other hand, the parties use the term in a sense which from the context leads to a conclusion that the word "penalty" is to be construed as "liquidated damages" or "liquidated damages" as "penalty," the context may in its effect rebut the presumption which would in the first instance arise from the use of the term in either case. Also it seems settled that one of the principal matters to be looked at in the context is whether or not the sum fixed is a sum assessed as a sum to be paid for the breach of the particular & definite stipulation, or whether it is a sum named to be paid in respect of several breaches which on the face of them may be the causes of varying degrees of damage to the party for whose benefit the clauses are inserted (*KENNEDY, J.*).—*Re WHITE & ARTHUR* (1901), 84 L. T. 594; 17 T. L. R. 461, D. C.

441. ———.]—*Defts.*, coal exporters at N., entered into a contract with *pltf.*, for the sale & delivery to him in Germany of a quantity of coal of which part was to be screened & part small coal at certain prices per ton c.i.f. The contract which was drawn up by *defts.*, contained the following clause: "Penalty for non-execution of this contract by either party, 1s. per ton on the portion unexecuted & the amount of proved loss if any on freight actually arranged by us." In an action to recover damages for non-delivery of the coal *pltf.* claimed that the 1s. per ton mentioned in the contract was a penalty & might be disregarded & that he was entitled to recover the difference between the contract price & the market price in Germany, which difference was much in excess of 1s. per ton:—*Held*: notwithstanding that the parties had called 1s. per ton a penalty, & that the loss caused to the *pltf.* by the non-delivery might be different in the case of the screened coal & of the small coal, & that the difference between the contract & market prices was easily ascertainable, the 1s. per ton was to be treated as liquidated damages.

I think that in using the word "penalty" the parties did not mean what they said. They include in that expression "the amount of proved loss; if any on the freight," showing thereby they were not using the term in the strict sense (*KENNEDY, J.*).—*DIESTAL v. STEVENSON*, [1906] 2 K. B. 345; 75 L. J. K. B. 797; 96 L. T. 10; 22 T. L. R. 673; 12 Com. Cas. 1.

442. ———. **Onus of disproof.**]—*WILLSON v. LOVE*, No. 423, *ante*.

443. **Payment expressed as liquidated damages—Conclusive.**]—This was an action upon an agreement between *pltf.* & *deft.*, coach proprietors, at Croydon. The agreement was that in consideration that B. would pay to *deft.* a lump sum within a month from date of agreement, *deft.* would withdraw his stage-coach from the road & not engage or concern himself in driving any other stage-coach from Croydon to London:—*Held*: the damages were liquidated.

Where a person binds himself in an agreement to pay a certain sum of money in case of a breach of the terms of it on his part, & it is therein stated

436 i. ———. **Not conclusive.**]—An indenture of demise contained a covenant by the lessee not to do a certain act, under the penalty of double the yearly rent thereinbefore reserved, to be recovered by distress or otherwise, in the same manner as the said yearly rent:—*Held*: although the word penalty was made use of, the case was not one of a penalty which would be relieved against in equity but of liquidated damages in the shape of a

double rent.—*GERARD v. O'REILLY* (1843), 3 Dr. & War. 414; 1 Con. & Law. 174.—*IR.*

443 i. **Payment expressed as liquidated damages—Conclusive.**]—On an agreement to deliver a certain number of withes & traverses of specified qualities & dimensions, for binding & rafting timber, by Mar. 1, & to pay \$4 as liquidated & assessed damages, recoverable by action of covenant or deductible

from the contract money for each & every day after Mar. 1, that the withes & traverses shall be undelivered:—*Held*: the sum named must be treated as liquidated damages, not as a penalty; & the stipulation for payment daily of a small sum, instead of one payment large in amount, was regarded as tending strongly to that conclusion.—*MCPHEE v. WILSON* (1866), 25 U. C. R. 169.—*CAN.*

"that the sum mentioned is to be considered as liquidated damages," *Semble*: in an action upon the agreement, the jury are bound to give the pltf. the whole money; & such sum is not to be considered as a penalty, but as damages ascertained between the parties.—*BARTON v. GLOVER* (1815), *Holt*, N. P. 43, N. P.

444. ———.]—(1) In an agreement for the sale of a public-house, it was stipulated, that the seller should not be concerned in carrying on the business of a publican, within a mile from the house he had parted with, "under the penal sum of £500, the same to be recoverable as & for liquidated damages." Notwithstanding this, he opened a public-house, about three-quarters of a mile off. No evidence of actual damage was given by pltf., but for deft. some witnesses stated that pltf. had spoken of the injury as not considerable:—*Held*: the whole sum was recoverable as stipulated damages, but it was left to the jury to state what was the actual damage.

(2) Whether a contract be under seal or not, if it clearly states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in an action for the breach of it would be for the stipulated sum. A ct. of justice has no more authority to put a different construction on the part of an instrument ascertaining the amount of damages, than it has to decide contrary to any other of its clauses. Our office is to ascertain the intent of the parties & if not contrary to law, to carry their intent into execution (*BEST, C.J.*)

(3) If it be doubtful from the terms of the contract, whether the parties mean that the sum mentioned in it shall be a penalty or liquidated damages, then I should incline to consider the clause as creating a penalty & not giving stipulated damages (*BEST, C.J.*).

(4) When deft. has so unequivocally agreed, that if he ever did, what it has been proved that he did, he would pay £500, what right has he now to say that the verdict against him ought not to be to this amount? (*BEST, C.J.*)—*CRISDEE v. BOLTON* (1827), 3 C. & P. 240, N. P.

Annotation:—*Reid*, *Sainter v. Ferguson* (1849), 7 C. B. 716.

445. ———.]—*RAWLINSON v. CLARK*, No. 434, *ante*.

446. ———.]—*ATKINS v. KINNIER*, No. 476, *post*.

447. ———.]—(1) Contract in writing for the sale by deft. to pltf. of a public-house containing terms as to valuation of fixtures, payments for goodwill & painting, & rent, & also the following clause: "By way of making this agreement binding, each of the above contracting parties have deposited in the hands of H. the sum of £40 each, & either party failing to complete this agreement shall forfeit to the other his deposit money as & for liquidated damages":—*Held*: the amount was liquidated damages, & not a penalty.

(2) The result of the cases on this subject is that the court will look at the real intention of the parties, so far as it can be gathered from the terms of the agreement.—*LEA v. WHITAKER* (1872), L. R. 8 C. P. 70; 27 L. T. 676; 37 J. P. 183; 21 W. R. 230.

Annotations:—*As to* (1) *Expld*, *Magee v. Lavell* (1874),

448 i. ———.]—*Not conclusive*.]—Where pltf., in debt on an agreement, lays his breach in such manner as to make it uncertain whether he is not claiming liquidated damages by reason of failure in some very minute particular of the agreement, as, for instance, for not clearing off all the standing timber, nor fencing certain land by a named day, the ct. will treat the sum mentioned in the agreement as a

penalty, though the parties have expressly agreed otherwise. Where a sum claimed in the declaration as liquidated damages, is held to be a penalty only, pltf. is restricted to the damages sustained.—*AINSLIE v. CHAPMAN* (1849), 5 U. C. R. 313.—*CAVE*.

448 ii. ———.]—The mere statement in a contract that a fixed sum shall be paid as liquidated damages

L. R. 9 C. P. 107. *Consd*, *Wallis v. Smith* (1882), 21 Ch. D. 243. *Reid*, *Pye v. British Automobile Commercial Syndicate* (1906), 22 T. L. R. 287. *As to* (2) *Reid*, *Marshall v. Mackintosh* (1898), 78 L. T. 750.

448. ———.]—*Not conclusive*.]—(1) By deed reciting that A. & B. carried on business as perfumers in partnership, & that it had been agreed between them that B. in consideration of £2,100, should assign to A. his moiety of the goodwill, stock-in-trade, etc., of the co-partnership, B., in consideration thereof, covenanted that he would not, during his life carry on the trade of a perfumer within the cities of London & Westminster or within the distance of 600 miles from the same respectively; & for the observance of this covenant, he bound himself to A., his exors., etc., in the sum of £5,000 by way of liquidated damages, & not of penalty:—*Held*: A. was entitled to recover, in respect of such breach, the whole sum of £5,000.

(2) The cts. have indeed held, that, in some cases, the words "liquidated damages" are not to be taken according to their obvious meaning; but those cases are all where the doing or omitting to do several things of various degrees of importance is secured by the sum named &, notwithstanding the language used, it is plain from the whole instrument that the real intention was different. Here, however, there is but one thing to which the £5,000 relates, viz. the restriction of trade, though extended to two different districts; & it is plain that the parties intended, that if the restriction was violated in either district, the sum should be paid & not that inquiry should be made as to the actual damage & loss sustained (*PATTESON, J.*)—*PRICE v. GREEN* (1847), 16 M. & W. 346; 16 L. J. Ex. 108; 9 L. T. O. S. 296; 153 E. R. 1222, Ex. Ch.; *previous proceedings, sub nom.* *GREEN v. PRICE* (1845), 13 M. & W. 695.

Annotations:—*As to* (1) *Reid*, *Re Newman, Ex p. Capper* (1876), 25 W. R. 244. *As to* (2) *Consd*, *Galeworthy v. Strutt* (1848), 1 Exch. 659; *Wallis v. Smith* (1882), 21 Ch. D. 243. *Reid*, *Mercer v. Irving* (1858), E. B. & E. 563. *Generally*, *Mentd*, *Nicholls v. Stretton* (1847), 10 Q. B. 346; *Dendy v. Henderson* (1855), 24 L. J. Ex. 324; *Bishop v. Kitchin* (1868), 38 L. J. Q. B. 20; *Farrer v. Close* (1869), L. R. 4 Q. B. 602; *R. v. Stainer* (1870), 18 W. R. 439; *Collins v. Locke* (1879), 4 App. Cas. 674; *M. S. & L. Ry. v. Brown* (1883), 8 App. Cas. 703; *Baines v. Geary* (1887), 35 Ch. D. 154; *Baker v. Hedgecock* (1888), 39 Ch. D. 520; *Mogul S.S. Co. v. McGregor, Gow* (1889), 23 Q. B. D. 598; *Swaine v. Wilson* (1889), 24 Q. B. D. 252; *Davies, Turner v. Lowen* (1891), 64 L. T. 655; *Brunton v. Dixon* (1892), 36 Sol. Jo. 556; *Maxim Nordenfellt Guns & Ammunition Co. v. Nordenfellt*, [1893] 1 Ch. 630; *Nevanas v. Walker & Foreman*, [1914] 1 Ch. 413.

449. ———.]—*Semble*: a clause in the original agreement, that for every breach of covenant a specified sum should be paid for liquidated damages, does not exclude the jurisdiction of the ct. to try the question, whether it be penalty or liquidated damages.—*COLES v. SIMS* (1854), 5 De G. M. & G. 1; 2 Eq. Rep. 951; 23 L. J. Ch. 258; 22 L. T. O. S. 277; 18 Jur. 683; 2 W. R. 151; 43 E. R. 768, L. J.

Annotations:—*Consd*, *General Accident Assce. Corp'n. v. Noel*, [1902] 1 K. B. 377. *Reid*, *Howard v. Woodward* (1884), 29 J. P. 3; *Cornwall v. Hawkins* (1872), 20 W. R. 653. *Mentd*, *Child v. Douglas* (1854), Kay. 560; *Johnstone v. Hall* (1856), 2 K. & J. 414; *Western v. Macdermott* (1866), 2 Ch. App. 72; *Tulk v. Metropolitan Board of Works* (1867), 8 B. & S. 777; *Keates v. Lyson* (1869), 4 Ch. App. 218; *Luker v. Dennis* (1877), 26 W. R. 167; *Renals v. Cowlishaw* (1878), 9 Ch. D. 125; *Patman v.*

upon breach does not prevent a party thereto maintaining that such sum has been fixed as a penalty, but the *onus* of proof will be upon him to show that what the parties said they did not intend. The fact that such sum would be exorbitant damages for the breach would be material to prove that the sum is in fact a penalty.—*JONKER v. VAN OS*, [1911] T. P. D. 655.—*S. AF.*

Sect. 1.—How determined: Sub-sects. 3 & 4.]

Harland (1881), 17 Ch. D. 853; **Nottingham Patent Brick & Tile Co. v. Butler** (1885), 15 Q. B. D. 261; **Russell v. Watts** (1885), 55 L. J. Ch. 158; **Sheppard v. Gilmore** (1887), 57 L. J. Ch. 6; **Mackenzie v. Childers** (1889), 43 Ch. D. 265; **Rogers v. Hosegood**, [1900] 2 Ch. 388; **Holloway v. Hill**, [1902] 2 Ch. 612; **Brigg v. Thornton** (1903), 73 L. J. Ch. 301.

450. ———.]—Pltf. entered into an agreement for the transfer of his tenancy in a public-house, & the sale of the goodwill thereof to deft. The subject-matter of the agreement, which was in writing, was therein described as "the house & premises he now occupies, known by the sign of the White Hart." There was a coach-house which belonged to the White Hart, & which, at the time of the making of the agreement, was not in the occupation of pltf., but of S., who held it as tenant to pltf. for a period which had not expired at the time fixed for the completion of the transfer by the agreement. The agreement contained a variety of stipulations with regard to the transfer of the licences, the payment of rates & taxes, & the purchase of fixtures, furniture, & stock at a valuation by deft., & concluded as follows: "If either party shall refuse or neglect to perform all & every part of this agreement, they hereby promise & agree to pay to the other who shall be willing to complete the same the sum of £100 as damages, & recoverable in any of Her Majesty's Cts. of law." Deft. refused to perform the agreement on the ground that it included the coach-house, & that pltf. could not perform his part, not being able to deliver up possession of that portion of the premises on the day fixed for completion, & pltf. accordingly brought his action to recover the £100 as liquidated damages:—**Held**: the words "he now occupies" formed an essential part of the description of the subject-matter of the agreement, & could not be rejected as *falsa demonstratio*, & consequently the agreement did not include the coach-house & pltf. was entitled to succeed; but the £100 was not liquidated damages but a penalty.

The cts. refuse to hold themselves bound by the mere use of the words "liquidated damages," & will look to what must be considered, in reason, to have been intended by the parties in relation to the subject-matter (**COLERIDGE, C.J.**).—**MAGEE v. LAVELL** (1874), L. R. 9 O. P. 107; 43 L. J. C. P. 131; 30 L. T. 169; 38 J. P. 344; 22 W. R. 334.

Annotations:—**Consd. Re Newman, Ex p. Capper** (1876), 4 Ch. D. 724; **Wallis v. Smith** (1882), 21 Ch. D. 243. **Refd.** **Ward v. Monaghan** (1885), 39 Sol. Jo. 485; **Willson v. Love**, [1896] 1 Q. B. 626; **Pye v. British Automobile Commercial Syndicate**, [1906] 1 K. B. 425. **Mentd.** **Serutton v. Childs** (1877), 36 L. T. 212; **Mowats v. Hudson** (1911), 105 L. T. 400.

453 I. Use of words not conclusive—Construction by court.—An agreement provided that "for the performance of this agreement each party binds himself to the other in the penalty of £50, liquidated damages, & not as a penalty, which £50 shall be forfeited by him who fails to perform this agreement, & shall be recovered the one of the other in an action of debt after one month from this date, on default made by either party":—**Held**: the £50 was a penalty, not liquidated damages.—**HENDERSON v. NICHOLS** (1849), 5 U. C. R. 398.—**CAN.**

453 II. ———.]—A contract for the erection of a poor-house contained a clause binding the contractor to have it completely finished on or before a specified day under a penalty of £5 sterling for every week during which the whole of said works shall remain unfinished after that day. In an action by the contractor for an alleged balance of the contract price, also for payment of extra work,

deft. pleaded that under the above clause pursuer, through failure to finish & deliver over the works at the stipulated time had incurred damages to a larger amount than the rate therein specified, & he proposed to take a counter issue, on the footing that the damages were fixed by the contract, & were not subject to modification, & also an issue in the footing that the damages might be assessed by the jury:—**Held**: the sum stipulated in the event of non-completion was of the nature of practical damages, & was not a penalty subject to modification.—**JOHNSTON v. ROBERTSON** (1861), 23 Dunl. (Ct. of Sess.) 646.—**SCOT.**

453 III. ———.]—Pltf., under an agreement with deft., obtained a concession to construct a line of railway within a prescribed period, & deft. undertook to pay subsidy for such construction, but stipulated in case of non-completion within such period, that large sums of money

451. ———.]—A contract for the erection of buildings provided that they should be completed Dec. 25, & that in default thereof the contractors should forfeit to the employer £10 per week for every week after that date during which the buildings should remain unfinished; & also that, if the contractors were prevented by bkpcy. or any other cause from completing, the employer might rescind, & that the moneys then already paid should be considered the full value of the works executed. There were various other stipulations, & a final provision that, in case the contract should not be in all things duly performed by the contractors, they should pay to the employer £1,000, as & for liquidated damages. Before Dec. 25, the contractors filed a liquidated petition, their trustees carried on the works for a time, & then abandoned the contract. Another builder was employed to complete the works, which were not finished till long after Dec. 25:—**Held**: the £1,000 was in the nature of a penalty, & the employer was entitled to prove in the liquidation only for the actual damage he had sustained by the delay in the completion of the works.—**Re NEWMAN, Ex p. CAPPER** (1876), 4 Ch. D. 724; 46 L. J. Bcy. 57; 35 L. T. 718; 25 W. R. 244.

Annotations:—**Consd. Wallis v. Smith** (1882), 21 Ch. D. 243; **Willson v. Love**, [1896] 1 Q. B. 626. **Refd.** **Catton v. Bennett** (1884), 51 L. T. 70; **Elphinstone v. Monkland Iron & Coal Co.** (1886), 11 App. Cas. 332.

452. ———.]—**PYE v. BRITISH AUTOMOBILE COMMERCIAL SYNDICATE, LTD.**, No. 429, *ante*.

453. Use of words not conclusive—Construction by Court.—A. agreed with B. to sell to him the stock & the goodwill of his business, & to demise to him his house in which the business was carried on, for which B. was to pay £800, & to take furniture & fixtures at a valuation. They were afterwards valued at £174. £400 was paid to A. at the time of executing the agreement, & B. agreed to accept & pay two bills of exchange, one for £400, payable twelve months after date, & the other for £174, payable two months after date. A. agreed not to carry on the business within five miles of the house, & for the true performance of this agreement each of them did thereby bind & oblige himself to the other of them in the penal sum of £500, to be recoverable for breach of the said agreement in a ct. of law, as & by way of liquidated damages:—**Held**: this sum was a penalty & not liquidated damages.

Where the sum which is to be a security for the performance of an agreement to do several acts, will, in cases of breaches of the agreement, be in some instances too large & in others too small a

lodged with or retained by him as security, should be forfeited "as & for liquidated damages." The parties agreed that the ordinary rules of law regarding the recovery of penalties for breaches of contract should not apply to this contract & this provision was confirmed by statute:—**Held**: the ordinary rules relating to the recovery of penalties for breaches of contract should be applied in case of breach by pltf. of any obligations entered into by him under this agreement & as the large amounts stipulated to be forfeited, exceeding £110,000, were manifestly out of all proportion to the damage suffered or inconvenience undergone by deft. by reason of the non-completion of the subsidy line, the penalty of forfeiture should not be enforced, notwithstanding that the sums were made payable as & for liquidated damages.—**HILLS v. COLONIAL GOVERNMENT** (1904), 21 S. C. 59; 2 Buch. A. C. 355.—**S. AF.**

compensation for the injury thereby occasioned, that sum is to be considered a penalty (BAYLEY, J.). —DAVIES v. PENTON (1827), 6 B. & C. 216; 9 Dow. & Ry. K. B. 369; 5 L. J. O. S. K. B. 112; 108 E. R. 433.

Annotations:—*Apld.* Boys v. Ansell (1839), 2 Arn. 9. *Reid.* Horner v. Flintoff (1842), 9 M. & W. 678; Magee v. Lavell (1874), L. R. 9 C. P. 107.

454. ———.]—CRISDEE v. BOLTON, No. 444, *ante*.

455. ———.]—A "penalty" & "liquidated damages" are contradictory words. The ct. leans against construing words to mean liquidated damages.—HORNER v. GRAVES (1831), 7 Bing. 735; 5 Moo. & P. 768; 9 L. J. O. S. C. P. 192; 131 E. R. 284.

Annotations:—*Reid.* Boys v. Ansell (1839), 5 Bing. N. C. 390. *Mentd.* Archer v. Marsh (1837), 6 Ad. & El. 959; Hitchcock v. Coker (1837), 6 L. J. Ex. 266; Proctor v. Sargent (1840), 2 Man. & G. 20; Whittaker v. Howe (1841), 3 Beav. 383; Mallan v. May (1843), 11 M. & W. 653; Price v. Green (1847), 16 L. J. Ex. 108; Tallis v. Tallis (1853), 1 E. & B. 391; Collins v. Locke (1879), 4 App. Cas. 674; Davies v. Davies (1887), 36 Ch. D. 359; Rogers v. Maddocks, [1892] 3 Ch. 346; Nordenfellt v. Maxim Nordenfellt Guns & Ammunition Co., [1894] A. C. 535; Haynes v. Doman, [1899] 2 Ch. 13; Underwood v. Barker, [1899] 1 Ch. 300; Townsend v. Jarman, [1900] 2 Ch. 698; Dowden & Pook v. Pook, [1904] 1 K. B. 45; Tivoli, Manchester v. Colley (1904), 52 W. R. 632; Leatham v. Johnstone-White (1907), 76 L. J. Ch. 304; Russell v. Amalgamated Soc. of Carpenters & Joiners, [1910] 1 K. B. 506; North-Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439; A.-G. of Commonwealth of Australia v. Adelaide S.S. Co., [1913] A. C. 781; Eastes v. Russ, [1914] 1 Ch. 468; Millers v. Steedman (1915), 84 L. J. K. B. 2057; Horwood v. Millar's Timber & Trading Co., [1916] 2 K. B. 44; Naylor, Benzon v. Krainsche Industrie Gesellschaft (1918), 87 L. J. K. B. 1066; Whitmore v. King (1918), 87 L. J. Ch. 647; Rodriguez v. Speyer, [1919] A. C. 59; Ropeways v. Hoyle (1919), 35 T. L. R. 285; British Reinforced Concrete Engineering Co. v. Schelfz, [1921] 2 Ch. 563.

456. ———.]—From whole instrument.]—(1) Deft. agreed to grant a lease with the usual covenants, & pltf. to execute a counterpart & pay the expenses & for the true performance of the agreement, each of the parties bound himself in the penalty of £500, to be recovered against the defaulter as liquidated damages:—*Held*: the £500 must be considered as a penalty & not as liquidated damages.

(2) Where the scale is so nicely balanced as to make it difficult to determine, whether the words employed in the particular stipulation constitute a penalty or an agreement for liquidated damages, we must look at the rest of the agreement & collect from it what must have been the real intention of the parties (TINDAL, C.J.).—BOYS v. ANCELL (1839), 5 Bing. N. C. 390; 2 Arn. 9; 7 Scott, 304; 8 L. J. C. P. 267; 3 Jur. 316; 132 E. R. 1149.

457. ———.]—By an agreement in writing, pltf. agreed to "sell & deft. to purchase the household furniture, stock in trade, etc., by valuation; B. to value for pltf. & M. for deft.; the goods to be valued, & possession given on or before Oct. 13, 1858; & in the event of either of the parties not complying in every particular set forth in this agreement, he should forfeit & pay

the sum of £50 & all expenses attending the same." Deft. did not take possession of the goods, which pltf. subsequently sold to another person. In an action for the breach of the agreement, deft. paid into ct. £5. The jury having found a verdict for deft., on motion to enter a verdict for pltf. for £45; —*Held*: the sum of £50 was a penalty & not liquidated damages; & therefore deft. was entitled to retain the verdict.

The words "liquidated damages" or "penalty" are not conclusive as to the character of the sum stipulated to be paid, for if the whole agreement is such that the ct. can see that the sum is a penal sum, it must be so treated (BRAMWELL, B.).—BETTS v. BURCH (1859), 4 H. & N. 506; 1 F. & F. 485; 28 L. J. Ex. 267; 33 L. T. O. S. 151; 7 W. R. 546; 157 E. R. 938.

Annotations:—*Consd.* Wallis v. Smith (1882), 21 Ch. D. 243. *Reid.* Magee v. Lavell (1874), 43 L. J. C. P. 131; *Re* Newman, *Ex p.* Capper (1876), 4 Ch. D. 724; Catton v. Bennett (1884), 51 L. T. 70; Elphinstone v. Monkland Iron & Coal Co. (1886), 11 App. Cas. 332; Willson v. Love, [1896] 1 Q. B. 826; *Mentd.* Hinton v. Sparkes (1868), L. R. 3 C. P. 161; Lea v. Whitaker (1872), L. R. 8 C. P. 70; Pye v. British Automobile Commercial Syndicate (1906), 22 T. L. R. 287.

458. ———.]—*Re* WHITE & ARTHUR, No. 440, *ante*.

459. ———.]—CLYDEBANK ENGINEERING & SHIPBUILDING Co. v. YZQUIERDO Y CASTANEDA (DON JOSE RAMOS), No. 424, *ante*.

460. ———.]—PUBLIC WORKS COMR. v. HILLS, No. 425, *ante*.

461. ———.]—Where a contract provides that on breach thereof a specified amount should be paid "as liquidated damages & not as a penalty," its true construction must have regard to the particular circumstances of the case & not be such as to render it unconscionable & extravagant. Where it is impossible at the date of contract to foresee the extent of uncertain injury which might be sustained by its breach, or the cost & difficulty of proving it, & the amount is reasonable, it should be recovered as liquidated damages.—WEBSTER v. BOSANQUET, [1912] A. C. 394; 81 L. J. P. C. 205; 106 L. T. 357; 28 T. L. R. 271, P. C. Annotation:—*Consd.* Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co., [1915] A. C. 79.

In building contracts.]—*See* BUILDING CONTRACTS, ENGINEERS & ARCHITECTS, Vol. VII., pp. 393 *et seq.*

SUB-SECT. 4.—LARGER SUM PAYABLE IN DEFAULT OF PAYMENT OF SMALLER SUM.

462. Larger sum regarded as penalty.]—ASTLEY v. WELDON, No. 427, *ante*.

463. ———.]—DAVIES v. PENTON, No. 453, *ante*.

464. ———.]—KEMBLE v. FARREN, No. 474, *post*.

465. ———.]—*Re* NEWMAN, *Ex p.* CAPPER, No.

451, *ante*.

466. ———.]—If the sum described as liquidated damages be a large sum, & the title to that

PART VI. SECT. 1, SUB-SECT. 4.

4621. Larger sum regarded as penalty.]—A stipulation by which on default of payment of one instalment, double the entire amount of the debt, due under an instalment bond is to become at once payable, is in the nature of a penalty.—JOSEPH KALIDAS v. KOLI DADA ABHESANG (1888), 1 L. R. 12 Bom. 555.—*IND.*

462 H. ———.]—A co. who were patentees of a mechanical apparatus for cash despatch in shops, sought to prove against the debtor for a sum of £30, & to remove their installation from the debtor's shop, relying upon

an agreement whereby in effect, in consideration of the use of the apparatus, & of the installation, repair, & final removal of the same by the co.; the debtor agreed to keep the apparatus for 7 years certain, & to pay therefor the sum of £35 in annual instalments of £5, of which one instalment only had been paid prior to debtor's arrangement:—*Held*: the sum payable upon breach of the agreement was liquidated damages & not a penalty.—*Re* O'B., [1917] 2 I. R. 626.—*IR.*

e. ———. Interests of third party.]—A mtgd. his property to D. to secure

£700, agreed by D. to be taken in lieu of a judgment debt of £3,000, & the £700 was to be payable by instalments at certain times, & if not punctually so paid, D. was to be remitted to his original rights, & to have the mtgo. security also. The judgments were assigned, by a contemporaneous deed, to trustees for D., & on punctual payment of the £700 for A. & B. A. had previously mtgd. his property to B. as a counter security, & for other debts. The instalments were not paid punctually, & the £3,000 was claimed in full:—*Held*: though the ct. would not interfere if the arrangement were between him & D. only, yet as the

Sect. 1.—How determined: Sub-sects. 4 & 5.]

sum is to arise upon some very trifling consideration, then it follows plainly that the large sum named never could have been meant to be the real measure of damages. It was an oppressive agreement, the sum named could never have been the proper amount of damages arising upon the non-observance of some of the stipulations of that agreement, which probably would have been measured by a few shillings, & therefore the very large sum stated to be damages was properly regarded as in the nature of a penalty (LORD WESTBURY).—*THOMPSON v. HUDSON* (1869), L. R. 4 H. L. 1; 38 L. J. Ch. 431, H. L.

Annotations.—*Apld. Re Newman, Ex p. Capper* (1876), 4 Ch. D. 724. *Reid. Re Hatton, Ex p. Hodges* (1872), 27 L. T. 396; *Protector Loan Co. v. Grice* (1880), 5 Q. B. D. 592; *Ward v. Monaghan* (1895), 39 Sol. Jo. 485. *Mentd. Dendy v. Evans*, (1910) 1 K. B. 263.

467. —.]—*WALLIS v. SMITH*, No. 12, *ante*.

468. —.]—*LAW v. REDDITCH LOCAL BOARD*, No. 428, *ante*.

SUB-SECT. 5.—VARIED STIPULATIONS.

469. **General rule.**—*PYE v. BRITISH AUTOMOBILE COMMERCIAL SYNDICATE, LTD.*, No. 429, *ante*.

470. —.]—*DUNLOP PNEUMATIC TYRE CO., LTD. v. NEW GARAGE & MOTOR CO., LTD.*, No. 426, *ante*.

471. **Lump sum to secure performance of several stipulations—Of varying importance & value—Regarded as penalty.**—*ASTLEY v. WELDON*, No. 427, *ante*.

472. —.]—*DAVIES v. PENTON*, No. 453, *ante*.

473. —.]—In an action on the case, to recover damages for breaking up a highway, deft. gave plff. a cognovit to confess a judgment for £200, with a defeasance; that no execution should issue, if deft., within a limited period, should reinstate the road according to certain stipulations

rights of B. were involved, the condition in default of punctual payment should be treated as a penalty, & relieved against, & this equity could be enforced by A. as well as by B.—*CARROLL v. O'CONNOR* (1847), 11 I. Eq. R. 200.—*IR.*

PART VI. SECT. 1, SUB-SECT. 5.

469 i. **General rule.**—Where a contract contains a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for payment of an ascertained sum of money, the general rule is, that the sum named is not to be treated as a penalty, but as liquidated damages. Where the stipulations resolve themselves into one the case comes within the rule that when the agreement is for the performance of one act, & there is no adequate means of ascertaining the damages from a violation & the parties agree upon a sum as liquidated damages, it will not be treated as a penalty.—*SCHRAEDER v. LILLIS* (1886), 10 O. R. 358.—*CAN.*

469 ii. —.]—Where a party binds himself to do several things of different degrees of importance, a sum made payable on the non-performance of either or any is necessarily a penalty only when one of these things agreed to be done is the payment of a sum of money.—*EDWARDS v. MOORE* (1906), 1 E. L. R. 422.—*CAN.*

469 iii. —.]—Where a sum is stipulated to be paid as liquidated damages & is payable not on one single event,

but on a number of events, some of which might result in considerable damages, the ct. may decline to construe the words according to their ordinary effect, & may treat the sum as a penalty but *aliter* when it is made payable upon only one event.—*ST. CATHARINES IMPROVEMENT CO. v. RUTHERFORD* (1914), 31 O. L. R. 574; 19 D. L. R. 662; 6 O. W. N. 568.—*CAN.*

469 iv. —.]—Where a document contains covenants for the performance of several things, & then one large sum is stated to be payable in the event of a breach, such sum must be considered a penalty.—*BEHARY LOLL DORS v. TEJ NARAIN* (1884), 1 L. R. 10 Calc. 764.—*IND.*

469 v. —.]—In determining whether a sum mentioned in a deed & expressed to be payable as liquidated damages on breach of any one of several covenants in a deed is to be considered as liquidated damages or as a penalty, two considerations will influence a ct. to treat the specified sum as a penalty—(1) if the same sum is expressed to be payable for the breach of any one of a number of covenants of greatly varying importance; (2) if the damage sustained through a breach bears no reasonable relation to the amount of the sum specified to be payable.—*SEARLE v. EVANS* (1907), 27 N. Z. L. R. 163.—*N.Z.*

469 vi. —.]—Where in a contract a single lump sum is made payable by way of compensation, on the

contained in a plan, & to the satisfaction of a surveyor. The road not being completely reinstated within the time prescribed, plff. sued out execution, & levied the £200 & costs:—*Held*: the sum of £200 was in the nature of a penalty, & not of liquidated damages.

In the defeasance there are stipulations of various degrees of importance; & as it would be unjust to say that if the road were completed only one day after the term agreed on, deft. should pay the whole £200, it would be equally so to say he should pay the whole after performance of a portion of the work (TINDAL, C.J.).—*CHARRINGTON v. LAING* (1829), 6 Bing. 242; 3 Moo. & P. 587; 8 L. J. O. S. C. P. 50; 130 E. R. 1273.

Annotations.—*Reid. Perry v. Turner* (1831), 2 Cr. & J. 89; *Ranger v. G. W. Ry.* (1854), 24 L. T. O. S. 22.

474. —.]—**Unless confined to specified stipulation or stipulations.**—Liquidated damages cannot be reserved on an agreement containing various stipulations, of various degrees of importance, unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined.

We see nothing illegal or unreasonable in the parties, by their mutual agreement settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained (TINDAL, C.J.)

But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, & that the former should not be considered as a penalty, appears to be a contradiction in terms (TINDAL, C.J.).—*KEMBLE v. FARREN* (1829), 6 Bing. 141; 3 Moo. & P. 425; 7 L. J. O. S. C. P. 258; 130 E. R. 1234.

Annotations.—*Consd. Boys v. Ancell* (1839), 5 Bing. N. C. 390. *Fold. Horner v. Flintoff* (1842), 9 M. & W. 678. *Consd. Green v. Price* (1845), 13 M. & W. 695; *Galsworthy v. Strutt* (1848), 1 Exch. 659; *Atkins v. Kinnier* (1850), 4 Exch. 776; *Ranger v. G. W. Ry.* (1854), 5 H. L. Cas. 72; *Bonsall v. Byrne* (1867), 16 W. R. 372; *Thompson v. Hudson* (1869), L. R. 4 H. L. 1. *Apld. Magee v. Lavell* (1874), L. R. 9 C. P. 107. *Consd. Re Newman, Ex p.*

occurrence of one or more or all of several events, some of which may occasion serious & others but trifling damage, the presumption is that the parties intended the sum to be a penalty & subject to modification; but if the stipulated payments are made proportionate to the extent to which the debtors may fail to implement their obligation & are to bear interest from the date of the failure, payments so adjusted with reference to the actual amount of damage, are not to be regarded as penalties but as liquidated damages. The mere use of the words "penalty" or "liquidated damages" is not conclusive as to whether the parties have stipulated for a penalty or liquidated damages.—*ELPHINSTONE (LORD) v. MONKLAND IRON & COAL CO., LTD.* (1886), 13 R. (Ct. of Sess.) 98.—*SCOT.*

471 i. **Lump sum to secure performance of several stipulations—Of varying importance & value—Regarded as penalty.**—Where a party binds himself in an agreement to pay plff. £25 if A. does not fulfil all the covenants & conditions of an agreement, the £25 must be looked on as a penalty, & not as liquidated damages giving plff. an action as for an absolute debt.—*MCLEAN v. TINSLEY* (1850), 7 U. C. R. 40.—*CAN.*

1. **Additional rent to secure performance of all or any of several conditions—Liquidated damages.**—T., the tenant, agreed, in case of breach of all or any of the conditions contained in the contract, to pay an additional or

Capper (1876), 4 Ch. D. 724; Wallis v. Smith (1882), 21 Ch. D. 243. *Follis Hope v. Burns & Oates* (1885), 1 T. L. R. 272; Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co., [1915] A. C. 79. *Reid. Beckham v. Drake* (1849), 2 H. L. Cas. 579; Reynolds v. Bridge (1856), 6 E. & B. 528; Cass v. Thompson (1857), 5 W. R. 289; Mercer v. Irving (1858), E. B. & E. 563; Reindel v. Schell (1858), 4 C. B. N. S. 97; Betts v. Burch (1859), 28 L. J. Ex. 267; Lea v. Whitaker (1872), L. R. 8 C. P. 70; Johnson v. Colquhoun (1883), 32 W. R. 124; Catton v. Bennett (1884), 51 L. T. 70; Elphinstone v. Monkland Iron & Coal Co. (1886), 11 App. Cas. 332; Law v. Redditch L. B., [1892] 1 Q. B. 127; Ward v. Monaghan (1895), 59 J. P. 532; Willson v. Love, [1896] 1 Q. B. 626. *Mentd. Sage v. Robinson* (1848), 18 L. J. Ex. 31; Ellen v. Topp (1851), 15 Jur. 451; Hinton v. Sparks (1868), 37 L. J. C. P. 81; Southill Upper U. C. v. Wakefield R. C., [1905] 2 Ch. 516.

475. ——— Unless limited to breaches of uncertain nature.]—BOYS v. ANCELL, No. 456, ante.

476. ———.]—Covenant on an indenture, whereby deft. & pltf. agreed to enter into partnership as surgeons for the term of three years; & deft. covenanted that, after the determination of the partnership, he would not at any time practice as a surgeon at 28, Dorset Crescent, or within the distance of two miles & a half thereof, measuring by the usual streets or ways of approach thereto, nor reside within the distance of two & a half miles of 28, Dorset Crescent, without pltf.'s consent, nor would attempt to prevail on any of the patients of deft., or of the partnership, to withdraw from pltf., or to employ any other medical attendant in prejudice of pltf., but would in all things endeavour to promote the business & advantage of pltf. as a surgeon, so far as it was in the power of deft., & as he could reasonably & properly be required to do; & that, if deft. should in any respect break or infringe this stipulation, he should pay pltf. £1,000 as & for liquidated damages, & not by way of penalty. Breach, that, after the expiration of the term, deft. did reside within the distance of two miles & a half of the premises, 28, Dorset Crescent. The plea traversed this allegation; & after verdict for pltf.:—*Held*: the sum of £1,000 was liquidated damages, & not a penalty.

Therefore, if a party agrees to pay £1,000 on several events, all of which are capable of accurate valuation, the sum must be construed as a penalty & not as liquidated damages. But if there be a contract consisting of one or more stipulations, the breach of which cannot be measured, then the parties must be taken to have meant that the sum agreed on was to be liquidated damages & not a penalty (PARKE, B.).—ATKINS v. KINNIER (1850), 4 Exch. 776; 19 L. J. Ex. 132; 154 E. R. 1429; *sub nom. ATKINS v. KINNEAR*, 14 L. T. O. S. 353.

Annotations:—*Consd. Reynolds v. Bridge* (1856), 6 E. & B. 528; Wallis v. Smith (1882), 21 Ch. D. 243. *Reid. Elves v. Crofts* (1850), 10 C. B. 241; Mercer v. Irving (1858), E. B. & E. 563; Bonsall v. Byrne (1867), 16 W. R. 372; Stegmann v. O'Connor (1899), 80 L. T. 234. *Mentd. Lake v. Butler* (1855), 24 L. J. Q. B. 273; Duignan v. Walker (1859), John. 446; Mouffet v. Cole (1872), L. R. 8 Exch. 32; Maxim Nordenfiet Guns & Ammunition Co. v. Nordenfiet, [1893] 1 Ch. 630.

penal rent:—*Held*: the additional rent was not a penalty.—WRIGHT v. TRACY (1873), 1 R. 7 C. L. 134.—*IR.*

g. Forfeiture of bonus.—Regarded as penalty.—Failure to perform contract.]

Pltf., under a bye-law granted the deft. a bonus of \$20,000 to aid him in the manufacture of steam-fire engines & agricultural implements, subject to a condition in the bye-law that he should give a mte. on the factory premises for \$10,000 & a bond for \$10,000, to be conditioned: (1) for the carrying on of such manufacturers for twenty years; (2) during that period to keep \$30,000 invested in the factory; & (3) to insure the building & plant in

pltf.'s favour for \$10,000. The deft. gave the bond & mte., the latter containing a covenant for insurance, & he invested the \$30,000 as stipulated for. The factory was one in which twenty-five men might have been employed, & which could have turned out 100 mowers in a year. In the course of two years only twenty mowers were constructed, & the number of persons employed dwindled down to two or three.—*Held*: if the sums secured by these instruments were liquidated damages, pltf. would be entitled to recover the whole \$30,000 upon breach though the actual damage might not exceed \$700 &

could never be more than \$10,000. This consideration alone sufficed to show that the principal sums must be regarded as penalties.—BRUSSELS VILLAGE v. RONALD (1885), 11 A. R. 605.—CAN.

h. Forfeiture of deposit.—Breach of agreement for sale of land.—Whether penalty.]—Vendors agreed to extend the time for the payment of the purchase money for three months, upon the terms of the purchaser paying down \$500, & it was agreed between the parties that "if deft. shall pay the balance of the purchase money within the time limited by the judgment, pltf. shall give credit to deft. upon the

477. ———.]—A deed providing for the determination of a partnership between two medical men at the end of three years contained the following covenant: "That after the determination of the term of three years, & so long as R. shall reside in W., etc., he, B., shall not practice, etc., nor see any patients except as hereinafter mentioned, nor introduce any other medical man in the town of W., etc., but shall before the expiration of the term, introduce R. to all the exclusive patients of B., & also use his best endeavours to secure the same for R. Provided always, & it is expressly agreed, that in case B. shall make default in performance of the covenant lastly hereinbefore contained, he will forthwith pay to R., the sum of £2,000, not in the nature of a penalty, but as ascertained liquidated damages. That, notwithstanding the clause lastly hereinbefore contained, B. may also, if he thinks fit, after the term of three years, attend midwifery cases in W., the fees for which shall be equal to or exceed one pound one shilling; but he shall pay one-half of the fees which he shall receive for each of such cases to R., etc."—*Held*: upon the construction of the covenant, the sum of £2,000, was not a penalty, but liquidated damages, all the stipulations being of uncertain value.—REYNOLDS v. BRIDGE (1856), 6 E. & B. 528; 26 L. J. Q. B. 12; 27 L. T. O. S. 169; 2 Jur. N. S. 1164; 4 W. R. 640; 119 E. R. 961.

Annotations:—*Consd. Mercer v. Irving* (1858), E. B. & E. 563; Wallis v. Smith (1882), 21 Ch. D. 243.

478. ——— Though expressly stated as liquidated damages.]—Pltf. & deft. entered into an agreement for the purchase by deft. of the pltf.'s goodwill, stock, tenant-right, etc.; it was stipulated by the agreement that pltf. should give possession on a certain day, & in the meantime should pay the rates & taxes, & keep deft. indemnified therefrom; & deft. agreed to pay £100 for the tenant-right, & take the fixtures at a valuation, & pay all rents, rates, taxes, etc., & to indemnify pltf. from the same; & lastly, the parties "mutually bound themselves the one to the other in the sum of £100 as settled & liquidated damages, to be paid & forfeited without any deduction, by such of them as should make default in the premises, unto the other of them requiring the same":—*Held*: the sum of £100 was a penalty only, & not recoverable as liquidated damages for the breach of any of the stipulations.

The rule laid down in *Kemble v. Farren*, No. 474, ante, was, that when an agreement contains several stipulations of various degrees of importance & value, a sum agreed to be paid by way of damages for the breach of any of them shall be construed as a penalty, & not as liquidated damages, even though the parties have in express terms stated the contrary. This case is rather stronger than that of *Kemble v. Farren*, No. 474, ante, because the word "forfeited" is used, which points to a

Sect. 1.—How determined: Sub-sects. 5 & 6.]

penalty (PARKE, B.).—*HORNER v. FLINTOFF* (1842), 9 M. & W. 678; 11 L. J. Ex. 270; 152 E. R. 287.

Annotations:—*Apld.* *Atkins v. Kinnier* (1850), 4 Exch. 776. *Reid.* *Galworthy v. Strutt* (1848), 1 Exch. 659.

479. ————.]—*BETTS v. BURCH*, No. 457, *ante*.

480. ————.]—*MAGEE v. LAVELL*, No. 450, *ante*.

481. ————.]—*Re NEWMAN, Ex p. CAPPER*, No. 451, *ante*.

482. ————.]—An agreement for the publication of a work contained stipulations that £10 should be paid by the publishers to the author for permission to publish, & that in the event of any delay in the publication or in the event of any of the terms of the agreement not being complied with by the publishers they should pay £50. In an action to recover £50 for delay:—*Held*: this sum was a penalty & not liquidated damages, & pltf. was only entitled to nominal damages.—*HOPE v. BURNS & OATES* (1885), 1 T. L. R. 272.

483. ————.]—*Subject to modification.*—When a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious & others trifling damage, the presumption is that the parties intended the sum to be penal & subject to modifications (LORD WATSON).—*ELPHINSTONE (LORD) v. MONKLAND IRON & COAL CO.* (1886), 11 App. Cas. 332; 35 W. R. 17, H. L.

Annotations:—*Apld.* *Willson v. Love*, [1896] 1 Q. B. 626. *Fold.* *Clydebank Engineering & Shipbuilding Co. v. Yzquierdo y Castaneda*, [1905] A. C. 6. *Consd.* *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A. C. 79. *Reid.* *Adams v. G. N. of Scotland Ry.*, [1891] A. C. 31. *Law v. Redditch L. B.*, [1892] 1 Q. B. 127; *Stegmann v. O'Connor* (1899), 81 L. T. 627; *Diestal v. Stevenson*, [1906] 2 K. B. 345. *Mentd.* *Re Midland Coal, Coke & Iron Co., Craig's Claim*, [1895] 1 Ch. 267; *Re Law Car & General Insce. Corp.*, [1913] 2 Ch. 103.

484. ————.]—*LAW v. REDDITCH LOCAL BOARD*, No. 428, *ante*.

485. ————.]—*Primâ facie presumption.*—*WILLSON v. LOVE*, No. 423, *ante*.

486. ————.]—*CLARKE v. M'TURK* (1897), 14 T. L. R. 27.

487. ————.]—By an agreement W. agreed to purchase a public-house of B. & the fittings, & to take the stock to a certain amount & pay for the same; B. agreed to assign the licences & pay certain rates & taxes & give possession, & not carry on the business of a licensed victualler within one mile, W. further agreeing to pay the purchase-money & produce references. It was further provided "that if either of the parties should neglect to perform or refuse to comply with any part of this agreement" the party refusing or neglecting should pay the other £25 as liquidated damages:—*Held*: this was a penalty.—*BRADLEY v. WALSH* (1903), 88 L. T. 737, D. C.

balance for \$500, but, if deft. shall fail to make payment, of the balance, within the time, then pltf. shall not be bound to give credit to deft. upon the balance for \$500, & in this respect time shall be of the essence of the contract." A few days after the expiry of the time, deft. tendered the purchase money, less \$500, which pltf. refused to accept:—*Held*: the above provision was in the nature of a forfeiture, & not of liquidated damages & the purchaser was entitled to be relieved from the terms of the judgment & to have a conveyance of the property upon paying the balance due after credit given for the \$500.—*EMPIRE LOAN & SAVINGS CO. v. McRAE* (1903), 23 C. L. T. 229; 5 O. L. R. 710;

2 O. W. R. 325, 405.—CAN.

k. — *Breach of agreement for sale of ship—Whether penalty.*—An agreement for the sale of a steamship at a price of \$30,000, provided that \$3,000 should be paid by the purchasers on signing the agreement, & the balance within five days of the vessel being ready for delivery. Failing the due payment by the purchasers of the purchase money, the vendors had liberty to re-sell the steamer by either public or private sale; & the deposit was to be forfeited to the vendors' sole use & any deficiency between the amount realised & the amount due was to be borne by the purchasers. The agreement was signed

488. ————.]—*Unless damage not accurately ascertainable.*—*DUNLOP PNEUMATIC TYRE CO., LTD. v. NEW GARAGE & MOTOR CO., LTD.*, No. 426, *ante*.

489. ————.]—*Lump sum not fair pre-estimate of probable damage.*—Agreement between pltf. & deft. provided that pltf. should sell their motor cars, to deft. for sale by him within a certain district, deft. undertaking not to sell any car or parts below a certain price, & to pay to pltf. £250 for every breach of such undertaking, the sum fixed being expressed to be "the agreed damages which the manufacturer will sustain." Deft. sold five cars at a lower price than that fixed:—*Held*: the agreed sum was a penalty & not liquidated damages, as breaches of the different conditions in the agreement would result in damages largely varying in amount, & therefore the sum of £250 was not a fair pre-estimate of the probable damage within the meaning of the decision in *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd.*, No. 426, *ante*.—*FORD MOTOR CO. (ENGLAND), LTD. v. ARMSTRONG* (1915), 31 T. L. R. 267; 59 Sol. Jo. 362, C. A.

490. ————.]—*No stipulation for payment of ascertained sum of money—Liquidated damages.*—*WALLIS v. SMITH*, No. 12, *ante*.

491. ————.]—*All capable of accurate valuation—Penalty.*—*ATKINS v. KINNIER*, No. 476, *ante*.

492. ————.]—*Relating to matters of small value—Penalty.*—*DIMECH v. CORLETT*, No. 435, *ante*.

493. *Payment by instalments—Forfeiture of previous sums paid on default in payment of one—Penalty.*—A written agreement for the sale of certain patent rights provided that the purchase-money should be £14,000, of which £1,400 was already paid at the date of the agreement, & the remainder was to be paid by instalments of £4,200 each on certain days, & it was a term of the agreement that the first two machines were to be furnished at net cost price, one half of such cost to be paid to the vendors when the machines were ordered, & the other half when they were ready for shipment. The agreement provided that if default should be made by the purchaser in the payment of any of the instalments at the stipulated times, or in case there should be a breach of any of the conditions mentioned in a clause of the agreement, then all payments made to the vendors should be absolutely forfeited to them as & by way of liquidated damages. The purchaser had paid the £1,400 as part of the purchase-money & also £450 for the machines, but, as he had made default in paying the first instalment, the vendors rescinded the contract & refused to supply the machines, & they claimed to retain the two sums paid to them as liquidated damages for breach of the contract:—*Held*: although the parties had used in their agreement the words "liquidated damages," the case came within the first class of

& the £3,000 paid. Thereafter the purchasers repudiated the contract, & brought an action to recover the £3,000 on the ground *inter alia* that it was stipulated for in the agreement merely as a penalty, & that in fact the vendors had suffered no damage by the failure of the purchasers to implement the contract:—*Held*: the sum had been deposited as a guarantee for performance of the contract & that, as the pursuers had repudiated the contract without justification, they were not entitled to take advantage of their own breach by claiming a return of the deposit.—*ROBERTS & COOPER, LTD. v. SALVESEN & CO.*, [1918] S. C. 794.—SCOT.

cases mentioned, in *Wallis v. Smith*, No. 12, *ante*, & was to be treated as a penalty only, & not as liquidated damages, & a reference was ordered as to the actual damage sustained by the vendors.—*BARTON v. CAPEWELL CONTINENTAL PATENTS CO., LTD.* (1893), 68 L. T. 857; 57 J. P. 712; 37 Sol. Jo. 442; 5 R. 374, D. C.

494. Forfeiture of deposit—Regarded as liquidated damages—Breach of agreement for sale of public-house.]—An agreement for the purchase of a public-house, with fixtures, etc., contained the following stipulations: "And, as earnest of this agreement the purchaser has paid into the hands of the vendor £50, which is to be allowed in part payment at the completion of this agreement. If the vendor shall not fulfil the same on his part, he shall return the deposit, in addition to the damages hereinafter stated: &, if the purchaser shall fail to perform his part of the agreement, then the deposit money shall become forfeited in part of the following damages: & if either of the parties neglect or refuse to comply with any part of this agreement, he shall pay to the other £50, hereby mutually agreed upon to be the damages, ascertained & fixed, on breach hereof." Instead of depositing the £50, the purchaser gave an I.O.U. for the amount. The purchaser failed to complete the purchase, & the vendor sold the public-house for £10 less than the purchaser agreed to pay for it. In an action by the vendor against purchaser for breach of the agreement, & upon the I.O.U.:—*Held*: pltf. was entitled to recover the £50, & was not limited to the amount of damage he had actually sustained. *Semble*: but for the clause for the forfeiture of the deposit, the £50 would have been a penalty, & not liquidated damages.—*HINTON v. SPARKES* (1868), 1 L. R. 3 C. P. 161; 37 L. J. C. P. 81; 17 L. T. 600; 16 W. R. 360.

Annotations:—*Folld. Lea v. Whitaker* (1872), L. R. 8 C. P. 70. *Consid. Wallis v. Smith* (1882), 21 Ch. D. 243. *Refd. Magee v. Lavell* (1874), 43 L. J. C. P. 131; *Pyb v. British Automobile Commercial Syndicate* (1906), 22 T. L. R. 287. *Mentd. Howe v. Smith* (1884), 27 Ch. D. 89.

495. ———.]—LEA v. WHITAKER, No. 447, *ante*.

496. ———.]—An agreement for sale of a public-house contained the two following provisions: (1) As an earnest hereof the purchaser has this day paid into the hands of S. the sum of £500 as a deposit, the deposit to form part of the purchase-money to be paid on the day of possession; & (2) should either vendor or purchaser refuse or neglect to carry out the above arrangement on her or his part, the one so refusing or neglecting shall pay to the other the sum of £500 as or in the nature of liquidated damages. The purchaser was unable to carry out his part of the agreement. The vendor brought this action for specific performance of the agreement, or, in the alternative, payment of the £500 as liquidated damages. It was contended that this £500 was a penalty, & was therefore not recoverable:—*Held*: the meaning of the agreement was that the £500 should be recoverable, not if some minute provision were not carried out, but if, owing to the fault of either party, the agreement were not

carried out at all, & that sum could be recovered in this case as liquidated damages.—*CATTON v. BENNETT* (1884), 51 L. T. 70.

497. ——— Breach of various stipulations.]—WALLIS v. SMITH, No. 12, *ante*.

SUB-SECT. 6.—SINGLE STIPULATION.

See BUILDING CONTRACTS, ENGINEERS & ARCHITECTS, Vol. VII., pp. 393–398, Nos. 236–260.

498. General rule.]—ASTLEY v. WELDON, No. 427, *ante*.

499. ———.]—SAINTER v. FERGUSON, No. 422, *ante*.

500. ———.]—LAW v. REDDITCH LOCAL BOARD, No. 428, *ante*.

501. Lump sum payable on breach—Bond to restrain trespass.]—The bill was for relief against a judgment on a bond, in which pltf. was jointly bound with his son, in the penalty of £100, that the son should not commit any trespass in the Duke of B.'s royalty, by shooting, hunting, fishing, etc., except with the licence of the game-keeper, or in company with a qualified person.

When these sort of bonds are given by way of stated damages between the parties, it is unreasonable to imagine they could only be intended as a bare security that the obligor should not offend for the future. Were this the case, in what respect is a gentleman in better condition, who has such a bond, than he was before, if, after he has obtained judgment at law, a ct. of equity will give him no other satisfaction than the bare value of the price of game he has killed (*LORD HARDWICKE, C.*).—*ROY v. BEAUFORT (DUKE)* (1741), 2 Atk. 190; 26 E. R. 519.

Annotations:—*Refd. Fallows v. Taylor* (1798), 7 Term Rep. 475; *Astley v. Weldon* (1801), 2 Bos. & P. 346.

502. ——— In accordance with injunction.]—A bond was executed by deft. for the payment of £100 to pltf. The condition of the bond was that if deft. should at all times thereafter, in obedience to a perpetual injunction granted by the High Ct. of Justice, refrain from trespassing on pltf.'s lands therein mentioned, or the walls, gates, or fences thereof, or inclosing the same, & from pulling down or removing or otherwise injuring the same, or inciting others to commit any such trespass, the obligation should be void. Deft. committed a breach of the injunction:—*Held*: the condition of the bond depended on one event only, namely, a breach of the injunction, & the sum secured by the bond was a liquidated sum, to the recovery of which the procedure of Ord. XIV., r. 1, was applicable.—*STRICKLAND v. WILLIAMS*, [1899] 1 Q. B. 382; 68 L. J. Q. B. 241; 80 L. T. 4; 15 T. L. R. 131, C. A.

Annotation:—*Refd. Re White & Arthur* (1901), 84 L. T. 594.

503. ——— Agreement in restraint of trade—Liquidated damages.]—BARTON v. GLOVER, No. 443, *ante*

504. ———.]—By a written agreement, pltf. & deft. agreed to become partners in the business of stage-coach proprietors, for the purpose of running a coach daily, at certain hours,

£2,000 as liquidated damages, & not as a penalty:—*Held*: such sum was recoverable as liquidated damages.—*GLEESON v. KINGSTON* (1880), 6 V. L. R. 243.—*AUS.*

1. ——— Agreement for service—Breach by employee—Liquidated damages.]—Deft. entered into a written agreement whereby, in consideration of a certain salary & allowance to be

PART VI. SECT. 1, SUB-SECT. 6.

498 l. General rule.]—When it is agreed that if a party do, or refrain from doing, any particular thing, a certain sum shall be paid by him, such sum may be treated as liquidated damages.—*BEHARY LOLL Doss v. TEJ NARAIN* (1884), 1 L. R. 10 Cal. 764.—*IND.*

503 l. Lump sum payable on breach—

Agreement in restraint of trade—Liquidated damages.]—A contract for the sale of a business, contained a covenant that the vendor would not within ten years carry on the business in the town, or within five miles of it, & would not sell or let a certain other store of the vendor to any person who should carry on such business, & that, in the event of any breach of the covenant, the vendor would pay

Sect. 1.—How determined: Sub-sect. 6.]

between London & Croydon. The agreement contained various stipulations as to the conduct of the business, & a provision that it should be lawful for either party to determine the partnership by giving four weeks' notice in writing. It contained also the following articles; that in the event of such dissolution of partnership, and so long as pltf. should continue to carry on the trade of a coach proprietor at Croydon, deft. should not, either on his own account or that of any other person or persons, or jointly with any other, run or use for hire any stage-coach, omnibus, or other carriage, or otherwise ply for hire on any part of the road over which the coach was appointed to run, at any time within one hour before or after certain specified hours of the day, under the penalty of £40, to be recovered by pltf. as liquidated damages; & the last article also provided, that, without prejudice to the right of the parties under the preceding article, they bound themselves for the true & faithful performance of the agreement in every respect, under the penalty of £100, to be recovered as aforesaid:—*Held*: the £40 must be construed as liquidated damages, & not as a penalty.—*LEIGHTON v. WALES* (1838), 3 M. & W. 545; 7 L. J. Ex. 145; 150 E. R. 1202.

Annotations:—*Refd.* Atkyns v. Kinnier (1850), 4 Exch. 776. *Mentd.* Maxim Nordenfellt Guns & Ammunition Co. v. Nordenfellt, [1893] 1 Ch. 630.

505. ————.]—*PRICE v. GREEN*, No. 448, *ante*.

506. ————.]—Deft., by deed, assigned to pltf. his business as a surgeon & apothecary, carried on by deft. in Park Street, Camden Town; & deft. covenanted that he should not nor would, directly or indirectly, by himself, or in co-partnership with any other person or persons, carry on or exercise his practice or profession of a surgeon & apothecary, or either of them, either by residing or visiting any patient, within the distance of three miles from the then place of business of deft., & that, in case of any breach of this covenant, deft. should & would pay to pltf. the full sum of £500 to be recovered against deft. as & for liquidated damages, & not as a penalty. After the execution of this deed, deft. attended several ladies in their confinements, within the three miles, & on one occasion received a sum of £14 14s. for his service; but he attended these persons with the knowledge & consent of pltf., in consequence of a request by him that deft. should for a time continue to visit the patients, to keep the connexion together; & the jury, in an action on the covenant, found that deft., in these instances, exercised the practice & profession of a surgeon, for the purpose of assisting pltf.:—*Held*: (1) for a breach of this covenant the measure of damages was the full sum of £500; (2) the above facts did not constitute a breach of the covenant.—*RAWLINSON v. CLARKE* (1845), 14 M. & W. 187; 14 L. J. Ex. 364; 5 L. T. O. S. 200; 153 E. R. 442; *on appeal* (1846), 15 M. & W. 292, Ex. Ch. *Annotations*:—*As to* (1) *Folld.* Galsworthy v. Strutt (1848), 1 Exch. 659. *Refd.* Green v. Price (1845), 14 L. J. Ex. 225. *Generally, Mentd.* *Re* Hall (1864), 11 L. T. 679.

507. ————.]—*GALSWORTHY v. STRUTT*, No. 528, *post*.

paid to him by pltf., he agreed to serve them in their business as bankers for three years, & if he should leave within that period, to pay them \$400 as liquidated damages. The agreement was signed by deft. but not by bank:—*Held*: deft. having left without excuse, he was liable for the \$400, which was recoverable as liquidated damages, & not as a penalty.—*BANK*

OF BRITISH NORTH AMERICA v. SIMPSON (1874), 24 C. P. 354.—*CAN.*

m. ———— *Agreement for service—Liquidated damages.*—Defts. engaged pltf. for one year as sales-agent on commission. The written agreement stated that in the event of either party desiring to cancel or put an end to the agreement, that party should pay to

508. ————.]—*SAINTER v. FERGUSON*, No. 422, *ante*.

509. ————.]—*MERCER v. IRVING*, No. 532, *post*.

510. ————.]—Pltf. agreed to hire as his assistant in the practice as a surgeon & apothecary, & deft. agreed to serve him for one month, & so on from month to month until either party should give to the other a calendar month's notice of his intention to determine the agreement, at a certain salary, pltf. to provide for deft. a dwelling-house at C. to reside in, deft. to be allowed all fees received from the practice of midwifery & any private practice; & in consideration of the premises & of the agreement of hiring, deft. agreed that he would not practise as a surgeon, apothecary, or surgeon-accoucheur, within the distance of five miles from C. without the consent in writing of pltf. "under a penalty or penal sum of £100, to be recoverable by pltf. as & for liquidated damages the said sum of £100 having been specified by the parties as the amount to be paid & recoverable by pltf. against deft. for the breach or non-observance by deft. of the last mentioned clause." Pltf. having recovered £100 damages:—*Held*: he was not entitled to an injunction to restrain deft. from practising within the prescribed distance, since, upon the true construction of the agreement, the £100 was liquidated damage, which the parties had agreed should be paid as an equivalent for so practising.—*CARNES v. NESBITT* (1862), 7 H. & N. 778; 31 L. J. Ex. 273; 158 E. R. 682.

Annotations:—*Refd.* Young v. Chalkley (1867), 16 L. T. 286; *Gent v. Harrison* (1893), 69 L. T. 307; *Stiles v. Ecclestone* (1903), 88 L. T. 294.

511. ———— *Agreement to take assignment of house & premises—Without requiring lessor's title—Liquidated damages.*—Deft. agreed to take an assignment of pltf.'s house & premises, without requiring lessor's title; that he would pay £2,300 for it, & also the amount of goods, fixtures, & effects, & take possession of the house on or before Sept. 29; pltf. agreed to give up possession of the premises, effects, & stock by that day, to assign licences, to repair or allow for all damaged outside windows, & to clear rent, taxes, & outgoings to the day of quitting possession. The expenses of the agreement were to be paid by the parties in equal moieties; & either party not fulfilling all & every part was to pay to the other £500, thereby settled & fixed as liquidated damages:—*Held*: on breach of the agreement by omission to take an assignment, deft. was liable to pay the whole £500; & that it was not a mere penalty to cover such damages as might be actually incurred.

I do not admit the assumption that the present is an agreement for the performance of several things, in substance it is for the performance of only one, the vendor was to leave & the vendee was to take possession (PARK, J.).—*REILLY v. JONES* (1823), 1 Bing. 302; 8 Moore, C. P. 244; 1 L. J. O. S. C. P. 105; 130 E. R. 122.

Annotations:—*Consd.* Boys v. Ancell (1839), 5 Bing. N. C. 390. *Folld.* Lea v. Whitaker (1872), L. R. 8 C. P. 70. *Consd.* Magee v. Lavell (1874), L. R. 9 C. P. 107; *Wallis v. Smith* (1882), 21 Ch. D. 243. *Refd.* Davies v. Penton (1827), 9 Dow. & Ry. K. B. 369; *Betts v. Burch* (1859), 28 L. J. Ex. 267; *Marshall v. Mackintosh* (1898), 78 L. T. 750.

the other \$500 by way of compensation for the cancellation & determination of the agreement. During the year defts. discharged pltf., & pltf. sued for the \$500:—*Held*: the \$500 was not a penalty, & pltf. was entitled to recover that sum.—*ELLIS v. FRUCHTMAN* (1912), 22 W. L. R. 776; 3 W. W. R. 558; 8 D. L. R. 353.—*CAN.*

512. — Agreement to enter into partnership—Liquidated damages.]—Two parties agreed to enter into partnership as ship chandlers & nautical instrument makers, each to invest the sum of £250; & in the event of either not being desirous to fulfil the contract, or refusing to execute the deed of partnership on or before a certain day, the party so refusing was to forfeit to the other £50:—*Held*: this sum was to be treated as liquidated damages & not as a penalty.—*CASS v. THOMPSON* (1857), 5 W. R. 289.

513. — Agreement to ship certain goods—Undertaking as to time of departure—Liquidated damages.]—On a guarantee that a certain vessel should sail with or before any other vessel then in the berth, "under penalty of forfeiting one-half of the freight," another vessel having sailed first:—*Held*: one-half of the freight could be recovered as liquidated damages, & also, it was immaterial whether the money intended to be made payable was called by the parties a penalty or liquidated damages.

The question then is, Is this a sum of money recoverable? is it, as popularly expressed, a penalty or liquidated damages? . . . It is a sum payable on one event. It is not a sum to secure the performance of several matters. This is the distinction on which the question turns; the names the parties give the money, "penalty" or "liquidated damages," are immaterial (*BRAMWELL, B.*).—*SPARROW v. PARIS* (1862), 7 II. & N. 594; 31 L. J. Ex. 137; 5 L. T. 799; 8 Jur. N. S. 391; 158 E. R. 608.

Annotations:—*Consd. Walls v. Smith* (1882), 21 Ch. D. 243. *Reid. Magee v. Lavell* (1874), 43 L. J. C. P. 131; *Willson v. Love*, [1896] 1 Q. B. 626.

514. — By lessee of public-house — If convicted under Licensing Acts—Liquidated damages.]—In the lease of a public-house for a term of one year & henceforward from year to year the tenant covenanted that he would not do or suffer to be done, or omit or suffer to be omitted, any act contrary to the provisions of any Licensing Act for the time being in force, whereupon a conviction should be made; & would, in that event, pay to the lessor the sum of £50, as & by way of liquidated damages for any & every such act. The tenant was convicted of selling intoxicating liquors during prohibited hours:—*Held*: he was liable to pay the full sum of £50 as liquidated damages.—*WARD v. MONAGHAN* (1895), 59 J. P. 532; 11 T. L. R. 529; 39 Sol. Jo. 670, C. A.

515 i. — Agreement for sale of land — Liquidated damages.]—Where in a contract for the sale of land it was agreed that in case either of the parties should retract, he should pay to the other by way of ascertained & liquidated damages the sum of £100:—*Held*: not a penalty.—*CUMMINGS v. McLACHLAN* (1859), 16 U. C. R. 626.—*CAN.*

n. — *Agreement guaranteeing re-sale—Liquidated damages.]*—*Deft.*, in order to induce *pltf.* to purchase land which *deft.* was endeavouring as agent to sell, & upon a sale of which he was to receive a commission from the vendor, signed a writing by which he guaranteed to forfeit £1,000 if the land was not re-sold before a certain date, providing that it was put into excellent shape at once. *Pltf.* did all that he was required to do in the guarantee. *Deft.* did not sell the land for him, nor was it sold at all:—*Held*: the words guarantee & forfeit did not import a penalty, but were used as equivalent to agree & pay. Where the money is to be payable on the breach of the agreement, containing only one entire act to be performed or to be abstained

from, the money can be recovered whether it is called a penalty or liquidated damages.—*CRIPPEN v. HITCHNER* (1911), 18 W. L. R. 259.—*CAN.*

o. — *Agreement to remove obstructions—Liquidated damages.]*—*Deft.*, who had trespassed on *pltf.*'s land by placing stones & commencing to build a stone fence thereon, entered into an agreement to remove same before Dec. 15, & he agreed "to pay to *pltf.* the sum of £200 as liquidated damages if the said stones & stone fence are not removed, as hereinbefore agreed, at the times mentioned in this agreement":—*Held*: the sum mentioned was not a penalty, but liquidated damages for the omission to perform a specific act, viz., the removal of the stones & stone fence.—*CRAIG v. DILLON* (1881), 6 A. R. 116.—*CAN.*

p. — *Restrictive covenant — Penalty.]*—A small plot of ground adjoining B.'s dwelling-house was in 1802 demised for building purposes. The lease contained a covenant that the tenement to be erected thereon, adjoining B.'s house, should be built

515. — Agreement for service — Wrongful dismissal—Liquidated damages.]—*THOMAS v. LONDON SEWING MACHINE CO.* (1897), 14 T. L. R. 38.

See, generally, MASTER & SERVANT.

516. — Agreement for sale of land — Option to vendor—Liquidated damages.]—*Pltf.* agreed to sell an estate to *defts.* for £51,086, £5,000 of the purchase money to be paid in cash & the balance to remain on mtge. for two years. Clause 5 was as follows: "The purchasers shall give the vendor the option of finding one-third of the capital of any co. . . which they may form for the purpose of developing the brine land. In the event of their failing to give him the option . . . within a period of two years from the completion of the purchase they shall pay the vendor the sum of £5,000 over & above the mtge. debt of £46,086 & interest." The purchase was completed in accordance with the agreement on Sept. 2, 1907, & in July, 1908, a private co. was formed for the purpose of working the estate. The whole of the capital—£100,000—was issued & no opportunity was given to *pltf.* to find one-third, but in Dec. 1908, he was informed by the co. that it was proposed to increase its capital to £120,000 & offering him in accordance with the terms of the agreement, one-third of that amount, viz. 4,000 £10 shares. *Pltf.* refused this offer & alleged that under the agreement he was entitled to an option to find one-third of the original capital, & not having had such option he claimed the extra £5,000 under the agreement:—*Held*: the £5,000 was not intended to be a penalty but a *bond fide* alternative.—*DAVIES v. CHAMBERLAIN* (1909), 25 T. L. R. 776; on appeal, 26 T. L. R. 138, C. A.

Annotation:—*Mentd. Kreglinger v. New Patagonia Meat & Cold Storage Co.* (1913), 109 L. T. 802.

Agricultural lease—Agreement to pay increased rent for pasture ploughed up.]—*See AGRICULTURE*, Vol. II., p. 19, Nos. 107, 111.

517. Mining lease — Covenant to restore land to its former condition—Proportionate sum payable on breach—Liquidated damages.]—The lessee of a mining lease covenanted that from time to time during the lease, or at the expiration thereof, he would put the lands generally into such state & condition as they were in before, or as near thereto as possible, or if he did not that he would pay £100 for every acre not so restored. Damage was done to about 30 acres of land, but the lessee did not restore the same to its former condition:—*Held*:

fit for a private family & no other, under a penalty of £10 yearly additional rent, unless B. should convert his own house to any public use. Two houses were accordingly built on the plot, one immediately adjoining the B.'s house & the other adjoining that. In 1869, F., *deft.*, proceeded to convert the first house into a public-house. The second of the two houses had been used as a public-house for forty years without any objection on B.'s part; but B.'s own house had always remained a private dwelling-house:—*Held*: the £10 was in the nature of a penalty & not of liquidated damages.—*BRAY v. FOGARTY* (1870), 18 W. R. 1151.—*IR.*

q. — *Agreement to remove building—Yearly sum payable on breach—Liquidated damages.]*—When, in an indenture of assignment of the assignor's interest in two fields, & a lime-kiln thereon situate, it was covenanted that the assignee should, on or before a certain day, prostrate & remove the said lime-kiln; & in case it should not be removed & prostrated, that the assignee should pay the assignor £100 for each year after that day, during

Sect. 1.—How determined: Sub-sects. 6 & 7. Sect. 2.]

the lessor was entitled to the sum of £100 for every acre although such sum greatly exceeded the amount of actual damage, as it was evident that the parties intended that to be paid in the event of a breach of covenant, & it was not in the nature of a penalty.—*Re MEXBOROUGH (EARL) & WOOD* (1882), 47 L. T. 516; 47 J. P. 151.

518. Agreement to perform certain work in limited time—Sums payable till works completed—Weekly sums—Liquidated damages.]—If two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, & a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly sum, & the work is not finished in the time; such weekly payments are not by way of penalty, but in the nature of liquidated damages, & may be set off by the obligee in an action brought against him by the obligor who executed.—*FLETCHER v. DYCHE* (1787), 2 Term Rep. 32; 100 E. R. 18.

Annotations:—Apld. Astley v. Weldon (1801), 2 Bos. & P. 346. *Fold. Bonsall v. Byrne* (1867), 16 W. R. 372. *Reid. Barton v. Glover* (1815), Holt, N. P. 43; *Reilly v. Jones* (1823), 8 Moore, C. P. 244; *Owen v. Wilkinson* (1858), 5 C. B. N. S. 526. *Mentd. Morley v. Inglis* (1837), 3 Hodg. 270; *East Anglian Ry. v. Lythgoe* (1851), 10 C. B. 726; *Attwool v. Attwool* (1853), 22 L. J. Q. B. 287; *R. v. Marylebone County Court Judge & G. W. Ry., Ex p. Phillips*, [1907] 2 K. B. 664.

519. ————]—Pltf. having contracted to supply iron rails to a foreign co., applied to defts. who wrote him—"We have this day sold you about 5,413 tons of iron rails delivered f.o.b. at Newport payment to be as stated in the specification." By the specification "the delivery of the rails is to commence by Feb. 15, 1873, & to be completed by May 15, 1873. The makers to have the option to begin delivery on Dec. 15, 1872. In the event of the makers exceeding the time of delivery above stipulated, they shall pay by way of fine 7s. 6d. per ton per week, this amount to be deducted out of the payment for the rails." The rails were to be stacked so that they might be tested, & payment to be made by bills. In the event of ships not being ready within fourteen days' notice being given, then the payment by the bills was to be made against wharf warrants & engineer's certificate for each 500 tons stacked, & being to buyer's orders, the sellers undertaking to put f.o.b. when the vessel is ready. The workmen in the employ of defts. struck work, & defts. did not deliver any rails until May. They continued the delivery from time to time, but the whole quantity was not delivered until Sept.:—*Held*: the sum of 7s. 6d. per ton per week was a liquidated sum

which defts. were bound to pay to pltf., but that it was only to be calculated from May 15.—*BERGHEIM v. BLAENAVON IRON & STEEL CO., LTD.* (1875), L. R. 10 Q. B. 319; 44 L. J. Q. B. 92; 32 L. T. 451; 23 W. R. 618.

520. ———— & lump sum—Liquidated damages.]—*LAW v. REDDITCH LOCAL BOARD*, No. 428, *ante*.

521. ———— Daily sum—Liquidated damages.]—*DE SOYSA v. DE PLESS POL*, No. 91, *ante*.

522. Agreement by corporation to supply water—Daily sum payable on breach—Liquidated damages.]—*BEAUMONT v. HUDDERSFIELD CORPN.* (1902), 67 J. P. 57; 19 T. L. R. 97; 47 Sol. Jo. 127; 1 L. G. R. 118, C. A.

Annotation:—Fold. Meltham Spinning Co. v. Huddersfield Corpn. (1903), 89 L. T. 403.

523. ————]—The Huddersfield Water Act, 1869, under which deft. corpn. constructed & maintained waterworks, required them to deliver certain compensation water; & provided that in case of neglect on the part of the corpn., in consequence of which the statutory quantity of compensation water was not delivered, the corpn., should for every day on which the neglect occurred, forfeit & pay to the occupiers of each of the mills & works affected thereby—who might sue for & recover the same—the sum of £5, & should in addition make compensation for any damage sustained by such occupiers, or any of them, in respect of which such penalties were an insufficient compensation, & that such occupiers might recover such compensation by proceedings in any ct. of competent jurisdiction:—*Held*: the £5 a day recoverable under the above Act was in the nature of liquidated damages & was not a "penalty" properly so called.—*MELTHAM SPINNING CO., LTD. v. HUDDERSFIELD CORPN.* (1903), 89 L. T. 403; 67 J. P. 445; 2 L. G. R. 32, C. A.

524. Agreement to supply coal—Sum payable in proportion to unexecuted portion—& amount of proved loss—Liquidated damages.]—*DIESTAL v. STEVENSON*, No. 441, *ante*.

525. ————]—A charterparty entered into between pltf. & defts. contained a clause in the following terms: "Captain to sign bills of lading—at pltf.'s office—without responsibility as to weight, & as presented to him, without prejudice to the tenor of this charterparty, within 24 hours after the cargo is on board, or pay 4d. per register ton per day (the first day's payment being due on the expiration of the 24 hours) for each day's delay." The captain refused to sign for seventeen days, but the owners offered to sign on his behalf within 24 hours.

In an action by the charterers against the owners:—*Held*: the clause was one for a penalty

which the lime-kiln should remain on the premises, or a rateable sum for any shorter time:—*Held*: the sum was in the nature of liquidated & ascertained damages, & not a penalty.—*HUBAND v. GRATTAN* (1833), 10 C. B. N. S. 389.—*IR*.

518 i. Agreement to perform certain work in limited time—Sums payable till work completed—Weekly sums—Liquidated damages.]—By a written agreement between pltf. & deft., pltf. agreed to repair a building owned by deft., the work to be completed by a certain day under a penalty of £25 per week for every week that the building remained unfinished after that date, said £25 per week to be settled & stipulated damages for delay. The contract was not completed at the date specified. Pltf. sued deft. for \$354.25, the full balance claimed to be

due under the contract. Dft. paid \$184.25 into ct. & claimed to set off \$25 per week for eight weeks' delay in completing the contract:—*Held*: the £25 per week were liquidated damages, & deft. was entitled to offset the \$25 per week for the full period of eight weeks.—*HORTON v. TOBIN* (1886), 20 N. S. R. (8 R. & G.), 169; 8 C. L. T. 377.—*CAN*.

r. Covenant not to assign or sublet without leave—Smaller rent if covenant observed—Whether higher rent penal.]—A. by indenture demised to B. certain lands for three lives at the yearly rent of £187 with the usual clause for distress & re-entry for non-payment of this rent. The lease also contained an agreement by B. not to sublet or assign without leave first obtained under the hand & seal of A. & that so long as B. should

perform the agreements & conditions therein contained A. would be content with the yearly rent of £93 15s. 2d. payable on the same days as the first reserved rent of £187:—*Held*: the larger rent thereby reserved was not a penal rent & that ejectment was maintainable for its non-payment.—*ASHTOWN (LORD) v. WHITE* (1847), 11 I. L. R. 400.—*IR*.

s. Covenant to cultivate in particular manner—Additional rent on failure to perform—Whether liquidated damages.]—*CARDEN v. BUTLER* (1832), 11 I. L. R. 400.—*IR*.

t. Forfeiture of bonus—Regarded as liquidated damages—Failure to comply with condition.]—In 1874 the county of H. gave to the H. Ry. Co. a bonus of \$65,000 to be used in the construction of the railway upon the condition that the co. should

& not liquidated damages.—*THE PRINCESS* (1894), 70 L. T. 388; 7 Asp. M. L. C. 432; 6 R. 723.
Annotation:—Held. Rayner v. Rederiakt. Condor of Stockholm (1895), 64 L. J. Q. B. 540.

526. ——— Until ship totally lost or cargo delivered—Penalty.]—A charterparty contained the clause, "The captain shall sign charterer's bills of lading as presented without qualification . . . or pay £10 for every day's delay as & for liquidated damages until the ship is totally lost or the cargo delivered." The captain wrongfully refused to sign the bills of lading as presented, but the charterers were unable to show that they had sustained any damage by his conduct:—*Held*: the clause imposed a penalty & not liquidated damages.—*RAYNER v. REDERIAKTIEBOLAGET CONDOR*, [1895] 2 Q. B. 289; 64 L. J. Q. B. 540; 73 L. T. 96; 8 Asp. M. L. C. 43; 1 Com. Cas. 80; 15 R. 542.

527. ——— Estimated amount of freight payable on breach—Penalty.]—*THORP v. HIBBARD* (1887), 4 T. L. R. 54.

SUB-SECT. 7.—DAMAGES UNASCERTAINABLE.

528. General rule.]—By a deed for the dissolution of partnership between pltf. & deft., it was covenanted by deft. that he would not at any time or times thereafter, within the next seven years, directly or indirectly, either by himself or in co-partnership with another or others, carry on the business of an attorney or solicitor within the distance of fifty miles from a place named, nor interfere with, solicit, or influence the clients of the late co-partnership; & that if he should in any respect infringe that covenant, then he should immediately thereupon pay pltf. the sum of £1,000, as & for liquidated damages, & not by way of penalty:—*Held*: the sum of £1,000 was, upon the construction of this covenant, to be considered by way of liquidated damages, & not as a penalty.

The rule seems to be this, that when there are many & different stipulations in an agreement, the breach of any of which gives rise to a definite amount of damage, & for which a disproportionate sum is annexed, it is not reasonable to hold that the parties intended the whole amount to be paid.

But when the damages cannot be ascertained, what absurdity is there in a party saying there shall be a fixed sum? & therefore in such case the cts. may give the words their plain & ordinary meaning (*ALDERSON, B.*).—*GALSWORTHY v. STRUTT* (1848), 1 Exch. 659; 17 L. J. Ex. 226; 10 L. T. O. S. 329; 154 E. R. 280.

Annotations:—Consd. Re Newman, Ex p. Capper (1876), 4 Ch. D. 724; *Stegmann v. O'Connor* (1899), 80 L. T. 234. *Held. Mercer v. Irving* (1858), E. B. & E. 563; *Betts v. Burch* (1859), 4 H. & N. 506; *Wallis v. Smith* (1882), 21 Ch. D. 243.

remain independent for 21 years. In 1888 the H. & N. W. Ry. Co. became merged in the G. Ry. Co. & ceased to be an independent line:—*Held*: there had been a breach of the condition entitling pltf. to recover the whole amount of the bonus as liquidated damages.—*HALTON COUNTY v. GRAND TRUNK RY. CO.* (1892), 19 A. R. 252; 21 S. C. R. 716.—*CAN.*

PART VI. SECT. 1, SUB-SECT. 7.

529 i. Loss unascertainable or not readily ascertainable—Sum agreed on regarded as liquidated damages.]—Deft. agreed under seal to manufacture into pot barley, & to store for pltf., certain barley of pltf., on or before July 15, 1875, & on that date to purchase the barley & pay therefor the sum of £785; & it was provided, that in case

deft. did not pay \$785, on the date, deft. should pay pltf. \$100 as liquidated damages:—*Held*: the \$100 was not a penal sum or forfeiture for not paying money due or for any ordinary debt or claim, but liquidated or agreed on damages for not buying at a named price goods of a fluctuating & uncertain value.—*KNOWLTON v. MACKAY* (1879), 29 C. P. 601.—*CAN.*

529 ii. ————Though a sum to be paid for default of performing an agreement is described as a penalty it may be really liquidated damages. The purchaser of the materials of certain old buildings was to remove them himself, & to repair those not to be removed, & cope the walls not to be taken down. He gave a bond that he would have the materials removed & the work completed by a

529. Loss unascertainable or not readily ascertainable—Sum agreed on regarded as liquidated damages.]—*KEMBLE v. FARREN*, No. 474, *ante*.

530. ————*ATKINS v. KINNIE*, No. 476, *ante*.

531. ————*REYNOLDS v. BRIDGE*, No. 477, *ante*.

532. ————*Deft. & B.*, being in partnership as surgeons, agreed to assign a portion of their business to pltf. for £150. A bond was entered into between them, by the condition of which it was declared, that if deft. or B. should practise, etc., within one mile of W., or should within three years attend any of the patients of pltf., or should induce any of the patients of pltf. to employ or consult deft. or any other medical practitioner, or should induce any other practitioner to set up in practice within such distance of one mile, or should carry on the business of a chemist or druggist within W.; or if B. should underlet or assign his term in his house at W. to any physician, or should permit any person carrying on such profession to reside in the house, "then, & in any or either of the cases, if deft. or B., their exors. or administrators, or either of them, did & should forthwith well & truly pay unto pltf. the sum of £300 the bond should be void." Deft. committed a breach of the bond by practising within one mile of W.:—*Held*: pltf. was entitled to recover the whole sum of £300.

It is difficult to estimate the amount of injury which might be ascertained—one cannot even say what would be the damage for attending even one patient within the limits assigned, & the parties accordingly thought it better to say that any breach should be visited with a liability to pay £300 (*COLERIDGE, J.*).—*MERCER v. IRVING* (1858), E. B. & E. 563; 27 L. J. Q. B. 291; 31 L. T. O. S. 197; 5 Jur. N. S. 143; 6 W. R. 661; 120 E. R. 619.

533. ————*WALLIS v. SMITH*, No. 12, *ante*.

534. ————*WEBSTER v. BOSANQUET*, No. 461, *ante*.

535. ————*DUNLOP PNEUMATIC TYRE CO., LTD. v. NEW GARAGE & MOTOR CO., LTD.*, No. 426, *ante*.

SECT. 2.—RECOVERY OF.

See BONDS, Vol. VII., pp. 213-218, Nos. 551-605.

See BUILDING CONTRACTS, ENGINEERS & ARCHITECTS, pp. 398-399, Nos. 261-264.

536. Amount recoverable—Amount agreed upon.]—In covenant by lessor against lessee upon a lease reserving an increased rent for every acre of certain lands converted into tillage, the jury by their verdict having given damages for the actual injury sustained instead of the increased

day, or pay £10 "penalty" for each week he should be behind:—*Held*: the breach was incapable of measurement, & the so-called penalty was really liquidated damages.—*BONSALL v. BRYNE* (1867), 16 W. R. 372.—*IR.*

PART VI. SECT. 2.

536 i. Amount recoverable—Amount agreed upon.]—By an agreement under seal deft. sold to pltf. a house & the goodwill of his medical practice for \$2,100, & deft. bound himself in the sum of \$400, to be paid to pltf. in case the deft. should set up or locate himself in the practice of medicine or surgery within the space of five years from the date hereof within a radius of five miles from the village:—*Held*: the sum of \$400 was payable as liquidated damages on the breach of the

Sect. 2.—Recovery of. Part VII. Sect. 1.]

rent, the ct. will not refuse pltf. a new trial, on the ground that the verdict was consistent with justice.

The jury, in this case, have given by their verdict a compensation for what they consider to be the actual damage sustained, when, in point of law, they ought to have given the increased rent (ABBOTT, C.J.).—FARRANT v. OLMIOUS (1820), 3 B. & Ald. 692; 106 E. R. 814.

Annotation:—Distd. Fuller v. Fenwick (1846), 3 C. B. 705.

537. ———.—]—CRISDEE v. BOLTON, No. 444. ante.

538. ———.—Amount of loss sustained.]—RANDALL v. EVEREST, No. 387. ante.

539. ———.—Whether penalty clause a limitation of liability.]—You may either receive the penalty & rescind the contract or bring action

on the covenants & let the contract stand (LORD MUNSFIELD, C.J.).—WINTER v. TRIMMER (1762), 1 Wm. Bl. 395; 96 E. R. 225.

Annotations:—Folld. Harrison v. Wright (1811), 13 East, 343. Reidd. Beckham v. Drake (1849), 2 H. L. Cas. 579.

540. ———.—]—LOWE v. PEERS, No. 388. ante.

541. ———.—]—In an action on an agreement to serve pltf. under a penalty, the jury cannot exceed the penalty in damages, & within it, are only to give pltf. a compensation for the loss he proves he has suffered.—WILBEAM v. ASHTON (1807), 1 Camp. 78, N. P.

Annotation:—Reidd. Harrison v. Wright (1811), 13 East, 343.

542. ———.—]—In *assumpsit* upon a memorandum for a charterparty, describing the agreement of deft., the shipowner, to proceed with all convenient speed to a foreign port, & there

agreement; & that the purchaser was entitled to that sum or to an injunction, but not to both.—SNIDER v. McKELVEY (1900), 27 A. R. 339.—CAN.

536 ii. ———.—]—Deft. in an action on a building contract admitted the claim, but counter-balanced for \$20 damages for delay in the completion of the work. The contract provided that the contractor should pay or allow to the employer \$1 per day as liquidated & ascertained damages for every day, excluding Sunday, that the works should remain unfinished after the time specified, & also provided that any question touching the construction of this contract should be settled & be determined by the award of one referee:—*Held*: the right to damages for delay was regulated & the amount fixed by the contract, & a reference to arb'n. was not a condition precedent to the deft.'s right to recover on his counter-claim.—COLEMAN v. PATTERSON (1910), 30 N. Z. L. R. 353.—N.Z.

536 iii. ———.—Whether for every breach.]—Pltfs. being indebted to deft. in \$80,000, & to other persons (whether partnership or individual debts) in an amount not exceeding \$2,160, by deed dated Oct. 1859, in consideration of a release of the \$80,000 & of \$1,000 paid, assigned to deft. all their stock-in-trade, etc., with a covenant on deft.'s part to indemnify the pltfs. from all debts & demands not exceeding \$2,160; & a further covenant by both pltfs. & deft. for \$4,000 as liquidated damages for the performance of the covenants on both sides contained in the deed:—*Held*: the sum of \$4,000 was not a debt due as liquidated damages upon each breach of the covenant.—RUTHERFORD v. STOVEL (1862), 12 C. P. 9.—CAN.

538 i. ———.—Amount of loss sustained.]—Where two persons entered into an agreement for a certain quantity of hops yearly, for five years, & agreed that each should be bound to the other for the faithful performance of the contract in the sum of \$200:—*Held*: the sum named must be treated as a penalty, & not as liquidated damages; & therefore, that the pltf. suing for non-delivery might recover beyond the \$200.—SLEEMAN v. WATEROUS (1873), 23 C. P. 195.—CAN.

538 ii. ———.—]—In 1874 the county of H. gave to the H. Ry. Co. a bonus of \$65,000 to be used in the construction of the railway, upon the condition that the company should remain independent for twenty-one years. In 1888 the H. Ry. Co. became in effect merged in the G. Ry. Co., & ceased to be an independent line:—*Held*: there had been a breach of the condition, entitling pltfs. to recover the whole amount of the bonus as liquidated damages.—HALTON COUNTY v. GRAND TRUNK RY. CO. (1891), 19 A. R. 252; 21 S. C. R.

716.—CAN.

538 iii. ———.—]—Under a covenant contained in a lease granting a right of way over certain lands to a railway co. for the purpose of a switch, the lessees on default in removing the tracks & ties from the land within fifteen days from the termination of the lease, were to forfeit to the lessor \$5 a day as liquidated damages, & not as a penalty, for each day after the time that the premises should remain in any way obstructed:—*Held*: such damages were liquidated, but this was a case to award actual damages estimated on a liberal scale.—TOWNSEND v. TORONTO HAMILTON & BUFFALO RY. CO. (1896), 28 O. R. 195.—CAN.

538 iv. ———.—]—A contract for the sale of 1,500 tons of coal to be paid for in car load lots as ordered within a fixed period contained the following provision: & for the insuring of the more effectual performance of this agreement, the purchasers further agree to pay to the vendors the sum of \$1 as a penalty by way of liquidated damages for every ton of the full amount not ordered & paid for by them on Apr. 1, 1907:—*Held*: the contract should be construed as providing for the payment or \$1 per ton as a penalty only & as pltfs. had suffered no damages from the refusal of the defts. to take the whole 1,500 tons, they could recover nothing.—BROCK v. ROYAL LUMBER CO. (1907), 17 Man. L. R. 351.—CAN.

538 v. ———.—]—In consideration of the purchase by pltfs. of part of the stock in trade of a hardware business defts. covenanted with pltfs. that they (defts.) would not carry on the business of hardware merchants in the village or elsewhere within 5 miles thereof for a period of 10 years, etc.; & for the due performance of the agreement the parties agreed that \$500 should be the measure of damages for the breach thereof; & that sum should be recovered by pltfs. as liquidated damages & not as a penalty:—*Held*: notwithstanding the use of the words liquidated damages the \$500 was a penalty, & for the breach of the covenant pltfs. were entitled only to the actual damage sustained.—TOWNSEND v. RUMBALL (1909), 1 O. W. N. 47; 9 O. L. R. 433.—CAN.

538 vi. ———.—]—An agreement by which pltf. agreed to out & deliver a specified number of logs provided *inter alia* that 10 per cent. of the price should be retained by defts. until the completion of the contract:—*Held*: this provision was not in the nature of a penalty, but that defts. were entitled to retain 10 per cent. by way of security for any damages they might sustain by reason of the non-performance of the agreement to deliver a specified quantity of ties, & they would be entitled to retain a portion of the 10 per cent. equal to the amount of damages they could show.—

GIESSE BROTHERS v. BELL & MCPHEE (1915), 33 W. L. R. 300.—CAN.

538 vii. ———.—]—MADHUB CHUNDER ROY v. LUKHEE JELLANCE (1868), 9 W. R. 212.—IND.

538 viii. ———.—]—Where the parties to a contract have, in anticipation of a breach, expressly determined by agreement what shall be the sum payable as damages for the breach, the ct. is not bound to award such sum for a breach, but may award reasonable compensation not exceeding such sum. As a general principle, compensation must be commensurate with the injury sustained.—NAIT RAM v. SHIB DAT (1882), 1 L. R. 5 All. 238.—IND.

538 ix. ———.—]—Though a contract stipulate for a sum of liquidated damages the ct. may, in the exercise of its equitable jurisdiction, modify the amount if it is exorbitant. In the general case where the facts are simple & admitted it lies with the ct. to modify the damages; but if the facts require to be ascertained by evidence with reference to the constitution of the contract & the position of the parties the ct. may call in the aid of a jury.—FOURREST & BARR v. HENDERSON COULBORN & CO. (1869), 8 Macph. (Cl. of Sess.) 187; 42 Sc. Jur. 88.—SCOT.

538 x. ———.—]—An agreement between two persons for the lease of an hotel provided:—Both parties hereto bind & oblige themselves to implement their part of this agreement under the penalty of £50 to be paid by the party failing to the party performing or willing to perform over & above performance. The tenant having refused to carry out the agreement at all, the landlord claimed damages for breach of contract to the amount of over £300:—*Held*: the landlord's claim for damages was not limited to the amount mentioned in the penalty clause.—DINGWALL v. BURNETT, [1912] S. C. 1097.—SCOT.

538 xi. ———.—]—CAPE TOWN COUNCIL v. LINDER (1887), 6 S. C. 410.—S. AF.

538 xii. ———.—]—OTTO v. LATEGAN (1892), 9 S. C. 250.—S. AF.

538 xiii. ———.—]—Pltf. who claims a penalty in terms of a contract is not entitled to recover it or any part of it, without proof of the amount of damage sustained by him by reason of the breach of contract.—POSTMASTER GENERAL v. VAN NIEKERK, [1915] C. P. D. 378.—S. AF.

538 xiv. ———.—]—A stipulation in a mtge. bond that the debtor on failure of payment of his debt shall pay collection costs should be treated as a penalty & the creditor is therefore entitled to recover only the actual loss which he has sustained through the debtor's breach of contract.—FRASER (D. & D. H.), LTD. v. WALTER (1916), App. D. 494.—S. AF.

load within twenty running days, a cargo from pltf.'s factors, & therewith return home, & in fifteen running days deliver the same, on payment of certain freight, concluded with a certain penalty for non-performance:—*Held*: pltf. might recover damages on the breach of the contract, in deft.'s not permitting the vessel to proceed on the voyage, beyond the amount of the penalty.—*HARRISON v. WRIGHT* (1811), 13 East, 343; 104 E. R. 402.

Annotations:—*Consd.* Wall v. Rederiakt. Luggude, [1915] 3 K. B. 66. *Refd.* Beckham v. Drake (1849), 2 H. L. Cas. 579.

543. ————]—Charterparty contained the following clause: "Penalty for non-performance of this agreement proved damages, not exceeding estimated amount of freight":—*Held*: the clause provided a penalty & not a limitation of liability & did not prevent the party complaining of non-performance from recovering the actual damages though exceeding the estimated amount of freight.—*WALL v. REDERIAKTIEBOLAGET LUGGUDE*, [1915] 3 K. B. 66; 84 L. J. K. B. 1663; 114 L. T. 286; 31 T. L. R. 487; 13 Asp. M. L. C. 271; 21 Com. Cas. 132.

Annotation:—*Apprvd.* Watts, Watts v. Mitsui Co., [1917] A. C. 227.

544. ————]—A clause in a charterparty which provides: "Penalty for non-performance of this agreement proved damages not exceeding the estimated amount of freight," is a penalty clause only & cannot be read as a limitation of the right to recover proved damages.—*WATTS, WATTS & CO., LTD. v. MITSUI & CO., LTD.*, [1917] A. C. 227; 86 L. J. K. B. 873; 116 L. T. 353; 33 T. L. R. 262; 61 Sol. Jo. 382; 13 Asp. M. L. C. 580; 22 Com. Cas. 242, H. L.; *revsq.* S. C. *sub nom.* MITSUI & CO., LTD. v. WATTS, WATTS & CO., LTD., [1916] 2 K. B. 820, C. A.

Annotations:—*Refd.* Montevideo Gas & Drydock Co. v. Clan Line Steamers (1921), 37 T. L. R. 544. *Mentd.* The Svorono (1917), 33 T. L. R. 415; Russian Bank for Foreign Trade v. Excess Insee, [1918] 2 K. B. 123; Hackney B. C. v. Doré, [1922] 1 K. B. 431.

—————]—*See* BONDS, Vol. VII., pp. 213-215, Nos. 551-572.

545. Mode of—Action of debt for penalty—Or action on the case.]—*WINTER v. TRIMMER*, No. 539, *ante*.

546. ————]—*LOWE v. PEERS*, No. 388, *ante*.

Part VII.—Pleading, Proof and Assessment.

SECT. 1.—PLEADING AND PRACTICE.

See, generally, PLEADING & PRACTICE; R. S. C., Ord. 19, r. 4, Ord. 21, r. 4.

547. Damages need not be denied—R. S. C., Ord. 21, r. 4.]—*WOOD v. DURHAM* (EARL), No. 378, *ante*.

548. ————]—It never was, & is not now, necessary to plead to damages, they are always in issue without plea, *sec* Ord. 21, r. 4 (LAWRENCE, J.).

PART VII. SECT. 1.

549 i. *Special damage—Must be pleaded.*]—Evidence of special damage in not being able to fulfil a contract for the delivery of logs, is not admissible under an allegation in the declaration that pltf. was prevented by the act of deft. from getting the logs to market, & thereby lost the freight & sale thereof.—*ROWE v. TITUS* (1849), 1 All. 326.—*CAN.*

549 ii. ————]—Where a party seeks to recover compensation not in the nature of general damages, to be left to the discretion of the jury, but in the shape of particular damages specially contracted for by the agreement itself, he should aver in his declaration notice to deft. before action brought of such particular damages & the amount.—*HENDERSON v. NICHOLS* (1849), 5 U. C. R. 398.—*CAN.*

549 iii. ————]—When there is a special count & common count in the declaration the effect of the special count being bad, when the general damages have been assessed is, that there must be a *venire de novo*, unless it can be said that the verdict was given wholly upon evidence applicable to the common count alone & not to the special count.—*DODGE v. MUIR* (1850), 7 U. C. R. 326.—*CAN.*

549 iv. ————]—In a special action on the case for obstructing an inquiry into the financial affairs of a township:—*Held*: upon the declaration the damage was sufficiently stated.—*EAST NISSOURI TOWNSHIP v. HORSEMAN* (1858), 16 U. C. R. 556.—*CAN.*

549 v. ————]—Where special

damage is claimed in consequence of an unlawful imprisonment by a justice of the peace it should be stated in the notice of action, otherwise evidence cannot be given of it.—*SEWELL v. OLIVE* (1859), 4 All. 394.—*CAN.*

549 vi. ————]—Special damage must be alleged.—*FIRTH v. FITZPATRICK* (1866), 6 All. 348.—*CAN.*

549 vii. ————]—In replevin for iron, pltf. cannot recover for loss sustained by not being able to get the iron at a certain time, for the purpose of manufacturing it, unless such special damage is alleged in the declaration.—*DOMVILLE v. KEAVAN* (1871), 2 Han. 392.—*CAN.*

549 viii. ————]—The object of stating special damage in a declaration is that deft. may be enabled to meet the charge if it is false; & therefore where the law does not necessarily imply that pltf. has sustained damages by the act complained of, it is essential to the validity of the declaration that the damage should be stated with particularity, & accuracy.—*MULLIS v. ROSE* (1876), 3 Pug. 384.—*CAN.*

549 ix. ————]—No special damages having been pleaded, the evidence as to such damages, having been objected to, was inadmissible, & therefore a new trial should be granted.—*DOMINION TELEGRAPH CO. v. SILVER* (1881), 10 S. C. R. 238.—*CAN.*

549 x. ————]—To an action upon a promissory note given for the price of a wire-binding machine deft. pleaded by way of counterclaim a warranty given upon the sale of the machine by pltf. & a breach of such warranty, claiming as damages loss of profits which he would have made

—*GOLDREI, FOUCARD & SON v. SINCLAIR & RUSSIAN CHAMBER OF COMMERCE IN LONDON* (1917), 87 L. J. K. B. 261; 118 L. T. 147; 33 T. L. R. 318; *affd.*, [1918] 1 K. B. 180, C. A.

Annotation:—*Mentd.* Parr v. Snell, [1923] 1 K. B. 1.

549. Special damage—Must be pleaded.]—*SIPPORA v. BASSET* (1664), 1 Sid. 225; 82 E. R. 1071.

Annotation:—*Refd.* Anon. (1729), 1 Barn. K. B. 302.

by hiring the machine to others, expense incurred in endeavouring to make the machine fit for use, & expense to which he was put & loss sustained in the cutting & binding of his own corn:—*Held*: particulars of the damages alleged should be given.—*ELLIOTT v. HOGUE* (1886), 3 Man. L. R. 674.—*CAN.*

549 xi. ————]—Where special damages are sought to be recovered in an action of libel, or for verbal slander, where the words are actionable *per se* such special damage must be alleged & pleaded with particularity, & in case of special damage by reason of loss of custom the names of the customers must be given or otherwise evidence of the special damage is inadmissible.—*ASHDOWN v. MANITOBA FREE PRESS CO.* (1890), 20 S. C. R. 43.—*CAN.*

549 xii. ————]—In an action for libel in the way of trade pltf. did not allege special damage:—*Held*: no evidence of special damage would be admissible at the trial.—*BLANCHFORD v. GREEN* (1891), 14 P. R. 424.—*CAN.*

549 xiii. ————]—In an action of libel pltf.'s statement of claim alleged special damage:—*Held*: as special damage was alleged in direct terms, pltf. would be allowed to prove that allegation.—*ACME SILVER CO. v. STACEY HARDWARE CO.* (1891), 21 O. R. 261.—*CAN.*

549 xiv. ————]—In an action for damages for breach of contract, evidence is not admissible of any damages which the law would not imply from such breach, unless the declaration contains an averment of the special damages sustained, or of such facts

Sect. 1.—Pleading and practice. Sect. 2.]

550. ———.]—Deft., a sheriff who held goods taken in execution, delivered them to plffs., assignees of a bkpt., after an action of trover had been commenced by them; plffs. accepted the goods without condition:—*Held*: they could not recover in the action more than nominal damages, at all events not without alleging special damage in the declaration.—*MOON v. RAPHAEL* (1835), 2 Bing. N. C. 310; 1 Hodg. 289; 2 Scott, 489; 5 L. J. C. P. 46; 132 E. R. 122.

Annotations.—*Consd.* *Bodley v. Reynolds* (1846), 15 L. J. Q. B. 219. *Mentd.* *Edmonson v. Nuttall* (1864), 17 C. B. N. S. 280.

551. ———.]—Special damage may be recovered in trover, if laid in the declaration.—*BODLEY v. REYNOLDS* (1846), 8 Q. B. 779; 15 L. J. Q. B. 219; 7 L. T. O. S. 61; 10 Jur. 310; 115 E. R. 1066.

Annotations.—*Apprvd.* *Wood v. Bell* (1856), 5 E. & B. 772. *Refd.* *France v. Gaudet* (1871), L. R. 6 Q. B. 199.

552. ———.]—*To be admitted in evidence.*—*RUSTELL v. MACQUISTER* (1807), 1 Camp. 49, n., N. P.

Annotations.—*Mentd.* *Finnerty v. Tipper* (1809), 2 Camp. 72; *Pearson v. Lemaitre* (1843), 5 Man. & G. 700; *Hemmings v. Gasson* (1858), 27 L. J. Q. B. 252.

553. ———.]—Plff.'s agent obtained from deft. bank a promise to pay certain cheques drawn by plff. in consideration of his depositing with it a store warrant in lieu of the cash which plff. had instructed him to pay to the credit of plff.'s account. The store warrant belonged to plff., was under pledge to the agent, & was accepted by the bank with full knowledge of the circumstances. In an action for dishonouring the cheques:—*Held*: (1) evidence of special damage, that is, of plff.'s loss of custom & credit from particular individuals, was wrongly admitted, special damage not having been alleged; (2) a new trial would be directed unless plff. consented that the damages should be reduced to £500, & in the event of his so consenting he would be entitled to judgment for £500.—*FLEMING v. BANK OF NEW ZEALAND*, [1900] A. C. 577; 69 L. J. P. C. 120; 83 L. T. 1; 16 T. L. R. 469, P. C.

Annotation.—*Mentd.* *Re Gloucester Municipal Petn.*, 1900, *Ford v. Newth*, [1901] 1 K. B. 683.

554. ———.]—*To prevent surprise at trial.*—*RATCLIFFE v. EVANS*, No. 15, *ante*.

555. *Amendment of claim.*—*Jury award larger sum than amount claimed.*—In an action for damages the jury awarded the plff. larger damages

as would amount to a notification to the deft. that the evidence would be tendered.—*PHILIP v. METROPOLITAN & SUBURBAN RY. CO.* (1893), 10 S. C. 52.—S. AF.

a. *Larger sum awarded than originally claimed.*—*Amount not limited by notice of claim.*—Plff., while walking on a wooden sidewalk on a street, trod on a decayed plank & sustained injuries which would cripple her for life. Judgment was given for plff. for \$5,000. Within a month after the accident plff. served on the city clerk a notice of claim for \$1,000 damages; but at the time of giving the notice she was unaware that she would be permanently crippled:—*Held*: the damages she was entitled to were not limited to the amount claimed in her notice of intention to sue which was in no way binding as to measure of damages particularly having regard to her want of knowledge of the extent of her injuries.—*IVISON v. WINNIPEG CITY* (1906), 4 W. L. R. 55.—CAN.

b. *Amendment of claim.*—In trover, damages being laid in the declaration at \$8,000, & the jury having found a verdict for \$10,548:—

Held: this did not necessarily entitle deft. to a new trial for excessive damages, & that plff. must get rid of the difficulty occasioned by the verdict exceeding the amount laid in the declaration.—*WILDE v. CROW* (1861), 10 C. P. 406.—CAN.

c. ———.]—A statement of claim may be amended so as to increase the damages claimed.—*DOYLE v. NEW ZEALAND CANDLE CO., LTD.* (1901), 19 N. Z. L. R. 623.—N.Z.

d. *Separate slanders must be made separate causes of action.*—*Separate damages must be claimed.*—Where in an action for general damages, separate slanders are alleged as separate causes of action, separate damages should be claimed in respect of each slander.—*MUNRO v. MOWBRAY* (1915), 34 N. Z. L. R. 750.—N.Z.

e. *Necessity to state in statement of claim the amount of damages claimed.*—Under R. 117 it is necessary in claims for unliquidated damages to mention in the statement of claim the amount claimed in an action for libel, though, *semble*, the English practice is different.—*VON TIEDT v. NEW ZEALAND TIMES*, [1919] N. Z. L. R.

than he had claimed & the ct. allowed an amendment so as to include the additional amount.—*WYATT v. ROSHERVILLE GARDENS CO.* (1886), 2 T. L. R. 282.

556. ———.]—Petitioner in a suit for dissolution of marriage claimed £500 damages from co-respt. The jury having awarded £1,000, the ct. allowed petitioner to amend his claim to that amount.—*MODERA v. MODERA & BARCLAY* (1893), 10 T. L. R. 69.

557. ———.]—*Undefended divorce suit.*—*Summons for leave to amend.*—Where in an undefended case damages are assessed at a higher figure than that claimed in the petition, a summons must be taken out by petitioner, if he desire to amend his claim, asking for leave to amend & re-serve the petition.—*BECKETT v. BECKETT & JONES*, [1901] P. 85; 70 L. J. P. 17; 84 L. T. 272; 17 T. L. R. 120.

See, generally, HUSBAND & WIFE.

558. ———.]—*Application for, necessary.*—In an action for libel plff. claimed £1,000 damages. No defence was delivered, & interlocutory judgment was signed for the damages to be assessed in the Sheriff's Ct. The jury returned a verdict for £2,500. Plff. without applying to amend the statement of claim, signed judgment for this amount:—*Held*: the judgment was bad.

When I look at the speeches of counsel for plff. to the jury, I cannot but regret that he took the line he did, both in opening the case to the jury, & also in his reply: I do not doubt that it had a very serious effect in inflaming the damages, damages which in my opinion are immoderate & out of all proportion to the circumstances of the case (COLLINS, M.R.).—*CHATEL v. DAILY MAIL PUBLISHING CO., LTD.* (1901), 18 T. L. R. 165, C. A.

— *In admiralty actions.*—*See ADMIRALTY*, Vol. I., pp. 158, 248, Nos. 668, 1759.

Pleading matters in aggravation & mitigation of damages.—*See Part IV., ante.*

— *In libel & slander.*—*See LIBEL & SLANDER.*

Interrogatories.—*See DISCOVERY, INSPECTION & INTERROGATORIES.*

SECT. 2.—PROOF.

Whether proof of actual damage essential.—*See Part II., Sect. 4, ante.*

729.—N.Z.

1. *Whether first action a bar to second.*—A separate suit will not lie for damages apart from the cause of action out of which those damages arise.—*SYNDA MAHOMED ABOO v. LALLA BISSESSUR DYAL* (1874), 21 W. R. 154.—IND.

g. *General damages.*—*No particulars need be given.*—A bill of particulars not to be furnished in actions of tort, & when the declaration pointed out the cause of action, unless a special case were made by deft., or when the damages were consequential, & not liquidated.—*JOYCE v. HAGMAN* (1831), 4 Ir. L. Rec. 1st ser. 152.—IR.

h. *Liquidated damages.*—*True amount must be stated on writ.*—In an action for liquidated damages, the true amount claimed as actually due must be stated on the back of the writ.—*MORDANT v. RYAN* (1863), 5 Ir. Jur. 274.—IR.

k. *Assessment.*—*Whether ven. fac. necessary.*—*SMITH v. MUIRHEAD* (1851), 13 U. C. R. 9.—CAN.

l. ———.]—*CORRIGAL v. BOULTON* (1858), 18 U. C. R. 520.—CAN.

559. Necessity for proof of special damage—Failure to prove—Right to general damages—Unless special damage gist of action.]—The principle ordinarily applicable to actions of tort is that *pltf.* is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action.—*MUDHUN MOHUN DOSS v. GOKUL DOSS* (1866), 10 Moo. Ind. App. 563; 19 E. R. 1085; *sub nom.* *Doss v. Doss*, 14 L. T. 646; *sub nom.* *MUDUN MOHUN DOSS v. GOKUL DOSS*, 14 W. R. 590, P. C.

— **Trade libel.]—See LIBEL & SLANDER; TRADE & TRADE UNIONS.**

560. — Action for maintenance.]—An action for damages for maintenance will not lie in the absence of proof of special damage.—*NEVILLE v. LONDON "EXPRESS" NEWSPAPER, LTD.*, [1919] A. C. 368; 88 L. J. K. B. 282; 120 L. T. 299; 35 T. L. R. 167; 63 Sol. Jo. 213, H. L.
Annotations:—Folld. Hickman v. Kent or Romney Marsh Sheepbreeders' Assocn. (1920), 37 T. L. R. 163. *Mentd. Wild v. Simpson*, [1919] 2 K. B. 544; *Ellis v. Torrington*, [1920] 1 K. B. 399; *Weid-Blundell v. Stephens*, [1920] A. C. 956.

561. — —.]—HICKMAN v. KENT OR ROMNEY MARSH SHEEPBREEDERS' ASSOCN. (1920), 37 T. L. R. 163, C. A.

562. — Not for injury to reputation of trading customer.]—In an action against a bank by a trading customer who had become *bkpt.* & his trustee in *bkpcy.* for damages for breach of contract, the jury found that the bank had agreed with the customer to supervise the financial side of his business during his absence on military service & to take all reasonable steps to maintain his credit & reputation, & had by its negligence in the discharge of its duties under this agreement caused the *bkpcy.* of the customer; & they awarded *pltf.* £45,000 odd damages for the loss occasioned to the *bkpt.*'s estate by the negligence of the bank, & £7,500 damages for the injury caused by that

negligence to the *bkpt.*'s credit & reputation:—*Held:* (1) in the case of a trading customer, substantial damages were recoverable on this head of claim without proof of special damage; &, on the facts, that the damages were not excessive; (2) as to the damages for the loss occasioned to the *bkpt.*'s estate, assuming that the damages were assessed upon a wrong basis, the bank was precluded by the course of the trial from demanding a new trial on this point.—*WILSON v. UNITED COUNTIES BANK, LTD.*, [1920] A. C. 102; 88 L. J. K. B. 1033, H. L.

Annotations:—Generally, Mentd. North Staffordshire Ry. v. Edge, [1920] A. C. 254; *Prosperity v. Lloyds Bank* (1923), 39 T. L. R. 372.

563. Admissibility of—Evidence of particular damage—Declaration of damage only general.]—*Pltf.* in an action of *assumpsit* may give evidence of particular loss sustained by breach of an agreement, if he have stated loss generally in his declaration:—*Held:* therefore evidence of loss of business by *pltf.*'s wife in her trade of milliner, was admissible as evidence of general damage, where no special damage on that ground was laid in the declaration, nor any customers named, nor any averment of her business introduced.—*WARD v. SMITH* (1822), 11 Price, 19; 147 E. R. 388.

564. — Evidence of extra costs beyond taxed costs—With intention of increasing damages—After verdict on writ of inquiry.]—In ejectment, where *deft.* appears & pleads, *pltf.* having obtained a verdict, cannot, in the execution of a writ of inquiry to assess damages in an action for mesne profits, give in evidence the extra costs beyond his taxed costs, in order to increase the damages.—*BROOKE v. BRIDGES* (1823), 7 Moore, C. P. 471; 1 L. J. O. S. C. P. 11.

Annotation:—Refd. Symonds v. Page (1830), 1 Cr. & J. 29.

565. — Contract void by Statute of Frauds—To prove value defendant placed on plaintiff's services.]—*Pltf.*, by the first count, alleged that

PART VII. SECT. 2.

m. Necessity for proof—Sum agreed on by parties.]—Where the contracting parties have agreed at what sum the amount of damages for breach of a contract shall be estimated, it is not necessary to prove the amount of loss sustained.—*PALMER v. SECRETARY OF STATE FOR INDIA* (1867), 2 Agra. 194.—IND.

n. —.]—Where a person sues for damages for injury done to his reversion, he must first prove that a legal tenancy exists between him & the tenant in possession; &, in order to receive other than nominal damages he must prove the nature & extent of his reversionary interest.—*SURMAN v. KEAST & MCCARTHY, LTD.* (1885), 3 N. Z. L. R. 326.—N.Z.

o. Admissibility of—Personal injuries—Evidence that plaintiff had family dependent on him.]—In an action to recover damages for personal injuries caused by *deft.*'s negligence, evidence of *pltf.* was admitted that he had a family who were dependent on him for their support:—*Held:* the evidence was rightly admitted.—*DEVIR v. CURLEY* (1882), 3 N. S. W. L. R. 322.—AUS.

p. — Where damages are general.]—*Pltf.* declared against the sheriff for an escape, alleging that *deft.* took one M. under a *ca. sa.* upon a judgment recovered by them & without their consent voluntarily suffered him to escape whereby they lost the sum indorsed on the writ & were otherwise injured. *Deft.* pleaded not guilty on which *pltf.* joined issue:—*Held:* the damages were general, & evidence as to the value of the debtor's

custody to the *pltf.* should have been received.—*KINGAN v. HALL* (1865), 24 U. C. R. 248.—CAN.

q. —.]—In an action on the case against a Roman Catholic clergyman, for publicly pronouncing *pltf.*, who was owner of a mill, to be an excommunicated person, *pltf.* examined witnesses to prove that after the excommunication he was avoided by his neighbours, & that his mill was deserted. The declaration did not specify the names of the persons who so avoided him or deserted his mill:—*Held:* general evidence of these two facts was properly received, on the ground that such evidence was not to be considered as evidence of special damage, but as evidence to show that the consequence which the *deft.* intended to arise from his act actually happened.—*M'LOUGHLIN v. WELSH* (1846), 10 I. L. R. 19.—IR.

r. — Proof of loss of business.]—In an action claiming damages for the dishonour of cheques, evidence of the loss of particular customers is inadmissible unless the loss of those particular customers has been specially alleged. General evidence as to loss of custom is alone admissible.—*BANK OF NEW ZEALAND v. FLEMING* (1898), 18 N. Z. L. R. 1.—N.Z.

s. Sufficiency of.]—*Pltf.* giving evidence on his own behalf cannot be allowed to state that he has sustained a certain amount of damage by the act of *deft.*; he should state the facts on which he relies to prove his damages from which the jury are to determine the amount.—*DOMVILLE v. KEAVAN* (1871), 2 Han. 392.—CAN.

t. —.]—*RYAN v. JAMES* (1872),

1 Pug. 122.—CAN.

a. — Proof of loss of profits.]—In an action by the owners of a ship, which when ready for sea has been run into & injured by another ship to recover for demurrage, loss of profits, & expenses incurred whilst the ship was detained in port in consequence of the collision, *pltf.* must prove that they sustained an actual loss, & give reasonable proof of the amount of such loss. The fact that the injured ship was in active employment, & loaded & ready to sail when the collision took place & that she was thereby delayed in reaching her port of destination, is not of itself sufficient to raise any presumption that she was prevented making any profits she would otherwise have earned.—*BARQUE STRATHEARN CO., LTD. v. MCLWRAITH, MCEACHARN & CO., LTD.* (1895), 16 N. S. W. L. R. 94.—AUS.

b. —.]—When judgment is given in favour of the proprietor of a business for the loss of probable profits during a certain period it does not necessarily follow that the proprietor should be held entirely unable to prove any loss of profit merely because he has not kept absolutely accurate accounts & his books are imperfect with respect to the operating expenses which should be deducted from the probable income. Such books may be admitted in evidence & an allowance made for the defects, & it is also open to the proprietor to testify that he made a certain profit during a certain period. The testimony of other men engaged in the same kind of business as to the probable

Sect. 2.—Proof. Sect. 3: Sub-sects. 1 & 2.]

by an agreement made between himself & deft., in consideration that the pltf. would serve deft. as his clerk for a term of three years, deft. agreed to pay him the sum of £80, & averred performance of all conditions, etc., & assigned as breach the nonpayment by deft. of the £80. The second count was for wages payable by deft. to pltf. for work & services done by pltf. as the hired clerk of deft.:—*Held*: although the agreement, not being one to be performed within a year, came within Stat. Frauds, s. 4, & so, not being in writing could not be sued or recovered upon under the first count of the declaration, yet it was nevertheless evidence on *quantum meruit*, of the value of pltf.'s services, & might be referred to & taken into consideration by the jury as the rule or measure of damages under the second count, & as showing the estimate which deft. himself had put upon pltf.'s services.—*SCARISBRICK v. PARKINSON* (1869), 20 L. T. 175; 17 W. R. 467.

566. Sufficiency of—Trade libel—Evidence of general loss of business.]—*RATCLIFFE v. EVANS*, No. 15, *ante*.

567. ————]—*CONCARIS v. DUNCAN & Co.*, [1909] W. N. 51.

SECT. 3.—ASSESSMENT.**SUB-SECT. 1.—IN GENERAL.**

568. Powers of jury.]—*LOWE v. PEERS*, No. 388, *ante*.

569. Duty of judge to direct jury.]—*HADLEY v. BAXENDALE*, No. 101, *ante*.

570. ————]—*WILSON v. NEWPORT DOCK CO.*, No. 109, *ante*.

571. Heads of damage matter of law for court—Amount of damage matter of fact for jury.]—When a contract is broken & an action is brought for damages, the heads of damage are matter of law for the ct., & the amount of damage under

each head is matter of fact entirely for the jury (*POLLOCK, C.B.*).—*BRADY v. OASTLER* (1864), 3 H. & C. 112; 33 L. J. Ex. 300; 11 L. T. 681; 11 Jur. N. S. 22; 159 E. R. 469.

Annotations:—*Mentd.* *Chinnock v. Ely* (1864), 5 New Rep. 185; *Ogle v. Vane* (1868), L. R. 3 Q. B. 272.

572. Where more than one issue.]—Although, where a fact is admitted as to one issue on the record, & denied as to another, the admission on the one issue is not evidence on the other; yet, if the jury find both issues for pltf. they may, in estimating the damages on the whole case, take into their consideration what appear on the whole case to be the real facts of it.—*HOWARD v. GOSSET* (1842), Car. & M. 380; 4 State Tr. N. S. 839, N. P.

573. Effect of payment into court—Sufficient to cover pecuniary loss sustained—Where no special damage.]—Pltf. was a bookkeeper in the employment of defts. who dismissed him without notice. Two months after his dismissal pltf. obtained a more lucrative situation. Upon his bringing an action for wrongful dismissal deft. paid £7 7s. into ct., which pltf. admitted was sufficient to cover his actual pecuniary loss, & the judge directed a verdict to be entered for defts. Upon a rule for a new trial, granted on the ground of the refusal by the judge to put the question, whether pltf. had been wrongfully dismissed or not, to the jury, & to allow them to assess the damages:—*Held*: where the amount paid into ct. was admitted to be sufficient to cover the actual pecuniary loss sustained by pltf., & no special damage proved, pltf. had no right to have any question left to the jury, & could not recover anything beyond the actual pecuniary loss sustained.—*WALTON v. TUCKER* (1880), 45 J. P. 23.

574. Damages cannot be given against defendant—Where verdict in his favour.]—A jury cannot give damages against deft. when they have acquitted him of that which was the ground of action (*COCKBURN, C.J.*).—*HILL v. FINNEY* (1865), 4 F. & F. 616, N. P.

Annotation:—*Mentd.* *Davies v. Hood* (1903), 19 T. L. R. 158.

Interest as damages.]—See MONEY & MONEY-LENDING.

cost of materials & supplies is also admissible for what it is worth.—*ANTONIOU v. ARNETT*, [1922] 1 W. W. R. 609; 65 D. L. R. 661; 17 Alta. L. R. 41.—*CAN.*

c. ————].—A pursuer with a view to the estimation of damages to establish the loss of profits during a particular period through breach of contract may show from the evidence of persons engaged in a similar trade, though in a different quarter of the country what would have been the average profits realised during the period in question.—*WATSON v. KIDSTON* (1839), 1 Duml. (Ct. of Sess.) 1254.—*SCOT.*

PART VII. SECT. 3, SUB-SECT. 1.

569 i. Duty of judge to direct jury.]—Precise directions should be given to the jury as to what they should take into account in estimating the damages.—*MURRAY v. ROYAL INSURANCE CO.* (1904), 11 B. C. R. 212.—*CAN.*

569 ii. ————]—Although the amount of damages is in a very large sense in the hands of the jury, it is necessary always, as a matter of law, to direct their attention to the rule which the law prescribes for their guidance, & not to leave them under the belief that they need not make any inquiry as to the injury occasioned to pltf., but are free to give whatever they think proper.—*WATT v. McQUAIG* (1905), 40 N. S. R.

553.—CAN.

569 iii. ————]—It is prudent for the presiding judge in effect to instruct the jury in all cases that arguments or comments of counsel that are not supported by the evidence should not receive any consideration & should be regarded by them as valueless, that counsel addressing them is not giving evidence.—*RYAN v. CANADIAN PACIFIC RY. CO.*, [1910] 2 W. W. R. 368.—*CAN.*

d. Each defendant as party to distinct contract—Damages assessed separately against each.]—Where the case of each deft. is as a party to a distinct contract it should be decided on its own merits; & it is wrong to make all defts. jointly & severally liable for damages.—*NAMASIVAYA GURUKKA v. KADIR AMMAL* (1893), 1 L. L. R. 17 Mad. 168.—*IND.*

e. Assessment—Average of estimates stated by witness.]—The assessment of damages by taking the average estimate of the witnesses examined is wrong in principle.—*FAIRMAN v. MONTREAL CITY* (1901), 31 S. C. R. 210.—*CAN.*

f. Whole of the evidence to be considered in assessment.]—Defts., bailiffs, were sued for selling under execution a horse which the pltf. claimed as exempt. The horse was sold for \$47.50; but pltf. swore it was worth \$120, & the purchaser

swore that he considered it worth \$90:—*Held*: the value of the horse was to be determined upon the whole evidence, & not only by the price it brought at the sale.—*McMARTIN v. HURLBURT* (1877), 2 A. R. 146.—*CAN.*

g. Necessity for assessment.]—Uncertainty is not an insuperable obstacle in assessing damages.—*WALTON v. FERGUSON* (1914), 28 W. L. R. 657; 6 W. W. R. 557; 16 D. L. R. 533.—*CAN.*

h. ———— Not in liquidated claim.]—In an action by the assignee of a bond, to which *non est factum* is pleaded, pltf. need not have damages assessed, but may take a verdict for nominal damages, & issue execution for the amount of his debt.—*McELROY v. GETTY* (1869), 1 Han. 262.—*CAN.*

574 i. Damages cannot be given against defendant—Where verdict in his favour.]—There can be no assessment of damages where a verdict is found for deft. on an issue going to the whole cause of action.—*PRYNNE v. CARROLL* (1853), 10 U. C. R. 519.—*CAN.*

k. No authority to assess—When no special venire.]—When the writ of trial is only to try the issue, & contains no special venire to assess damages, the jury have no authority to assess damages on breaches suggested.—*HUNTER v. VERNON* (1850), 7 U. C. R. 552.—*CAN.*

SUB-SECT. 2.—BY COURT OR JURY.

575. Assessment by court—Damages for non-attendance of witness—5 Eliz. c. 9, s. 12.]—The further recompense given by above Act, against a witness for non-attendance, must be assessed by the ct. out of which the process issued, not by the jury, or judge, at *Nisi Prius*.—PEARSON v. ILES (1781), 2 Doug. K. B. 556; 99 E. R. 352.

Annotations:—Mentd. Amey v. Long (1808), 9 East, 473; Mullett v. Hunt (1833), 1 Cr. & M. 752; Miller v. Knox (1838), 4 Bing. N. C. 574.

576. — On interlocutory judgment—With assent of plaintiff.]—GOULD v. HAMMERSLEY (1811), 4 Taunt. 148; 128 E. R. 285, Ex. Ch.

577. Master—Not where amount speculative.]—MORGAN v. ELSTON (1843), 1 L. T. O. S. 252.

578. — Where matter of simple computation.]—Upon an interlocutory judgment for pltf. in an action on a covenant to pay to pltf. all such sums as should be received by deft., a sequestrator, & be at his disposition from time to time, in part or in full satisfaction of a certain debt due to pltf.:—*Held*: the rule *nisi* for reference to the Master to compute would not be made absolute.

This involves something more than a simple computation, & the rule cannot be supported (*per Cur.*).—SMITH v. NESBITT (1845), 2 C. B. 286; 15 L. J. C. P. 31; 6 L. T. O. S. 154; 135 E. R. 955. See, now, R. S. C., Ord. 36, r. 57.

Official referee.]—See R. S. C., Ord. 36, r. 57A.

579. Province of jury.]—Damages are peculiarly for the jury.—PAGE v. RATTCLIFF (1832), 1 L. J. C. P. 57.

580. —.]—In trover for the value of a quantity of tobacco, the estimate of value given by pltf.'s witnesses was higher than the estimate given by the witnesses for deft. & the jury gave an amount of damages according to neither estimate, but upon a mean between the two estimates:—*Held*: the verdict would not be disturbed.—PHILLIPS v. HATFIELD (1840), H. & W. 55.

581. —.]—It is for the jury to measure the damages. If they give a larger sum than is proper we can reduce it (POLLOCK, C.B.).—HAWKINS v. HARWOOD (1849), as reported in 14 L. T. O. S. 273.

582. —.]—Pltf. brought his action against the railway co. for non-delivery of certain goods sent for the purpose of exhibition at an agricultural meeting:—*Held*: it was right to leave the amount of damages to the jury.—CAWLEY v. NORTH STAFFORDSHIRE RY. CO. (1856), 26 L. T. O. S. 222; 20 J. P. 72.

583. —.]—The question of damages is entirely within the province of the jury, & the ct. will not in such a case interfere with their finding upon it.—SAUNDERS v. LONDON & NORTH-WESTERN RY. CO. (1860), 2 L. T. 153.

584. —.]—By agreement under seal between pltf. & defts. testator, the latter agreed to grant a lease for sixty years of certain tenements then in pltf.'s possession, as tenant from year to year. After testator's death defts. repudiated the alleged agreement, contending it was a forgery, & recovered judgment in an action of ejectment in the county ct. Pltf. thereupon gave the following notice "I hereby give you notice this day that I give up possession of all the land, according to the judge's order, that I now hold of the late J. S. (Signed) G. S." Pltf. having brought an action in this court on the agreement, the judge told the jury that this notice amounted to an abandonment of all pltf.'s claim under the agreement, & that if they found the agreement had been signed by testator, he was only entitled to nominal damages:—*Held*: this was a misdirection as the amount of damages ought to have been left to the jury.—SMITH v. SYMONDS (1860), 1 L. T. 299.

585. —.]—To an action claiming special damages for the non-delivery of goods within a reasonable time, defts. admitting their negligence to have been the cause of the non-delivery, paid £10 into ct. The judge left it to the jury to say whether the £10 paid into ct. was a sufficient compensation for the pecuniary loss pltf. had sustained, pointing out that the law did not entitle pltf. to recover under some of the heads of his claim, & that on the evidence there was no pretence for saying that he had sustained any substantial loss. The jury having given a verdict for £5 beyond the £10 paid into ct.:—*Held*: the amount of damages was a question for the jury, & had been properly left to them.—ADAMS v. MIDLAND RY. CO. (1861), 31 L. J. Ex. 35; *sub nom.* ADAMS v. GREAT WESTERN RY. CO., 10 W. R. 84.

586. —.]—The jury must define the amount of damages.—WILSON v. REED (1860), 2 F. & F. 149, N. P.

587. —.]—BRADY v. OASTLER, No. 571, *ante*.

588. —.]—KELLY v. SHERLOCK, No. 822, *post*.

589. —.]—The question of damages is so peculiarly the province of the jury that the ct. will not set aside a verdict on the ground of excessive damages, even where they may appear disproportioned to the condition of pltf., & where the ct. might not itself have awarded them so liberally.—EVANS v. DAVIES (1869), 17 W. R. 679.

590. —.]—The assessment of damages is peculiarly the province of the jury (LORD HERSCHELL, C.).—DAVIS v. SHEPSTONE (1886), 11 App. Cas. 187; 55 L. J. P. C. 51; 55 L. T. 1; 50 J. P. 709; 34 W. R. 722; 2 T. L. R. 380, P. C.

Annotations:—Mentd. Pankhurst v. Sowler (1886), 3 T. L. R. 183; Joynt v. Cycle Trade Publishing Co. (1904), 91 L. T. 155.

PART VII. SECT. 3, SUB-SECT. 2.

575 i. Assessment by court.]—A judge who has jurisdiction to try the issues of fact in any case may at the same time assess the damages, & it is not necessary to summon a jury for that purpose.—WOOLLACOTT v. WINNIPEG ELECTRIC STREET RY. CO. (1895), 10 Man. L. R. 482.—CAN.

579 i. Province of jury.]—In assessing damages for the death of a deceased the jury added a clause for the amount to be paid in instalments, payments to cease in the event of death or re-marriage:—*Held*: such an addition to their finding should be considered as mere surplusage & beyond their jurisdiction.—WALDRON v. ELSTON RURAL MUNICIPALITY, [1921] 3 W. W. R. 1227; 70 D. L. R. 786.—CAN.

579 ii. —.]—In actions for personal

torts, the jury, although their power is not despotical, have great latitude on the question of damages, & the ct. will not interfere to disturb a verdict on the ground of excessive damages, unless the damages given are outrageous or flagrantly excessive, & out of all proportion to the position of the parties & the circumstances of the case. In such cases the jury may properly give extra damages of a vindictive, exemplary, or punitive character.—MCCOMB v. LOW, 1 J. R. 49.—N.Z.

579 iii. —.]—The question of amount of damage for non-performance of a contract of sale is not confined to the difference between the contract price & the market price on or about the day on which the contract was broken, but is to be left to the jury for consideration, upon all the cir-

cumstances of the case, of what will best compensate the party.—DUNLOP v. HIGGINS (1848), 6 Boll. Sc. App. 195; 20 Sc. Jur. 279.—SCOT.

579 iv. —.]—On motion for expenses, it was pleaded that the damages were too high:—*Held*: the amount awarded did not enter into this question; to allow it to do so would be taking the question of damages out of the jury's hands.—BEATSON v. DRYSDALE (1819), 2 Murr. 151.—SCOT.

579 v. —.]—Where parties were mutually to blame, & inflicted injuries on each other, & raised counter-actions of damages, which were sent to trial together, the jury, in the circumstances, found a verdict in favour of each pursuer in the action raised by him, & assessed the damages in each action at one shilling.—DICK v. SMALL (1835), 13 Sh. (Ct. of Sess.) 1134.—SCOT.

Sect. 3.—Assessment: Sub-sects. 2 & 3, A. & B.]

591. —[—An action was brought by a servant against his master & his master's wife, for a libel in an indorsement upon a written character given to the servant by his previous employer, which the servant had handed to his master when he entered his service, & also for malicious defacement of the document. At the trial before a jury, the judge held that there was no publication of the libel, & as to the defacement of the testimonial, he withdrew the case from the jury, & awarded to pltf. the nominal damages of one shilling only:—*Held*: the judge was wrong in withdrawing the case from the jury, as the question of damages was entirely a question of fact for the jury.—*WENNHAKE v. MORGAN* (1888), 20 Q. B. D. 635; 57 L. J. Q. B. 241; 59 L. T. 28; 52 J. P. 470; 36 W. R. 697; 4 T. L. R. 295, D. C.

592. —[—*BRAY v. FORD*, No. 737, *post*.
See, also, Nos. 829, 830, *post*.

SUB-SECT. 3.—COMPUTATION OF DAMAGES.**A. Time.**

See R. S. O., Ord. 36, r. 58.

593. From what time—*Judgment by default—Defence withdrawn.*—*HOPE v. BOOTH* (1853), 21 L. T. O. S. 62.

594. At what time—*Contract repudiated—Date of acceptance of repudiation.*—*TREDEGAR IRON & COAL CO., LTD. v. HAWTHORN BROTHERS & CO.* (1902), 18 T. L. R. 716, C. A.

—*Breach of contract for sale of goods.*—*See* SALE OF GOODS.

—*Breach of contract in regard to stocks & shares.*—*See* STOCK EXCHANGE.

595. —*Contract to be completed at specified time.*—A shipbuilding co., at the time of being wound up, was under a contract with a steam-packet co. to do certain repairs to a ship within a given time, & under orders obtained in the matter of the winding up the official liquidator was authorised to complete the repairs, the rights of all parties being reserved. The repairs not having been completed within the stipulated time, leave was given to the steam-packet co. to go in under the winding-up order & prove in respect of any damage that might have accrued from the delay:—*Held*: the time for ascertaining the damage was the time when the breach of contract came to an end, & not the date of the winding-up order.—*Re TRENT & HUMBER CO., Ex p. CAMBRIAN STEAM PACKET CO.* (1868), 4 Ch. App. 112; 38 L. J. Ch. 38; 19 L. T. 465; 17 W. R. 181, L. C.

Annotations:—*Reid. Re Albert Life Assoc., Bell's Case, Kerr's & Stubbs' Cases, Bleackley's Case, Craig's Exors' Case, Wilson's Case* (1870), L. R. 9 Eq. 706; *Re Albert*

Life Assoc., Cook's Policy (1870), L. R. 9 Eq. 703. *Mentl. Re Paraguassu Steam Tramroad Co., Black, Hawthorn's Case* (1872), 27 L. T. 509; *Re Phoenix Bessemer Steel Co., Ex p. Carnforth Hematite Iron Co.* (1876), 4 Ch. D. 108; *Barratt v. L. B. & S. C. Ry.* (1877), *De Colyar's County Court Cases*, 195; *Re Northern Counties of England Fire Insce., Macfarlane's Claim* (1880), 17 Ch. D. 337; *The Argentine* (1888), 13 P. D. 191; *The Creta Holme* (1897), 66 L. J. P. 166.

B. Rate of Exchange.

596. Amount due in foreign currency—*Expressly stipulated.*—Lands in Ireland were charged with a sum of £5,000 "lawful money of Ireland." 6 Geo. 4, c. 79, for assimilating the currency of Great Britain & Ireland, was passed subsequently, & afterwards the money became raisable:—*Held*: the money must be paid in Irish currency, according to the direction of the statute.

In the case now the parties must have had some meaning and some intention when they say "lawful money of Ireland." I apprehend that they could mean nothing but this, that the £5,000 was to be paid according to the value of Irish currency (*WOOD, V.-C.*).—*BOURNE v. HARTLEY, BOURNE v. MAHON* (1854), 2 Eq. Rep. 910; 23 L. T. O. S. 219; 18 Jur. 532.

597. —*Legacy in rupees.*—*Legacy by a will in India, if paid by remittance in this country, payment must be according to the current value of the rupee in India without regard to the exchange or the expense of remittance.*—*COCKERELL v. BARBER* (1810), 16 Ves. 461; 33 E. R. 1059, L. C. *Annotations*:—*Consd. Manners v. Pearson*, [1898] 1 Ch. 581. *Reid. Sluysken v. Hunter* (1815), 1 Mer. 40.

598. —*Date of judgment sued on.*—In an action brought in England to recover the value of a given sum in Jamaica currency upon a judgment obtained in that island; the value is that sum in sterling which the currency would have produced according to the actual rate of exchange between Jamaica & England at date of Jamaican judgment.—*SCOTT v. BEVAN* (1831), 2 B. & Ad. 78; 9 L. J. O. S. K. B. 152; 109 E. R. 1073.

Annotations:—*Consd. Manners v. Pearson*, [1898] 1 Ch. 581; *Di Ferdinando v. Simon, Smits*, [1920] 3 K. B. 409; *Lebeaupin v. Crispin*, [1920] 2 K. B. 714. *Apud. Re British American Continental Bank, Credit General Liegeois' Claim*, [1922] 2 Ch. 589. *Reid. Bertram v. Duhamel* (1838), 2 Moo. P. C. C. 212; *S.S. Cella v. S.S. Volturmo*, [1921] 2 A. C. 544; *Soc. des Hotels du Touquet-Paris-Plage v. Cumming*, [1921] 3 K. B. 459; *Ullendahl v. Pankhurst Wright* (1923), 39 T. L. R. 628.

599. —*Award.*—In an action of trover, for billets paid to pltf. by the Peruvian govt., & purporting to be of the value of \$16,000, the cause was referred to arbn.; & an award having been made in favour of pltf., the ct. ordered the value of the billets to be estimated by the prothonotary, at the rate at which they were current at the time of the award:—*Held*: such value was to be estimated as the value of a bill of exchange for the amount of the dollars specified in the billets, upon a solvent house in the country

PART VII. SECT. 3, SUB-SECT. 3.—A.

1. At what time.—The right principle in the assessment of damages is that they must be ascertained as of the date at which the contract should have been performed by defts.—*SHEARPE v. WHITE* (1911), 18 O. W. R. 801; 2 O. W. N. 849; 35 O. L. R. 298.—CAN.

m. —[—Damages for a breach of contract must be calculated with relation to the time of the breach, & not to any future time.—*MYTLER v. BOYD* (1841), *Arm. M. & O. 173*.—IR.

n. To what time.—Damages should be assessed up to the date of judgment.—*STALKER v. DUNWICH TOWNSHIP* (1888), 15 O. R. 343.—CAN.

o. —[—*TURNER v. BURNS* (1894), 24 O. R. 28.—CAN.

p. —[—Where the cause of action is a continuing one, the damages should be assessed up to the date of the delivery of the judgment.—*NOBLE v. TURTLE MOUNTAIN MUNICIPALITY* (1905), 15 Man. L. R. 514.—CAN.

q. —[—Whether or not a High Ct. in India can award damages in respect of a continuing cause of action, up to the date of its decree, subsequent successive accruals of an obligation to contribute to a fund could not be treated as falling within that description, & could not be awarded in a suit where they had accrued due

subsequently to its institution.—*FRASER & CO. v. BOMBAY ICE MANUFACTURING CO.* (1904), 1 L. R. 29 Bom. 107.—IND.

r. —[—It is a proper direction in an action for damage to land by the fouling of a stream to direct the jury to assess damage arising subsequent to the commencement of the action as the effect of acts done before that time. Such prospective damages are recoverable, although the lease of the pltf. has expired before the trial, where, being a lease from the Crown, it contains a covenant to renew, & a purchasing clause.—*COSTELLO v. O'DONNELLY* (1882), 1 N. Z. L. R. C. A. 105.—N.Z.

where they were issued, although they were at a considerable discount at the time of making the award.—*DELEGAL v. NAYLOR* (1831), 7 Bing. 460; 5 Moo. & P. 443; 9 L. J. O.S. C. P. 167; 131 E. R. 178.

Annotations.—*Reid. Manners v. Pearson* (1898), 46 W. R. 498; *S.S. Celia v. S.S. Volturmo*, [1921] 2 A. C. 544.

600. — *Date of judgment.*—Pltfs., who were merchants in New York, sold to defts. in England a quantity of condensed milk for delivery on certain dates in 1918. Defts. committed a breach of the contract:—*Held*: the damages ought to be assessed at such a sum in sterling as would give pltfs. the proper compensation in dollars at the rate of exchange prevailing on the date of the judgment.—*KIRSCH & Co. v. ALLEN, HARDING & Co., LTD.* (1919), 89 L. J. K. B. 265; 122 L. T. 159; 36 T. L. R. 59; 25 Com. Cas. 63; *reversd.* on other grounds (1920), 123 L. T. 105, C. A.

Annotations.—*Dttd. Di Ferdinando v. Simon, Smits*, [1920] 3 K. B. 409. *Consd. Lebeaupin v. Crispin*, [1920] 2 K. B. 714; *Re British American Continental Bank, Lissac & Rosenkranz's Claim*, [1923] 1 Ch. 276. *Reid. Barry v. Van den Hark*, [1920] 2 K. B. 709; *S.S. Celia v. S.S. Volturmo*, [1921] 2 A. C. 544.

601. — *Day of trial.*—A cheque for 7,680 francs (Paris) is a bill of exchange, being for a sum of money certain or which can be made certain within Bills of Exchange Act, 1882 (c. 61), s. 9 (1) (d). The drawer cannot as between himself & an endorsee of the cheque, set up an oral agreement between himself & the original payee that the rate of exchange shall be that ruling at the date of the cheque. In an action on such a cheque the rate of exchange at which the amount of the judgment is to be calculated is that ruling at the day of the trial.—*COHN v. BOULKEN* (1920), 36 T. L. R. 767; 64 Sol. Jo. 636.

Annotations.—*Consd. Ullendahl v. Pankhurst Wright* (1923), 39 T. L. R. 628. *Reid. Re Chesterman's Trusts, Mott v. Browning*, [1923] 2 Ch. 466.

602. — *Date of detention—Ship undergoing repairs due to collision.*—In an action arising out of a collision between an English ship & an Italian ship both ships were held to blame & the cross-claims for damages were agreed, subject to a question raised by the owners of the Italian ship as to the rate of exchange in respect of a claim calculated in Italian lire for detention during the period that the ship was undergoing repairs:—*Held*: the proper date for ascertaining the rate of exchange for the purpose of converting the amount payable into English currency was the date at which the detention occurred.—*S.S. CELIA v. S.S. VOLTURNO*, [1921] 2 A. C. 544; 90 L. J. P.

385; 126 L. T. 1; 37 T. L. R. 900; 15 Asp. M. L. C. 374; 27 Com. Cas. 40, H. L.; *affg.* S. C. *sub nom.* *THE VOLTURNO*, [1920] P. 447, 454, n., C. A.

Annotations.—*Apld. Re British American Continental Bank, Goldzieher & Penso's Claim*, [1922] 2 Ch. 575. *Consd. Re British American Continental Bank, Credit General Ligeols' Claim*, [1922] 2 Ch. 589. *Reid. Re British American Continental Bank, Lissac & Rosenkranz's Claim*, [1923] 1 Ch. 276; *Re Chesterman's Trusts, Mott v. Browning*, [1923] 2 Ch. 466.

603. — *Date of breach.*—Defts. in 1891 entered into a contract with M. to pay him monthly one cent. in Mexican currency per cubic metre of certain excavation works being done in Mexico, as & when payment should be received by defts. from the Mexican authorities; & during M.'s life they duly paid him. M. died in June, 1894; but he had no legal personal representative till May, 1896, when pltf. became his administrator.

In an action for account brought by pltf. in June, 1896, the ct., on Nov. 4, 1897, declared that he was entitled to an account of what was due under the contract, & on Nov. 13 defts. delivered an account showing that 19,366 Mexican dollars were due to pltf. on Aug. 31, 1896, & offering to pay that amount in Mexican currency or in English currency at the rate of exchange on Nov. 13. On Aug. 31, 1896, the Mexican dollar was worth 2s. 6d., on Nov. 13, 1897, it was only worth 1s. 10½d., & pltf. refused defts.' offer, & contended that the value of the dollar should be ascertained at the several times the monthly payments became due, or, in the alternative, on Aug. 31, 1896:—*Held*: (VAUGHAN WILLIAMS, L.J., *diss.*) pltf. was not entitled to have the dollars turned into English money until the amount due on taking the whole account was ascertained.—*MANNERS v. PEARSON & SON*, [1898] 1 Ch. 581; 67 L. J. Ch. 304; 78 L. T. 432; 46 W. R. 498; 14 T. L. R. 312; 42 Sol. Jo. 413, C. A.

Annotations.—*Apld. Di Ferdinando v. Simon, Smits*, [1920] 3 K. B. 409. *Consd. Lebeaupin v. Crispin*, [1920] 2 K. B. 714; *Soc. des Hotels du Touquet-Paris-Plage v. Cumming*, [1921] 3 K. B. 459; *S.S. Celia v. S.S. Volturmo*, [1921] 2 A. C. 544; *Re British American Continental Bank, Credit General Ligeols' Claim*, [1922] 2 Ch. 589. *Reid. Re British American Continental Bank, Goldzieher & Penso's Claim*, [1922] 2 Ch. 575; *Re Chesterman's Trusts, Mott v. Browning*, [1923] 2 Ch. 466.

604. — —.—Defts. contracted to carry goods for pltf. from this country to Italy & deliver them there on Feb. 10, 1919, but in breach of their contract failed to do so, & converted the goods. In an action by pltf. the ct. fixed the damages as the value of the goods in Italy on Feb. 10, namely,

PART VII. SECT. 3, SUB-SECT. 3.—B.

600 i. *Amount due in foreign currency—Date of judgment.*—In an action brought in this province for the value of goods sold & delivered in E., pltf. is entitled to recover such a sum in currency as will be equivalent to the demand in sterling money, according to the rate of exchange at the time of trial.—*CAMPBELL v. WILSON* (1838), Ber. [418] 265.—CAN.

600 ii. — —.—Pltf., a French advocate, living in France, rendered professional services there in 1912–13, to deft., living in Ontario, for which he charged a fee of 2,000 francs, & his claim in this action, brought in the County Ct., was for that sum, \$400 being stated by pltf. at its equivalent in Canadian money.—*Held*: pltf. was entitled to recover only the equivalent in Canadian currency of 2,000 francs, & not being money payable at a fixed time & place, must be determined according to the rate of exchange which prevailed when judgment was given in the County Ct.—*QUARTER v. FARAH* (1921), 49

O. L. R. 186; 64 D. L. R. 37.—CAN.

s. — *Date of payment.*—By its debentures deft. promised to pay at the Bank of M. at its principal offices in any of the following cities, namely, London, England, New York, U.S.A., Montreal, Toronto, or Regina, in Canada, the sum of £100 sterling on Mar. 1, 1938, & to pay interest at 5 per cent. per annum on presentation at said bank of the interest coupons. Each interest coupon promised to pay at the bank in any of the cities £2 10s. on the date specified therein. Pltfs. presented for payment at the bank at Toronto coupons for interest then falling due amounting to £227 10s. Canadian money was then at a premium over English money:—*Held*: the amount of Canadian currency then, the date of maturity of the coupons, necessary to purchase in Toronto £227 10s. was sufficient to discharge deft.'s obligation.—*TORONTO GENERAL TRUSTS CORP. v. REGINA CITY*, [1922] 2 W. W. R. 986.—CAN.

603 i. — *Date of breach.*—In a suit for damages caused to pltf. by

reason of negligence on the part of the second deft. as a common carrier, it was contended on behalf of the second deft. that the loss caused to pltf. being in the first instance measurable in sterling, judgment must be based upon the rate of exchange prevailing on the date of the judgment:—*Held*: this contention must be overruled.—*DEKHARI TEA CO., LTD. v. ASSAM-BENGAL RY. CO., LTD.* (1921), 1 L. R. 48 Calc. 886.—IND.

603 ii. — —.—Where a payment originating in one country is to be made in another country, & the currency denomination specified is the same in both countries, e.g., U.S. & Canada, the rule is that the payment must be made in the currency of the country, where the money is payable, unless by express terms or necessary implication payment in some other currency is required, & the rate of exchange must be taken as that of the date on which payment should have been made.—*SIMMS v. CHERNENKOFF*, [1922] 1 W. W. R. 967.—CAN.

Sect. 3.—Assessment: Sub-sect. 3, B.]

190 lire per 100 lbs. :—*Held*: in arriving at the proper equivalent in British currency for the purposes of assessing these damages, the rate of exchange prevailing between the two countries, when the breach was committed, & not that prevailing at the date of the judgment, should be adopted.—*DI FERDINANDO v. SIMON, SMITS & Co.*, [1920] 3 K. B. 409; 89 L. J. K. B. 1039; 124 L. T. 117; 36 T. L. R. 797; 25 Com. Cas. 37, C. A.

Annotations:—*Consd.* The *Volturno*, [1920] P. 447. *Refd.* *Barry v. van den Hurk*, [1920] 2 K. B. 709; *Lebeaupin v. Crispin*, [1920] 2 K. B. 714; *S.S. Cella v. S.S. Volturno*, [1921] 2 A. C. 544; *Soc. des Hôtels Le Touquet-Paris-Plage v. Cummings* (1921), 126 L. T. 513; *Re British American Continental Bank, Credit General Liegeois' Claim*, [1922] 2 Ch. 589; *Re British American Continental Bank, Goldzieher & Penso's Claim*, [1922] 2 Ch. 575; *Re British American Continental Bank, Lissner & Rosenkranz's Claim*, [1923] 1 Ch. 276; *Re Chesterman's Trusts, Mott v. Browning*, [1923] 2 Ch. 466.

605. ——— Not date of award.]—By each of two contracts, each dated May 16, 1917, C. & Co. sold to L. 2,500 cases of "British Columbia Fraser river salmon." The first contract had the words "the salmon to be the first 2,500 cases of ½-lb. flat pinks packed by the St. Mungo Cannery, Fraser river, during 1917 season." The second contract had a similar clause, except that the packing was to be by the Acme Cannery. No deliveries having been made under the contracts, the buyer claimed damages, & the umpire awarded him \$12,500, to be paid in London at the rate of exchange ruling at the date of the award, namely, Feb. 24, 1920 :—*Held*: the damages, assessed at \$12,500, were payable in London at the rate of exchange ruling upon the date of the breach of contract, namely, Sept. 30, 1917, & not at the rate ruling at the date of the award.—*LEBEAUPIN v. CRISPIN*, [1920] 2 K. B. 714; 89 L. J. K. B. 1024; 124 L. T. 124; 36 T. L. R. 739; 64 Sol. Jo. 652; 25 Com. Cas. 335.

Annotations:—*Consd.* The *Volturno*, [1920] P. 447. *Refd.* *Di Ferdinando v. Simon, Smits*, [1920] 3 K. B. 409; *S.S. Cella v. S.S. Volturno*, [1921] 2 A. C. 544; *Re British American Continental Bank, Goldzieher & Penso's Claim*, [1922] 2 Ch. 575.

606. ———.]—Where, upon the breach of a contract the person in default, whether seller or buyer, becomes liable for the payment of a sum of money in a foreign currency, the damages, for the purposes of an English judgment, must be assessed as at the date of the default, & the sum payable must be converted into English currency according to the rate of exchange prevailing at that date.—*BARRY v. VAN DEN HURK*, [1920] 2 K. B. 709; 89 L. J. K. B. 899; 123 L. T. 719; 36 T. L. R. 663; 64 Sol. Jo. 602.

Annotations:—*Apprvd.* *Lebeaupin v. Crispin*, [1920] 2 K. B. 714. *Consd.* The *Volturno*, [1920] P. 447. *Refd.* *Di Ferdinando v. Simon, Smits*, [1920] 3 K. B. 409; *S.S. Cella v. S.S. Volturno*, [1921] 2 A. C. 544; *Re British American Continental Bank, Goldzieher & Penso's Claim*, [1922] 2 Ch. 575.

607. ———.]—A bank in England, hereinafter called the bank, contracted with appcts., a German bank, to deliver to appcts. on Dec. 31, 1920, specific amounts of American dollars & English pounds sterling against the delivery to the bank of specific amounts of Swiss francs & German marks. The appcts. performed their part of the contract, but the bank failed to deliver either the dollars or the sterling. On Jan. 6, 1921, the bank suspended payment, & on Jan. 25, 1921, a compulsory winding-up order was made & a liquidator was appointed. The appcts. on Jan. 15, 1921, to put themselves in a position to fulfil their obligations to customers & to minimise their loss, purchased, as it was not disputed they were entitled to do, the American

dollars & English sterling against the bank & paid therefor German marks at the market price ruling on that day. On May 19, 1921, the appcts. at the invitation of the liquidator lodged their proof for a sum of English pounds sterling which represented the German marks converted into English currency at the rate of exchange ruling on Jan. 25, 1921, the date of the winding-up order. In Dec. 1921, the liquidator, in pursuance of s. 214 of the Companies (Consolidation) Act, 1908 (c. 69), purchased the same number of marks as the appcts. had expended in acquiring the undelivered currencies, & on Jan. 5, 1922, in spite of the appcts.' proof, tendered that sum of marks to the appcts. in full satisfaction of their claim, which tender was refused. Owing to the rapid depreciation of the mark from & after Jan. 1921, the value of the marks converted into English currency at the date of the purchase & tender by the liquidator as compared with their value on Dec. 31, 1920, was approximately in the ratio of £5,000 to £20,000. Upon the appln. of the appcts. that the liquidator be directed to admit their proof :—*Held*: the claim was for damages for breach of contract to deliver American dollars & English sterling & not for a debt in German marks, & on the authority of *In re British American Continental Bank, Goldzieher & Penso's Claim*, No. 608, *post*, the appcts. were entitled to be admitted as creditors in the winding-up for the value of the marks in English sterling at the rate of exchange ruling on Dec. 31, 1920, the date of the breach, & were not bound to accept the tender of the marks made on Jan. 5, 1922.—*RE BRITISH AMERICAN CONTINENTAL BANK, LTD., LISSNER & ROSENKRANZ'S CLAIM*, [1923] 1 Ch. 276; 92 L. J. Ch. 241; 128 L. T. 727, C. A.

Annotation:—*Consd.* *Re Chesterman's Trusts, Mott v. Browning*, [1923] 2 Ch. 466.

608. ———.]—Upon a claim in the winding up of a co., a bank, for damages for breach of contract to deliver foreign currency, the correct date when the claim ought to be converted into English currency for the purpose of ascertaining the amount for which the claimants were entitled to be admitted, as creditors is the date of the breach & not the date of the winding-up order.—*RE BRITISH AMERICAN CONTINENTAL BANK, LTD., GOLDZIEHER & PENSO'S CLAIM*, [1922] 2 Ch. 575; 91 L. J. Ch. 760; 38 T. L. R. 785; 66 Sol. Jo. 647, C. A.

Annotations:—*Fold.* *Re British American Continental Bank, Lissner & Rosenkranz's Claim* [1923] 1 Ch. 276. *Refd.* *Re British American Continental Bank, Credit General Liegeois' Claim*, [1922] 2 Ch. 589; *Re Chesterman's Trusts, Mott v. Browning*, [1923] 2 Ch. 466.

609. ——— Date when debt became due.]—Upon a claim in the winding-up of a co., a bank, in England for a debt, by way of overdraft, due from the bank to claimants, a Belgian co., in Belgium, in Belgian currency, the correct date on which that debt ought to be converted into English money for the purpose of ascertaining the amount for which claimants ought to be admitted as creditors is the date when the debt became due in Belgium.—*RE BRITISH AMERICAN CONTINENTAL BANK, LTD., CREDIT GENERAL LIEGEOIS' CLAIM*, [1922] 2 Ch. 589; 91 L. J. Ch. 765; 127 L. T. 284; 38 T. L. R. 464; 66 Sol. Jo. 388.

Annotations:—*Refd.* *Re British American Continental Bank, Lissner & Rosenkranz's Claim*, [1923] 1 Ch. 276; *Re Chesterman's Trusts, Mott v. Browning*, [1923] 2 Ch. 466.

610. ———.]—*SOCIÉTÉ DES HÔTELS LE TOUQUET-PARIS-PLAGE v. CUMMINGS*, No. 8, *ante*.

611. ———.]—In an action for the price of

goods sold & delivered, where the price is payable in a foreign currency, the rate of exchange to be taken is that prevailing at the date when the debt became due, & not that prevailing at the date of the verdict or judgment.—*ULLENDahl v. PANKHURST, WRIGHT & Co.* (1923), 39 T. L. R. 628; *sub nom. UELLENDahl v. PANKHURST, WRIGHT & Co.*, 67 Sol. Jo. 791.

Annotation.—*Reid. Re Chesterman's Trusts, Mott v. Browning*, [1923] 2 Ch. 466.

612. ———. ———.]—*PEYRAE v. WILKINSON*, [1923] W. N. 291.

613. ———. ———.]—*Charterparty stipulating payment in sterling in London—Payment in Argentine—Argentine Decree, Dec. 2, 1881, not applicable.*

—By a decree of the Republic of Argentina of the above date, passed for the purpose of establishing the relative value of certain coins in circulation as compared with the lawful currency of the country, an English sovereign was made a legal tender at a fixed rate:—*Held*: this decree only regulated the value of sovereigns as compared with Argentine currency, & did not affect international transactions, & that if payments under an English charterparty, which were to be made in sterling in London, were, for the convenience of the parties made in Argentina, they should be made at the current rate of exchange, whether it be below or above the rate at which an English sovereign was made a legal tender.—*ATLANTIC SHIPPING & TRADING Co. v. DREYFUS (LOUIS) & Co.* (No. 2), *STATHATOS & Co. v. DREYFUS (LOUIS) & Co.* (1922), 91 L. J. K. B. 518; 127 L. T. 415; 38 T. L. R. 556, H. L.; *reusg. S. C. sub nom. DREYFUS & Co. v. ATLANTIC SHIPPING & TRADING Co.* (1921), 37 T. L. R. 417, C. A.

Annotations.—*Mentd. Czarnikow v. Roth, Schmidt* (1922), 92 L. J. K. B. 81; *Ford v. Compagnie Furness (France)*, [1922] 2 K. B. 797; *Pinnock v. Lewis & Peat*, [1923] 1 K. B. 690.

614. ———. ———.]—*Loan of roubles—Whether repayable in paper roubles.*—*Pltfs.*, a British bank, obtained from *defts.*, a Russian bank, on the security of certain bonds, a loan of 750,000 Russian roubles, in June, 1914, when the currency was based on the gold rouble. At that time 750,000 Russian roubles represented £78,206, but subsequently they became almost valueless owing to the issue of paper currency uncovered by gold. In an action for redemption:—*Held*: the loan was repayable in paper roubles issued by the authority of the Russian Govt. & in use at the material date, & upon payment of the principal & interest in roubles & of the costs in English money *pltf.*s. were entitled to redemption.—*BRITISH BANK FOR FOREIGN TRADE, LTD. v. RUSSIAN COMMERCIAL & INDUSTRIAL BANK* (1921), 38 T. L. R. 65.

Annotation.—*Apprvd. Re Chesterman's Trusts, Mott v. Browning*, [1923] 2 Ch. 466.

615. ———. ———.]—*Whether reichsmarks repayable by German Treasury Notes.*—*Re CHESTERMAN'S TRUSTS, MOTT v. BROWNING*, No. 618, *post*.

616. *Amount due in English currency—Rent-charge on lands in Ireland.*—Power was given in a marriage settlement to grant to a wife any annual sum of money, or yearly rentcharge to be tax free & without any deduction, & to be issuing out of & chargeable upon lands in Ireland, so that such rentcharge do not exceed in the whole, the yearly sum of £3,000 of lawful money of Great Britain:—*Held*: a rentcharge appointed under this power is payable in Ireland in the currency of England.—*LANSDOWNE v. LANSDOWNE* (1820), 2 Bli. 60; 4 E. R. 250, H. L.

Annotations.—*Follid. Noel v. Rochfort* (1836), 10 Bli. N. S. 483; *Bourne v. Hartley, Bourne v. Mahon* (1854), 2 Eq. Rep. 910. *Reid. Cope v. Cope* (1846), 15 Sim. 118.

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617. ———. ———.]—*Irish Bonds.*—In 1801, R. a partner in a banking concern in Ireland, applied to N. & Co., a banking-house in London, for a loan of £10,000, to bring into the Irish firm as his share of the capital; which sum they advanced upon the security of four bonds for £2,500 each, with warrants of attorney to confess judgments; which were accordingly entered up in the Ct. of King's Bench in Ireland, in the year 1803. The bonds were expressed to be for the sum "of £5,000 sterling," & the condition was for the payment of the sum of £2,500 sterling of "good & lawful money of Great Britain with legal interest." The warrants of attorney recited the bonds in the same words. The judgments had only the expression "£5,000 sterling." Upon the execution of the bonds credit was given to R. in the books of N. & Co. for the sum of £10,000, of which R. being advised, he by letter dated in Aug. 1801, authorised N. & Co. to answer bills to the amount of £10,000, which were afterwards drawn by the Irish firm, & accepted & paid by N. & Co. Payments on account of the debt were made at various times to B., a legal agent of N. & Co. at Dublin, & he accepted & accounted for those payments as made in Irish currency. Upon a bill filed by the assignee of the debt:—*Held*: it was payable in English currency & with English interest.—*NORL v. ROCHFORD* (1836), 10 Bli. N. S. 483; 4 Cl. & Fin. 158; 6 E. R. 179.

618. ———. ———.]—*Date of conversion—Date of Master's Certificate.*—In an action brought to administer the trusts of a fund settled by an indenture dated Mar. 23, 1887, an inquiry was ordered whether the persons who had become entitled on the death of the tenant for life, who died on Jan. 19, 1920, to shares of the trust fund, which was represented by a fund in *ct.*, had encumbered their shares. The Master by his certificate, dated Nov. 24, 1922, found that S. had not encumbered her share, that Edwin von B. had absolutely assigned his share to one M. B., who, on Nov. 23, 1911, had assigned it by way of *mtge.* to a Dutch bank to secure the repayment of a sum of German reichsmarks, & that Egon von B. had, on Feb. 12, 1906, also assigned by way of *mtge.* his share to another Dutch bank to secure the repayment of a sum of German reichsmarks. The Master further found that there were due to the Dutch banks certain sums in German reichsmarks. On further consideration the *ct.* was asked to apportion the *mtge.* security in the proper proportions between the *mtgors.* & *mtgees.*, & it was therefore necessary to convert the sums found due in reichsmarks into English currency. At the date of the execution of the *mtges.* the creditors could under German law have insisted on payment in gold, but by a German Imperial Statute of Aug. 4, 1914, it was provided that Imperial Treasury notes should be legal tender & that any agreement made before July 31, 1914, for the payment of any debt in gold should, until further order, not be binding on the debtor, & no further order had been made:—*Held*: (1) the loans were loans of foreign money, involving on the one side an obligation to pay, & on the other side an obligation to accept payment in whatever at the date of repayment was legal tender & legal currency in the foreign country whose money was lent, & the covenants to pay specified sums in reichsmarks were satisfied under the German law now in force, by the payment in Treasury notes of sums so specified; (2) the date for the conversion of the sums of money found due in marks into English currency was the date of the Master's certificate.—*Re CHESTERMAN'S TRUSTS, MOTT v. BROWNING*, [1923] 2 Ch. 466, C. A.

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SECT. 3.—Assessment: Sub-sect. 3, B.; sub-sects. 4 & 5.]

Continuing cause of action—Damages assessed to date of assessment—R. S. C., Ord. 36, r. 58.]—See No. 90, ante.

SUB-SECT. 4.—JOINT TORTFEASORS.

See R. S. C., Ord. 14, r. 4; TORTS.

619. Damages must be assessed jointly.]—Upon a joint trespass the jury cannot assess several damages.—*HILL v. GOODCHILD* (1771), 5 Burr. 2790; 98 E. R. 405.

Annotations:—*Distd. Elliot v. Allen* (1845), 1 C. B. 18. *Consd. Greenlands v. Wilmshurst & London Asscn. for Protection of Trade*, [1913] 3 K. B. 507.

620. ——— Though several pleas.]—(1) In assault & battery, if there are several defts. who plead severally, & one makes default, the jury shall assess damages against all. (2) In trespass against two, if the jury find one guilty at one time & the other at another time, several damages may be taxed.—*HEYDON'S CASE* (1612), 11 Co. Rep. 5 a; 77 E. R. 1150.

Annotations:—As to (1) *Apld. Smithson v. Garth* (1691), 3 Lev. 324; *Onslow v. Orchard* (1721), 1 Stra. 422. *Follid. Hill v. Goodchild* (1771), 5 Burr. 2790. *Distd. Elliot v. Allen* (1845), 1 C. B. 18. *Follid. Greenlands v. Wilmshurst & London Asscn. for Protection of Trade*, [1913] 3 K. B. 507. *Refd. Watson's Case* (circa 1630), *Het. 20. As to (2) Apld. Player v. Wain* (1626), *Cro. Car. 54. Generally Mentd. Kay v. Panchiman* (1775), 2 Wm. Bl. 1029.

621. ———.]—In trespass against several, if one pleads not guilty, & the other justifies, & damages are severally assessed, it is bad.—*AUSTEN v. WILWARD* (1601), *Cro. Eliz.* 860; 78 E. R. 1086.

Annotations:—*Follid. Hill v. Goodchild* (1771), 5 Burr. 2790. *Refd. Heydon's Case* (1612), 11 Co. Rep. 5 a.

622. ———.]—On an action for a joint trespass, the jury cannot find damages severally although defts. plead several pleas.—*CRANE & HILL v. HUMMERSTONE* (1606), *Cro. Jac.* 118; 79 E. R. 102.

Annotation:—*Follid. Hill v. Goodchild* (1771), 5 Burr. 2790.

623. ———.]—*COCKE v. JENNOR* (1614), *Hob.* 66; 80 E. R. 214.

Annotations:—*Follid. Greenlands v. Wilmshurst & London Asscn. for Protection of Trade*, [1913] 3 K. B. 507. *Mentd. Lacy v. Kinston* (1701), 1 Ld. Raym. 688; *Pennington v. Healey* (1833), 1 Cr. & M. 402; *Duck v. Mayeu*, (1892) 2 Q. B. D. 511; *Howe v. Oliver & Haynes* (1908), 24 T. L. R. 781.

624. ———.]—When the cause of action is joint, damages must be jointly assessed, though the pleas be several.—*MATTHEWS v. COAL* (1615), *Cro. Jac.* 384; 79 E. R. 329.

625. ———.]—(1) Where there is single cause of action against several defts. arising from a joint tort, & defts. sever their defences, the jury have no power to sever the damages, & judgment cannot be entered against the several defts. for different amounts.

(2) There must be some reasonable relation between the wrong done & the solatium applied (*HAMILTON, L.J.*).—*GREENLANDS, LTD. v. WILMSHURST & LONDON ASSCN. FOR PROTECTION OF TRADE*, [1913] 3 K. B. 507; 83 L. J. K. B. 1; 109

L. T. 487; 29 T. L. R. 685; 57 Sol. Jo. 740, C. A.; *reversd. on other grounds, sub nom. LONDON ASSCN. FOR PROTECTION OF TRADE v. GREENLANDS, LTD.*, [1916] 2 A. C. 15, H. L.

Annotations:—As to (1) *Refd. Wiffen v. Bailey & Romford* U. D. C. (1914), 112 L. T. 274; *Thomas v. Moore*, [1918] 1 K. B. 555; *Pratt v. British Medical Asscn.*, [1919] 1 K. B. 244. *Generally, Mentd. Hobson v. Leng*, [1914] 3 K. B. 1245; *Adam v. Ward*, [1917] A. C. 309.

626. ——— Where liability joint—Unsatisfied judgment against one—Bar to action against the other.]—*Pltf.* was appointed secretary of a co. upon his agreeing to invest £500 therein. He took up shares to the nominal value of £500, & the directors signed an undertaking to repurchase, or to find a purchaser for the shares, at the minimum value of par in case he relinquished the position of secretary. The co. never did any business, & was in fact a fraudulent promotion of two of the directors. *Pltf.* resigned, & brought an action against the three directors to recover £500, as the agreed purchase price of the shares, or, in the alternative, £500 damages for breach of the undertaking. Two original directors delivered no defence, & *pltf.* signed the interlocutory judgment against them in default for damages to be assessed. Before the action could proceed against the third deft., who had delivered a defence, the damages were assessed at £516, & final judgment was entered for this sum:—*Held*: the undertaking was joint, & not several, & final judgment having been recovered against two of three joint contractors, the action on the same cause against the third was barred, although the judgment remained unsatisfied.—*PARR v. SNEILL*, [1923] 1 K. B. 1; 91 L. J. K. B. 865; 128 L. T. 106, C. A.

627. ——— Though degrees of culpability.]—*LOWFIELD v. BANCROFT* (1731), 2 Stra. 910; 93 E. R. 935.

628. ———.]—*BROWN v. ALLEN* (1802), 4 Esp. 158, N. P.

Annotation:—*Distd. Elliot v. Allen* (1845), 1 C. B. 18.

629. ———.]—To a count for an expulsion A. pleaded not guilty, & B. & C. paid 20s. into ct., & pleaded that *pltf.* had sustained no greater damages. The jury wished to find a verdict for *pltf.* against A. for £20 beyond the sum paid into ct., & a verdict that 20s. as to B. & C. was sufficient:—*Held*: this could not be done. If the jury thought the damages that *pltf.* had sustained exceeded 20s., they should find a verdict against all defts. for so much as *pltf.*'s damages exceeded that sum.—*WALKER v. WOOLCOTT* (1838), 8 C. & P. 352; 2 J. P. 56, N. P.

630. ———.]—In trespass against several defts., where all are implicated in one joint act of trespass, the damages must be assessed against all jointly, though all may not have been equally culpable.—*ELLIOT v. ALLEN* (1845), as reported in 1 C. B. 18; 135 E. R. 441.

Annotations:—*Refd. Smith v. Pritchard* (1849), 8 C. B. 565; *Greenlands v. Wilmshurst & London Asscn. for Protection of Trade*, [1913] 3 K. B. 507. *Mentd. G. v. Pearson* (1846), 2 Coll. 581; *Cox v. Reid* (1849), 13 Q. B. 538.

631. ———.]—Where two persons are jointly sued for false imprisonment, one of whom has acted from improper motives, the damages

PART VII. SECT. 3, SUB-SECT. 4.

6271. Damages must be assessed jointly—Though degrees of culpability.]—Where a jury found one of defts. in an action for assault & battery guilty as a principal in the first degree & awarded damages £5, & the other deft. as only in the second degree, but awarded damages £10, the ct. gave judgment against defts.—*DAWE v.*

FADDY & CONNELL (1818), 1 Nfld. L. R. 137.—*NFLD.*

t. Damages assessed severally.]—Where different sets of defts. are not joint tort-feasors, a joint assessment of damages is improper.—*McGILLIVRAY v. LOCHIEL TOWNSHIP* (1904), 24 C. L. T. 346; 8 O. L. R. 446; 4 O. W. R. 193.—*CAN.*

a. ———.]—Where an action is

brought against a number of defts. jointly for an illegal conspiracy, the fact that separate defts. joined the conspiracy at different times is no ground for objection that the action is wrongfully constituted in law, as joining separate causes of action against separate defts., there being in substance only one cause of action, namely, the conspiracy to injure. In such a case the jury may differ

ought not to be assessed with reference to the act & motives of the most guilty, or the most innocent party, but the true criterion of damage is the whole injury which pltf. has sustained from the joint act of trespass.—*CLARK v. NEWSAM* (1847), 1 Exch. 131; 16 L. J. Ex. 296; 9 L. T. O. S. 199; 11 J. P. 840.

Annotations.—*Apld.* *Smith v. Streatfield*, [1913] 3 K. B. 764. *Mentd.* *R. v. West* (1847), 2 Car. & Kir. 496.

632. ———.]—Pltf. claimed damages in respect of a libel from two defts. who joined in their defence. The jury found a verdict for pltf., assessing the damages at £500—£495 against one deft. & £5 against the other:—*Held*: the jury had no power in such a case to sever the damages, & judgment was properly entered for £500 against both defts.—*DAMIENS v. MODERN SOCIETY, LTD.* (1910), 27 T. L. R. 164.

Annotations.—*Refd.* *Greenlands v. Wilmshurst & London Asscn. for Protection of Trade*, [1913] 3 K. B. 507; *Pratt v. British Medical Asscn.*, [1919] 1 K. B. 244.

633. ———.]—The writer of a pamphlet employed a firm of printers to print it. He then circulated the pamphlet. It contained statements defamatory of pltf. The writer was actuated by malice. The printers acted in the ordinary course of their business & without malice:—*Held*: the writer & the printers, were joint tortfeasors & jointly liable to pltf.—*SMITH v. STREATFIELD*, [1913] 3 K. B. 764; 82 L. J. K. B. 1237; 109 L. T. 173; 29 T. L. R. 707.

Annotations.—*Refd.* *London Asscn. for Protection of Trade v. Greenlands* (1915), 85 L. J. K. B. 698; *Pratt v. British Medical Asscn.*, [1919] 1 K. B. 244.

634. ———.]—*Judgment by default.*—*HEYDON'S CASE*, No. 620, *ante*.

635. ———.]—*ONSLOW v. ORCHARD* (1721), 1 Stra. 422; 93 E. R. 610.

Annotation.—*Refd.* *Mitchell v. Milbank* (1795), 6 Term Rep. 199.

636. ———.]—If two defts. in trespass suffer judgment by default, & pltf. execute writs of inquiry against them separately & takes several damages against them, it is irregular; & if pltf. enter up final judgment with those several damages against defts. it is erroneous.—*MITCHELL v. MILBANK* (1795), 6 Term Rep. 199; 101 E. R. 510.

Annotation.—*Refd.* *Greenlands v. Wilmshurst & London Asscn. for Protection of Trade*, [1913] 3 K. B. 507.

637. ———.]—*Collision at sea.*—The owners of a steamer sued the owners of a barque & the owners of its tug in one action for damages sustained in a collision between all three vessels. Against the owners of the barque judgment was recovered by default for the whole amount of the damage sustained, & the barque was sold & the proceeds paid into ct. Against the owners of the tug judgment was recovered for half the damage, this sum exceeding the proceeds of the barque:—*Held*: the owners of the steamer were entitled to recover half the damages from the owners of the tug without giving credit for the proceeds of the barque.—*THE MORGENGRY & THE*

BLACKCOCK, [1900] P. 1; 69 L. J. P. 1; 81 L. T. 417; 48 W. R. 121; 16 T. L. R. 14; 8 Asp. M. L. C. 591, C. A.

Annotation.—*Consd.* *The Seacombe, The Devonshire*, [1912] P. 21.

638. Separate actions—Each liable for whole loss—Collision at sea.—In two separate actions of damage by collision brought, in the one case, by pltf. owners of a barge & her master & crew, & the owners of her cargo & freight, against deft. owners of another vessel, & in the second case, by pltf. owners of barge & her master & mate, against deft. owners of another vessel, the same facts were found by the ct., namely, that a barge whilst being towed by a tug came into collision with, & was sunk by, a third vessel through the joint negligence of the tug & the third vessel:—*Held*: the cases were governed by the common law, under which one of two joint tortfeasors can be sued separately, the result being that, in each case, defts. were liable for the whole of the loss sustained by pltf.—*DEVONSHIRE (OWNERS) v. BARGE LESLIE (OWNERS)*, [1912] A. C. 634; 81 L. J. P. 94; 107 L. T. 179; 28 T. L. R. 551; 57 Sol. Jo. 10; 12 Asp. M. L. C. 210, H. L.; *affg.* *S. C. sub nom. THE SEACOMBE, THE DEVONSHIRE*, [1912] P. 21, C. A.

Annotations.—*Consd.* *The Kurak*, [1923] P. 206. *Refd.* *The Calrubahn*, [1914] P. 25; *The Harlow*, [1922] P. 175. *Mentd.* *The Devonshire & St. Winifred*, [1913] P. 13; *The Umona*, [1914] P. 141; *The Ran, The Graygarth*, [1922] P. 80.

639. Damages assessed severally—Where defendants severally guilty.—Damages must be severally assessed, where defts. are severally guilty.—*MORE v. MORE* (1593), Cro. Eliz. 296; 78 E. R. 549.

640. ———.]—*SAMPSON v. CRANFIELD & UPTON* (1611), 1 Bulst. 157; 80 E. R. 848.

Annotation.—*Distd.* *Eliot v. Allen* (1845), 1 C. B. 18.

641. ———.]—*HEYDON'S CASE*, No. 620, *ante*.

642. ———.]—*PLAYER v. WAIN & DEWS*

(1626), Cro. Car. 54; 79 E. R. 651.

643. ———.]—Trespass for several things at the same time against several defts., one does one part & another another part, all of them shall be charged for the whole & not severally for several parts. If several damages are given, pltf. can have only one of them.—*SMITHSON v. GARTH* (1691), 3 Lev. 324; 83 E. R. 711.

644. ———.]—*Where pleas not made jointly.*—*CHAPMAN v. HOUSE, SLATER & GOODACRE* (1740), 2 Stra. 1140; 93 E. R. 1087.

SUB-SECT. 5.—IN DEFAULT OF APPEARANCE.

See R. S. C., Ord. 13, rr. 5, 6; Ord. 27, rr. 4, 5; Ord. 36, rr. 57, 57a.

645. Plaintiff entitled to nominal damages—Although jury find no damage sustained.—In all cases of judgment by default pltf. is entitled to have the verdict entered for nominal damages,

entiate between, & assess separate damages against, separate defts., according to the respective dates when such defts. became members of the conspiracy.—*O'KEEFE v. WALSH* (1903), 38 L. L. T. 194.—*IR.*

b. ———.]—In a suit for mesne profits against a number of defts. who have been in possession of distinct portions of a newly-formed chur., & are proved to have no title thereto, it is competent to apportion the damages payable by defts. severally in respect of the portions held by them respectively. *After*: where defts. have jointly taken possession of a

particular portion of such land.—*KRISHNA MOHUN BASAK v. KUNJO BEHARI BASAK* (1881), 9 C. L. R. 1.—*IND.*

PART VII. SECT. 3, SUB-SECT. 5.

c. Interlocutory judgment necessary for assessment.—Pltf. must assess his damages after interlocutory judgment, in debt on a bond to the limits.—*CALLAGHER v. STROBRIDGE* (1829), Dra. 158.—*CAN.*

d. ———.]—In an action commenced by a writ not specially indorsed, where deft. does not plead to the declaration, pltf. must sign

interlocutory judgment against the deft. before he is in a position to serve notice of trial & assessment of damages.—*FENWICK v. DONOHUE* (1879), 8 P. R. 116.—*CAN.*

e. ———.]—*Proof.*—In assessing damages under the Act after judgment by default, pltf. must establish the amount of his debt or damages by legal proof.—*MITCHELL v. LAWYER* (1872), 14 N. B. R. (1 Pug.) 79.—*CAN.*

f. ———.]—*Admissibility of evidence on assessment.*—Where a special contract is set out in the declaration, & pltf. obtain judgment by default, or

Sect. 3.—Assessment: Sub-sects. 5 & 6. Sect. 4: Sub-sects. 1, 2 & 3, A.]

although the jury find no damages sustained.—*DODS v. EVANS* (1864), 15 C. B. N. S. 621; 33 L. J. C. P. 146; 9 L. T. 723; 12 W. R. 432; 143 E. R. 929; *sub nom.* *DODDS v. EVANS*, 3 New Rep. 430.

SUB-SECT. 6.—EFFECT OF FAILURE TO ASSESS.

646. No assessment by jury—Nominal damages entered by court.]—On the trial of issues joined on a return to a *mandamus*, the jury found generally for the crown, without mentioning any damages. The judge certified for the costs of a special jury. On application by the prosecutors, the judge, without referring to any notes, directed that the verdict should be entered on the *postea*, with 1s. damages:—*Held*: the order was right.—*R. v. FALK* (1842), 1 Q. B. 653; 2 Gal. & Dav. 803; 13 L. J. Q. B. 187; 113 E. R. 1282, Ex. Ch.

Annotations.—*Consd.* *Dods v. Evans* (1864), 15 C. B. N. S. 621. *Refd.* *Fotherby v. Met. Ry.* (1866), L. R. 2 C. P. 188; *R. v. Marshland, Smooth & Fen District Comrs.* (1920) 1 K. B. 155. *Mentd.* *R. v. Kell* (1841), 1 Q. B. 660; *R. v. James* (1843), 7 J. P. 383.

647. — Writ of inquiry does not issue.]—Where, on the trial of a cause, no damages were assessed on the issues found for *pltf.*, the *ct.* refused to award a writ of inquiry to assess the damages on those issues.—*CARRUTHERS v. WEST* (1848), 11 L. T. O. S. 246; 12 Jur. 98c.

See, now, R. S. C., Ords. 13, 36, rr. 6, 57.

SECT. 4.—REVIEW OF ASSESSMENT—NEW TRIAL.

SUB-SECT. 1.—IN GENERAL.

See, Jud. Act, 1890 (c. 44), s. 1; R. S. C., Ords. 39, 54, rr. 1, 22a.

648. General rule.]—When in an action of tort the jury find a verdict for *pltf.* for a sum which the C. A. considers unreasonable & excessive, that *ct.* has no jurisdiction, without *deft.*'s consent, to order that unless *pltf.* consents to reduce the damages there shall be a new trial.

I have come to the conclusion that there is not power in the *ct.* to alter the verdict except by ordering a new trial (LORD HALSBURY, C.).—*WATT v. WATT*, [1905] A. C. 115; 74 L. J. K. B. 438; 92 L. T. 480; 69 J. P. 249; 53 W. R. 547; 21 T. L. R. 386; 49 Sol. Jo. 400, H. L.

Annotations.—*Consd.* *Jenkins v. Taft Vale Ry.* (1912), 106 L. T. 715. *Expld. & Distd.* *Barber v. Deutsche Bank (Berlin) London Agency*, [1919] A. C. 304.

Motion for new trial.—To what court application made.]—See PRACTICE & PROCEDURE.

Appeal from assessment by master.—To what court made.]—See PRACTICE & PROCEDURE.

on demurrer, the contract is admitted as stated in the declaration, & evidence which would have been admissible under the general issue will not be received on an inquiry to assess the damages.—*McDONALD v. CUMMINGS* (1874), 2 Pug. 282.—CAN.

g. — Summons to set aside—No assessment before hearing.]—A *pltf.* is not at liberty to go on & assess his damages, pending a summons to set aside his interlocutory judgment, & after it is returnable.—*PAGE v. MEYERS* (1851), 8 U. C. R. 70.—CAN.

PART VII. SECT. 3, SUB-SECT. 6.

h. No assessment by jury—Assess-

ment by court.]—In an action of seduction no appearance was entered, *pltf.* then filed a statement of claim to which no defence was made & interlocutory judgment was signed & notice of assessment of damages given. *Deft.* did not appear at the trial & a jury was called who disagreed as to the amount of damages & were discharged. The judge then tried the case himself without a jury, upon a fresh taking of evidence, & assessed the damages, & gave judgment for *pltf.*

Semble: the judge in such an action had no power to dispense with the jury.—*ADAIR v. WADE* (1885), 9 O. R. 15.—CAN.

Appeal from decision of county court judge.]—See COUNTY COURTS, Vol. XIII., p. 526, No. 776.

Review of damages by award.]—See ARBITRATION, Vol. II., p. 498, Nos. 1389, 1390.

649. Re-assessment directed by court—Proviso against increase on award made.]—In an action on the case against eighteen *defts.*, two of them, N. & P., suffered judgment by default; a *nolle prosequi* was entered as to N.; & at the trial the jury found a verdict for all *defts.* except P., assessing the damages against him at £900. The *ct.* being dissatisfied with the verdict in favour of one of *defts.*, granted a new trial as to him, on payment of the costs of all *defts.* except P.; & also directed a re-assessment of damages as to P., with a proviso that on such re-assessment the damages against him should not exceed the £900.—*PRICE v. HARRIS* (1833), 10 Bing. 331; 3 Moo. & S. 838; 3 L. J. C. P. 73; 131 E. R. 932.

Annotations.—*Mentd.* *Doe d. Dudgeon v. Martin* (1845), 2 Dow. & L. 678; *Purnell v. G. W. Ry.* (1876), 1 Q. B. D. 636.

650. Where defendant consents to assessment.]—In an action of trespass, the judge being of opinion that *deft.* was entitled to a verdict upon that issue, directed the jury so to find, but at the same time asked them to assess the damages, in case *pltf.* should be entitled to a verdict, which they did. The verdict was accordingly entered for *deft.*, with leave to move to enter it for *pltf.*:—*Held*: *pltf.* was not entitled to judgment *non obstante veredicto*, or to a new trial, *deft.* consenting to a verdict for *pltf.*, with the damages found by the jury.—*DAVIS v. FALK* (1847), 9 L. T. O. S. 50.

SUB-SECT. 2.—DAMAGES AWARDED UNDER £20.

See, generally, PRACTICE & PROCEDURE.

651. Whether new trial granted—Verdict perverse.]—Where the verdict is perverse, the *ct.* will grant a new trial although the damages given for *pltf.* are less than £20.—*FREEMAN v. PRICE* (1827), 1 Y. & J. 402; 148 E. R. 727.

Annotation.—*Mentd.* *Alum v. Boulbee* (1854), 9 Exch. 738. **652. —.]**—Where less than £20 is sought to be recovered, the *ct.* will not grant a new trial to *pltf.* as upon a perverse verdict, although the verdict was clearly wrong.—*ARMSTRONG v. FREE* (1836), 2 Hodg. 197.

653. — Verdict against evidence.]—In a cause decided by an inferior *ct.* on a writ of trial, the *ct.* will hear a motion for a new trial on the ground that the verdict was against evidence, though the damages were below £20.—*TAYLOR v. HELPS* (1834), 5 B. & Ad. 1068; 110 E. R. 1087.

654. —.]—*SOWELL v. CHAMPION*, No. 199, *ante*.

655. —.]—The jury have virtually estimated the injury of which *pltf.* complains at £5, which according to the well-known rule pre-

PART VII. SECT. 4, SUB-SECT. 2.

k. Whether new trial granted.]—In an action for maliciously suing out an attachment, it appeared that *deft.*, when he made the affidavit, was aware that *pltf.* was then actually in prison. For the defence it was shown that the goods attached were eventually sold under executions against *pltf.*, & therefore no substantial damage was suffered. The *ct.*, however, refused a new trial on this ground, the verdict being for only £18.—*OWENS v. PURCELL* (1854), 11 U. C. R. 390.—CAN.

l. —.]—The *ct.* refused to disturb a verdict for \$20 for trespass to land, as the pleadings would have to

cludes our interference with the verdict as being against evidence (TINDAL, C.J.).—MANTON v. BALES (1845), 1 O. B. 444; 135 E. R. 613.

656. ———.]—The ct. will not set aside a verdict as against the weight of evidence when the damages are under £20.—TARLINGTON v. SPENCER (1859), 32 L. T. O. S. 244; *sub nom.* TARLINGTON v. STAREY, 23 J. P. 56; 7 W. R. 188.

657. ——— In actions of replevin.]—Where in an action of replevin pltf. obtained a verdict, damages £4 4s., the ct. refused to grant a new trial which was moved for on the ground that the verdict was against the evidence, although it was insisted that the rule as to trifling damages could not apply to an action of this nature.—BROWN v. RAY (1824), 9 Moore, C. P. 583; 3 L. J. O. S. C. P. 2.

Annotation:—Consd. Edgson v. Cardwell (1873), L. R. 8 C. P. 647.

658. ———.]—The rule that a new trial will not be granted for either party, where the sum given or recoverable is under £20, does not apply to replevin.—EDGSON v. CARDWELL (1873), L. R. 8 C. P. 647; 28 L. T. 819.

See, generally, DISTRESS.

659. ——— Circumstances peculiar—Trial of a right—Liability of personal character to injury.]—It is the custom not to grant a new trial on the ground that the verdict is against the weight of evidence where the damages do not exceed £20 except under peculiar circumstances, such as the trial of a right, or where the personal character of a person might be injured.—JOYCE v. METROPOLITAN BOARD OF WORKS (1881), 44 L. T. 811; 45 J. P. 667.

660. ——— Verdict incorrect & contrary to judge's direction—Plaintiff only entitled to nominal damages.]—Where the jury have incorrectly, & contrary to the judge's direction, found for deft., the ct. will not grant a new trial to enable pltf. to recover nominal damages only.—HARRIS v. JONES (1832), 1 Mood. & R. 173.

Annotation:—Mentd. Calthorpe v. McOscar, [1923] 2 K. B. 573.

be amended, & a new trial could only be granted on payment of costs.—MUNN v. GALBRAITH (1863), 13 C. P. 75.—CAN.

m. ——— Question of right involved.]—In trespass the jury gave £5 damages for pltf., against the judge's charge. The verdict being contrary to law:—*Held*: the smallness of damages was no reason against a new trial, because the verdict if it stood would be conclusive on the parties as to their rights.—SOPER v. MARSH (1836), 5 O. S. 68.—CAN.

n. ———.]—A new trial ordered notwithstanding that the amount recovered was less than £20, a public right being involved.—PROUSE v. GLENNY (1863), 13 C. P. 560.—CAN.

PART VII. SECT. 4, SUB-SECT. 3.—A.

661 i. Quantum of damage—Application of wrong principle by court below.]—Where the judge assessed the damages upon a wrong measure of damages, a new trial was ordered.—HOLLAND v. HARDY (1882), 3 N. S. W. L. R. 450.—AUS.

661 ii. ———.]—If the amount awarded in the ct. of first instance is not such as to shock the sense of justice, & to make it apparent that there was error or partiality on the part of the judge, his discretion exercised in determining the amount of damages should not be interfered with.—LEVI v. REED (1881), 6 S. C. R. 482.—CAN.

661 iii. ———.]—A ct. of appeal

should not interfere with damages awarded by a judgment unless they appear to have been calculated upon a wrong principle, or arrived at without regard to considerations which ought to govern a tribunal in awarding damages.—MONTREAL CORPN. v. HALL (1885), 12 S. C. R. 74.—CAN.

661 iv. ———.]—*Held*: though the damages awarded were not such as the ct. would have given, the matter was one in the discretion of the trial judge, & there was no reason for interfering with his discretion in that respect.—DOMINION IRON & STEEL CO. v. MCLENNAN (1904), 34 S. C. R. 394.—CAN.

661 v. ———.]—A finding as to damages can stand upon no other footing than any other finding made by a judge trying the case without a jury. The ct. has power to interfere, & it is its duty to interfere with the finding where it is erroneous; there is a difference between a finding by a judge & a finding by a jury.—BATEMAN v. MIDDLESEX COUNTY (1912), 22 O. W. R. 685; 3 O. W. N. 1541; 24 O. L. R. 84; 27 O. L. R. 122; 6 D. L. R. 533.—CAN.

661 vi. ———.]—The assessment of the quantum of damages, either special or general, should not be disturbed unless it is shown that the conclusions arrived at are clearly erroneous.—KERLEY v. EDMONTON CITY (1915), 30 W. L. R. 553.—CAN.

661 vii. ———.]—Though an appeal lies from the judgment of a judge

SUB-SECT. 3.—GROUNDS FOR REVIEW.

A. In General.

661. Quantum of damages—Application of wrong principle by court below.]—The C. A. will not entertain an appeal from an ord. of the ct. below, assessing damages, unless it is shown that the ct. below has acted on a wrong principle in assessing the quantum of damages.—BAIL v. RAY (1873), 30 L. T. 1; 22 W. R. 283, L. O. & L. JJ.

662. Not where evidence given by party on inquiry as to damages.]—STANELIES CASE (1628), Litt. 150; 124 E. R. 181.

663. Disparity between two former awards—Third trial ordered.]—PETERBOROUGH (EARL) v. SADLER (1700), 12 Mod. Rep. 347; 88 E. R. 1371.

664. Mistake by jury—Awarding damages to defendant—Not assessing damages of plaintiff at writ of inquiry.]—DANIEL v. PURKIS (1732), Kel. W. 97; 25 E. R. 510.

665. ——— Amount smaller than intended—Affidavit as to mistake.]—The ct. will not at a distance of time after the trial amend the *postea* by increasing the damages given by the jury, although all the jurymen [in an affidavit stating their intention to have been to give pltf. such increased sum, & that they conceived that the verdict they had given was calculated to give him such sum.—JACKSON v. WILLIAMSON (1788), 2 Term Rep. 281; 100 E. R. 153.

666. ——— Amount not carrying costs.]—If a jury give a verdict in ignorance that it will not carry costs, it is no reason why the verdict should be disturbed.—KILMORE v. ABDOLAH (1858), 27 L. J. Ex. 307.

667. Mistake by counsel—In value agreed upon.]—Where damages found by the jury have been calculated upon a value assented to by counsel on both sides, the ct. will not interfere to alter the amount of the verdict on affidavits that counsel were mistaken in that which they assumed as the basis of their calculation.—HILTON v. FOWLER (1836), 5 Dowl. 312.

at the trial on questions of fact as well as of law, on the former an Applt. Ct. should not interfere with such decision, unless there is some good & special reason for doubting its soundness.—MORROW v. OGILVIE FLOUR MILLS CO. (1918), 57 S. C. R. 403; 44 D. L. R. 557.—CAN.

661 viii. ———.]—MORTIMER v. SHAW (1922), 66 D. L. R. 139.—CAN.

661 ix. ———.]—In fixing damages, when the trial judge has arrived at a conclusion on the different elements involved, the ct. of appeal ought not to substitute its judgment for his unless it is convinced that he acted upon some wrong principle or that the amount fixed is unreasonably excessive.—MOCK v. REGINA TRADING CO., LTD. & MCGREGOR, [1922] 2 W. W. R. 1241; 68 D. L. R. 159.—CAN.

o. ——— Practice of Privy Council.]—It is against the practice of the Privy Council to disturb the conclusion reached by all the ct. below on a question affecting the amount of damages.—DOMINION RADIATOR CO., LTD. v. STEEL CO. OF CANADA, LTD., [1919] 3 W. W. R. 41.—CAN.

p. ——— Imposition of terms.]—The ct. will not ordinarily interfere with the verdict unless the damages are manifestly extravagant, or unless some wrong element has been admitted in the computation of them, or there is reason to attribute partiality or other improper motive to the jury; & in case of such interference the ct. will impose equitable conditions on a deft.

Sect. 4.—Review of assessment—new trial: Sub-sect. 8, A. & B. (a).]

668. — Action on mortgage deed—Verdict taken for principal without interest.]—In an undefended action on a mtge. deed, pltf.'s counsel inadvertently took a verdict for the principal money only, omitting to include interest. The ct. refused to increase the verdict.—*BAKER v. BROWN* (1836), 2 M. & W. 199; 5 Dowl. 313; 2 Gale, 223; 6 L. J. Ex. 11; 150 E. R. 727.

669. New trial unlikely to show materially different position.]—The ct. will not grant a new trial to pltf. on the ground that the damages are small, even though the ct. may conceive they are smaller than what is reasonable, unless the judge at the trial is dissatisfied.

The ct. ought not to grant a new trial unless it is made out that on the second trial the position would have been materially different from that in which it was at the former trial (*TINDAL, C.J.*).—*GIBBS v. TUNALEY* (1845), 1 C. B. 640; 5 L. T. O. S. 197; 135 E. R. 692.

Annotation:—Reid. Kelly v. Sherlock (1866), L. R. 1 Q. B. 686.

670. Right of plaintiff to nominal damages—Failure to claim at trial.]—The ct. will not grant a new trial on the ground that pltf. is entitled to nominal damages, if nominal damages have not been claimed at the trial.—*HOBSON v. COWLEY* (1858), 27 L. J. Ex. 205; 6 W. R. 334.

671. Estoppel—Conduct of party applying for

seeking relief.—*BARCLAY v. ADAIR* (1858), 7 C. P. 157.—CAN.

q. Right to or award of nominal damages only—No new trial granted.]—The ct. will not entertain a motion for a new trial on the ground that nominal damages should have been given when the point was not raised at the trial.—*ROGERS v. PECK* (1838), Ber. [488], 318.—CAN.

r. — — —.]—A verdict which had been given for pltf. was allowed to stand for nominal damages.—*GREEN v. WILLISTON* (1845), 3 Kerr. 58.—CAN.

s. — — —.]—If the jury return a nominal verdict for pltf., the ct. will not set it aside on the ground that to sustain a verdict for even nominal damages clear proof of an injury received from deft.'s neglect should have been given.—*O'CONNOR v. HAMILTON* (1848), 4 U. C. R. 243.—CAN.

t. — — —.]—*SEWELL v. OLIVE* (1859), 4 All. 394.—CAN.

a. — — —.]—*O'FLAHERTY v. DEVINE* (1863), 5 All. 434.—CAN.

b. — — —.]—*ATKINSON v. MITCHELL* (1866), 3 All. 345.—CAN.

c. — — —.]—*EATON v. GORR BANK* (1868), 27 U. C. R. 490.—CAN.

d. — — —.]—*BELYEA v. HAMM* (1871), 2 Han. 27.—CAN.

e. — — —.]—*HAMILTON v. SIMPSON* (1880), 19 N. B. R. 497.—CAN.

f. — — —.]—*BEATTY v. OILRE* (1886), 12 S. C. R. 708.—CAN.

g. — — —.]—*SCAMMEL v. CLARKE* (1894), 23 S. C. R. 307.—CAN.

h. — — —.]—*HARRIS v. DUNLOP* (1896), 33 N. B. R. 556.—CAN.

k. — — —.]—*WILKIE v. RICHARDS* (1900), 32 N. S. R. 304.—CAN.

l. — — —.]—The ct. refuse to grant a new trial when the damages would be necessarily nominal, & no title would be in question.—*PURCELL v. NOLAN* (1839), 1 L. R. 258.—IR.

m. Right to small damages only—Misconduct of jury—New trial granted where important principle involved.]—Where a verdict is contrary to the judge's charge, a new trial will be granted, though the amount of dam-

ages which pltf. would be entitled to recover is small, the principle involved in the case being important.—*FRENCH v. HODGIN* (1833), (1825-1897), N. B. Dig. 547.—CAN.

n. — — —.]—Where actions are brought in the inferior jurisdiction of the superior ct. for trifling amounts, which might have been recovered at much less expense in the inferior courts, the ct. will not favour such actions by granting new trials in cases which rest in their discretion. It must be clearly shown that the direction of the presiding judge has been wrong, or that the verdict has been against evidence.—*COMSTOCK v. MOORE* (1857), 6 C. P. 434.—CAN.

671 i. Estoppel—Conduct of party applying for new trial—Objection not taken in court below.]—The question of damages was held not to justify a new trial, as the little evidence given on the point was not objected to at the trial, nor mentioned in the judge's address to the jury.—*WARD v. MAINLAND TRANSFER CO.*, [1919] 3 W. R. 193.—CAN.

o. Absence of measure of precise calculation—Dependent on conjecture.]—Where pltf. & deft. have had open accounts for a long period, & have taken no pains to come to an understanding in regard to the terms of their dealing, or to preserve the means of proving the necessary facts, & the jury find more or less upon conjecture what the ct. may think excessive damages, for pltf., the ct. will very rarely on that ground grant a new trial.—*CORNER v. MCKINNON* (1848), 4 U. C. R. 350.—CAN.

p. — — —.]—The sound rule to adopt is that in mere matters of fact, or in the estimation of damages not susceptible of precise calculation or not ascertainable by the appn. of any rule prescribing a measure of damages, the appeal ct. should sustain the judgment of the trial judge unless satisfied that his conclusions are clearly erroneous.—*GINGRAS v. DESILETS* (1881), Cass. Dig. 116.—CAN.

aa. — — —.]—*MCILVEE v. FOLEY BROTHERS*, [1919] 1 W. W. R. 403.—CAN.

new trial—Objection not taken to defective count.]

—After judgment for pltf. on demurrer without argument, & general damages assessed, the ct. will not permit deft. to move in arrest of judgment on the ground that the damages appear to be partly given upon a count which cannot be sustained, because deft. had the opportunity of excepting to that count on demurrer.—*CRESWELL v. PACKHAM* (1816), 6 Taunt. 630; 2 Marsh. 326; 128 E. R. 1180.

672. — — — Basis of assessment not challenged.]—*WILSON v. UNITED COUNTIES BANK, LTD.*, No. 562, ante.

See, generally, ESTOPPEL.

673. Absence of measure for precise calculation—Dependent on conjecture.]—Resps. obtained against applts. an interdict restraining the latter in the working of their mines. The interdict was recalled, & applts. brought their action for damages, & substantial damages were awarded. On appeal: —*Held*: the House could not interfere with an award of damages which did not admit of precise calculation, but was based upon a series of conjectures.—*CLIPPENS OIL CO., LTD. v. EDINBURGH & DISTRICT WATER TRUSTEES*, [1907] A. C. 291; 76 L. J. P. C. 79, H. L.

674. Declaration containing several counts—Some counts not actionable—General damages awarded.]—*ANGER v. WILKINS* (1732), Barnes, 478; 94 E. R. 1012.

Annotation:—Reid. Corner v. Shew (1838), 4 M. & W. 163.

674 i. Declaration containing several counts—Some counts not actionable—General damages awarded.]—Where damages have been assessed generally upon a good & bad count, the practice at common law is to direct a trial *de novo*, & not to give either party the costs of the first trial.—*MEASURE v. MCFADYEN* (1910), 11 C. L. R. 723.—AUS.

674 ii. — — —.]—The damages were assessed on the fifth count & in case the verdict on that count could not legally stand, were also assessed on other counts in the declaration; but as it was found the verdict on the fifth count must stand it was directed that the damages separately assessed on the other counts would merge in this as the matter was presented to the jury.—*DAVIS v. LANGDON* (1911), 11 S. R. N. S. W. 149.—AUS.

674 iii. — — —.]—Where one count is good & another bad, & the damages general, the court will not arrest judgment but award a *verdict de novo*.—*DECOW v. TAIT* (1866), 25 U. C. R. 188.—CAN.

674 iv. — — —.]—Pltf. claimed damages from trespasses committed by deft.'s cattle on his lands, & damages sustained by reason of the overflow of water on pltf.'s land, caused by a dam erected by deft. The jury found in favour of pltf. on both grounds of his claim, assessing the damages generally at \$50. As to the first claim, the ct. were of opinion that the evidence sustained pltf.'s allegation; but as the damages were assessed generally, & there was some doubt whether the liability of deft. for the overflow of the water was established, the finding of the jury was set aside, & a new trial was granted with costs.—*CAIN v. UHLMAN* (1887), 20 N. S. R. 148; 8 C. L. T. 373.—CAN.

bb. Party taken by surprise in court below.]—Where deft. was surprised, in so far as one issue was concerned, he was entitled to relief as to the item \$200 for damages in respect thereof.—*NORWICH UNION FIRE IN-*

675. ————]—SMITH v. HAWARD (1735), Barnes, 480; 94 E. R. 1013.

Annotation:—*Reid*. Corner v. Shew (1838), 1 Horn. & H. 215.

676. ————]—Where general damages are given on a declaration in which several breaches are assigned, one of which is bad, the ct. will not arrest the judgment but will award a *venire de novo*.—LEACH v. THOMAS (1837), 2 M. & W. 427; 5 Dowl. 612; Murp. & H. 119; 6 L. J. Ex. 126; 1 Jur. 497; 150 E. R. 824.

Annotations:—*Folld*. Ayrey v. Fearnside (1838), 4 M. & W. 168. *Consd*. Corner v. Shew (1838), 4 M. & W. 163. *Reid*. Empson v. Griffin (1839), 11 Ad. & El. 186; Gould v. Oliver (1840), 2 Man. & G. 208; Lewin v. Edwards (1842), 9 M. & W. 720; Kitchenman v. Skeel (1848), 18 L. J. Ex. 23. *Mentd*. Campbell & Haynes v. R. (1847), 2 Cox. C. C. 463; Bishop v. Elliott (1855), 11 Exch. 113; Wedd v. Porter, [1916] 2 K. B. 91.

677. ————]—The jury having found general damages on a declaration containing a count on the instrument as a promissory note, & a count on an account stated, the ct. awarded a *venire de novo*.—AYREY v. FEARNSIDES (1838), 4 M. & W. 168; 150 E. R. 1388; *sub nom*. AYREY v. FEARNSIDE, 1 Horn & H. 202; 7 L. J. Ex. 288; 2 Jur. 596.

678. ————]—If one count or one breach in a count in a declaration which contains several counts be bad, & general damages have been assessed on the whole, a *venire de novo* may be granted.—CORNER v. SHEW (1838), 4 M. & W. 163; 6 Dowl. 688; 1 Horn & H. 215; 7 L. J. Ex. 284; 2 Jur. 761; 150 E. R. 1386.

Annotations:—*Folld*. Ayrey v. Fearnside (1838), 4 M. & W. 168; Lewin v. Edwards (1842), 6 Jur. 401. *Consd*. Kitchenman v. Skeel (1848), 3 Exch. 49. *Mentd*. Brown v. Maclean (1849), 12 L. T. O. S. 423; Bignell v. Harpur (1850), 19 L. J. Ex. 168; R. v. Mellor (1858), 7 Cox. C. C. 454; Farhall v. Farhall (1871), 7 Ch. App. 123.

679. ————]—Nominal damages awarded.]—Where, in an action of debt on simple contract, the declaration contains good & bad counts, & nominal damages are assessed on the whole, the ct. will award a *venire de novo*.—LEWIN v. EDWARDS (1842), 9 M. & W. 720; 1 Dowl. N. S. 639; 11 L. J. Ex. 291; 6 Jur. 401; 152 E. R. 304.

Annotations:—*Mentd*. Atkinson v. Davies (1843), 11 M. & W. 236; Burmester v. Hogarth (1843), 11 M. & W. 97; O'Connell v. R. (1844), 11 Cl. & Fin. 155; Keene v. Beard (1860), 8 C. B. N. S. 372.

SURANCE v. KAVANAGH (1905), 36 S. C. R. 7.—CAN.

q. ————]—Pltf. is entitled to a new trial on the ground of surprise on payment of costs.—ROBERTSON v. ROSS (1852), 2 C. P. 193.—CAN.

r. *No proper evidence in court below as basis for assessment.*]—The lower ct., upon a motion for a new trial, being of opinion that there was no evidence upon which damages assessed could be calculated, directed a further inquiry as to such damages.—PARKS v. BLACKWOOD (1893), 2 B. C. R. 346.—CAN.

PART VII. SECT. 4, SUB-SECT. 3.—B. (a).

680 i. *General rule.—Discretion of court.*]—The damages were not so excessive that reasonable men with the full facts before their minds could not have reasonably awarded them. Where a party would suffer by an order being made for a new trial such disadvantage as could not be adjusted by an order for costs, the order should not be made when the party asking for it is solely to blame.—ROWE v. AUSTRALIAN UNITED STEAM NAVIGATION CO., LTD. (1909), 9 C. L. R. 1.—AUS.

680 ii. ————]—Where the damages are not so high as to be unreasonable, & there is no ground for ordering a new trial.—MCKENZIE v. HOOKING

(No. 2) (1912), 14 W. A. L. R. 98.—AUS.

680 iii. ————]—Pltf. proved that on a levy, & without the goods, having been taken from his possession, he paid the sheriff £10, the amount of the execution; the judge told the jury that the amount paid by pltf. was a fair measure of damages, but they gave a verdict for £29.—*Held*: the damages were not so excessive as to justify the ct. in granting a new trial.—WILSON v. STREET (1855), 3 All. 251.—CAN.

680 iv. ————]—Where the ct. directed a wrong measure of damages, but the difference amounted to only a few dollars, debts. were left to bring a cross-action for the amount, rather than disturb a just verdict for such a small sum.—YOUNG v. LAIDLAW (1862), 12 C. P. 612.—CAN.

680 v. ————]—*Held*: while the damages were so excessive under the circumstances as to have justified the judge in granting a new trial, it was not usual for a ct. of appeal to interfere with a verdict on the ground of excessive damages, & the ct. was not prepared to say the judgment in this case should be interfered with.—BELL v. WETMORE (1880), 19 N. B. R. 534.—CAN.

680 vi. ————]—*Held*: though the amount of damages found was not satisfactory & might well have been

When award made by foreign tribunal.]—See CONFLICT OF LAWS, Vol. XI., p. 457, No. 1136.

Misdirection of jury.]—See Nos. 731, 741, *post*.

B. Damages Excessive.

(a) In General.

680. *General rule.*]—Judgment arrested because more damages recovered than ought.—PRINCE v. MOLT (1697), 2 Salk. 662; Carth. 386; Comb. 442; Holt, K. B. 192; 1 Ld. Raym. 248; 12 Mod. Rep. 131; 91 E. R. 565.

Annotation:—*Mentd*. Chapman v. Mattison (1738), Andr. 191.

681. ————]—ANON. (1773), Lofft, 146; 98 E. R. 579.

682. ————]—The ct. may in any case grant a new trial upon the ground of excessive damages.—DUCKER v. WOOD (1786), 1 Term Rep. 277; 99 E. R. 1092.

Annotation:—*Reid*. Goldsmith v. Setton (1796), 3 Anst. 808.

683. ————]—There is no species of action in which the ct. will not grant a new trial for excess of damages if the circumstances require it.—HEWLETT v. CRUCHLEY (1813), 5 Taunt. 277; 128 E. R. 606.

684. ————]—Judge dissatisfied with verdict.]—Where the damages are excessive, & the judge reported that he thought them too high, the ct. will grant a new trial, even in actions of tort.—NEWTON v. HOUGHTON (1832), 1 L. J. C. P. 47.

685. ————]—Judge not dissatisfied with verdict.—*Personal injuries.*]—In an action against a railway co. for an injury sustained through carelessness of the co.'s servants, pltf.'s injuries, arising from concussion of the brain & spine, appearing to be very serious & likely to be permanent, disease of the brain having resulted, & he having lost an income of £150 a year, the jury gave £2,000, & the judge not being judicially dissatisfied, the ct. sustained the verdict:—*Held*: in cases of the kind, it is impossible to assess the damages with certainty or any general rule; & the ct. cannot take the matter out of the hands of both judge & jury, & assess the damages for themselves.—BRITTON v. SOUTH WALES RY. CO. (1858), 1 F. & F. 171; 27 L. J. Ex. 355.

submitted to a jury of business men as a question proper for their determination, the ct. would dismiss the appeal.—ROYAL INSURANCE CO. v. DUFFUS (1890), 18 S. C. R. 711.—CAN.

680 vii. ————]—Where there is evidence in support of a verdict, upon proper directions to the jury by the trial judge, a ct. of appeal ought not to interfere with the assessment of damages unless they appear to be so excessive that no reasonable men, upon such evidence, would have awarded such an amount.—GRAND TRUNK RY. CO. OF CANADA v. DEFENCIER (1905), Cout. Cas. 343.—CAN.

680 viii. ————]—High damages assessed by a jury are not a ground for reversing the judgment of an inferior ct.—ROBERTS v. SIMPSON (1817), 1 Nfld. L. R. 76.—NFLD.

680 ix. ————]—*Imposition of terms.*]—The damages appearing to be excessive, a new trial was granted on payment of costs.—SCOTT v. KEIKIE (1865), 15 C. P. 200.—CAN.

680 x. ————]—Where in an action of *assumpsit* for £356 11s. 8d. being a claim for salvage services, the jury found a verdict for pltf. for £300, the ct. set aside the verdict on the grounds of its being excessive, deft. paying the costs of the previous trial.—SIDMS v. ELIAS (1859), 4 Nfld. L. R. 289.—NFLD.

Sect. 4.—Review of assessment—new trial: Sub-sect. 3, B. (a).]

686. —[—]—*PHILLIPS v. LONDON & SOUTH WESTERN RY. CO.*, No. 784, *post*.

687. — *Discretion of court.*—A motion to reduce damages is an appln. to the discretion of the ct.—*DAVIS v. MARSHALL* (1861), 4 L. T. 216.

688. — *Review by Court of Equity.*—Damages recovered at law for breach of a covenant in a lease were alleged to be excessive:—*Held*: equity would not ascertain the damages.—*HOOKER v. ARTHUR* (1871), 2 Rep. Ch. 62; 21 E. R. 616.

689. — *Misconduct of jury.*—Where a plff. had obtained against a railway co. a verdict with damages, sustained by reason of an accident to a train in which he was a passenger, & a new trial was ordered by the Ct. of Q. B. on the ground alone of excessive damages, the finding as to negligence by the deft. co. being approved by two cls.:—*Held*: inasmuch as there had been no misdirection the judge having put to the jury whether all was done which was reasonably & practically possible under the circumstances of the case, & inasmuch as the

damages were not of such an excessive character as to show that the jury had been either influenced by improper motives or led into error, there ought not to be a new trial.—*LAMBKIN v. SOUTH EASTERN RY. CO.* (1880), 5 App. Cas. 352; 28 W. R. 837, P. O.

690. —[—]—*KARAVIAS v. CALLINICOS*, [1917] W. N. 323, C. A.

691. *Whether court has power to reduce—On motion for new trial—Without consent of parties.*—Where, upon showing cause against a rule for a nonsuit or new trial, it appears that the verdict has been entered for an amount not warranted by the evidence, the ct. will make the rule absolute, unless the parties consent that the damages shall be reduced.

We cannot, however, reduce the damages without the consent of both parties, & therefore the rule must be made absolute for a new trial (*LORD DENMAN, C.J.*).—*LEESON v. SMITH* (1834), 4 Nev. & M. K. B. 304.

Annotation.—*Apprvd. Watt v. Watt*, [1905] A. C. 115.

692. — *Plaintiff consenting to reduction.*—*ROBINSON v. PHILLIPS* (1843), 2 L. T. O. S. 75, 151.

691 i. *Whether court has power to reduce—On motion for new trial.*—There is no authority by which the ct. can, when the jury has found a general verdict for damages, reduce the damages because the jury have given particulars showing how they have arrived at their estimate of damage. In such a case deft.'s remedy is a new trial on the ground that the damages are excessive.—*BRUCE v. MCGEE* (1914), 33 N. Z. L. R. 1565.—N.Z.

a. — *When damages mere matter of arithmetic.*—Where the amount is mere matter of computation & the verdict excessive, the ct. will direct a verdict for plff. for the correct amount, or a new trial on payment of costs.—*STEPHENSON v. RANNEY* (1852), 2 C. P. 196.—CAN.

t. —[—]—*WARD v. MAINLAND TRANSFER CO.*, [1919] 3 W. W. R. 193.—CAN.

a. —[—]—In an action for breach of contract, where the loss sustained is entirely a matter of arithmetic calculation, & the jury has awarded damages in excess of the computed amount:—*Held*: instead of ordering a new trial the ct. can reduce the damages.—*MURDOCH v. WHEKMAN & CO.* (1894), 23 I. L. T. 39.—IRE.

b. — *Rather than order third trial.*—Where plff. had recovered damages which in the opinion of the ct. of appeal were excessive, the ct. ordered a new trial. On the second trial a jury increased the damages from \$15,000 to \$17,500, & the ct. of appeal reduced the damages to \$12,000.—*TAYLOR v. BRITISH COLUMBIA ELECTRIC RY. CO., LTD.* (1912), 16 B. C. R. 420.—CAN.

c. — *Error in court below on point other than damages—Correction a matter of calculation.*—Where damages had been assessed on an account by a judge at chambers, but the affidavit on which it was made did not support all the items of the account, the ct. reduced the damages to the amount warranted by the affidavit.—*SCOUILLAR v. WEBB* (1842), 1 Kerr, 520.—CAN.

d. —[—]—Where damages were assessed by the trial judge generally in favour of several plffs., whose rights & interests were distinct, & were apportioned equally between them by the divisional ct., the ct. of appeal, while holding that one plff. only was entitled to recover, reduced the damages apportioned to him, being of opinion that such

damages were excessive; as, in the general assessment, matters had been taken into consideration of which he was not entitled to complain.—*EDMONDS v. HAMILTON PROVIDENT & LOAN SOCIETY* (1890), 13 A. R. 347.—CAN.

a. —[—]—The ct. holding, on the construction of a referee's judgment, that this element had been wrongly allowed to enter into the computation of the damages, reduced them from \$250 to \$50.—*MCKIM v. EAST LUTHER TOWNSHIP* (1901), 21 C. L. T. 113; 1 O. L. R. 89.—CAN.

f. —[—]—Where the referee had erred in adopting the severer rule against defts. in assessing the damages, his report was amended in view of such error.—*KIRKPATRICK v. MCNAMEE* (1905), 36 S. C. R. 152.—CAN.

692 i. — *Plaintiff consenting to reduction.*—The ct. being of opinion that the damages were excessive, the rule was discharged, without costs, on plff. consenting to reduce the damages.—*MURPHY v. GOLDMAN* (1880), 7 N. S. W. L. R. 334; 3 N. S. W. W. N. 23.—AUS.

692 ii. —[—]—Ordered that there should be a new trial without costs unless plff. would reduce his verdict to nominal damages & that he should in either case pay the costs of this application.—*JOHNSON v. LAMB* (1855), 13 U. C. L. 508.—CAN.

692 iii. —[—]—The ct. ordered a new trial, unless plff. consented to accept nominal damages.—*WHITE v. SMITH* (1859), 4 All. 335.—CAN.

692 iv. —[—]—*JOHNSON v. PARKE* (1862), 12 C. P. 179.—CAN.

692 v. —[—]—Where a verdict is found against the charge of the judge, & the uncontradicted evidence of the only witness examined at the trial, for a larger amount than the evidence warrants, the ct. will either order a new trial, or if plff. consents, reduce the damages to the sum warranted by the evidence. The ct. have power so to reduce the damages with the consent of plff. alone, & against the will of deft.—*RISSER v. HART* (1865), 1 Old. 727.—CAN.

692 vi. —[—]—In a case in which no more than the actual damages sustained should have been assessed; & the jury has awarded excessive damages, the ct. will grant a new trial on payment of costs, unless plff.

reduces the verdict to a sum named.—*MOFFATT v. GRAND TRUNK RY. CO.* (1865), 15 C. P. 392.—CAN.

692 vii. —[—]—The damages being, in the opinion of the ct., excessive, a new trial was ordered unless plff. would consent to reduce the verdict to a sum specified.—*HOOD v. CRONKITE* (1869), 29 U. C. R. 98.—CAN.

692 viii. —[—]—*COOK v. COOK* (1875), 36 U. C. R. 553.—CAN.

692 ix. —[—]—*ONTARIO COPPER LIGHTNING ROD CO. v. HEWITT* (1879), 30 C. P. 172.—CAN.

692 x. —[—]—*MASSIE v. TORONTO PRINTING CO.* (1886), 11 O. R. 362.—CAN.

692 xi. —[—]—*MILLER v. MANITOBA LUMBER & FUEL CO.* (1890), 6 Man. L. R. 487.—CAN.

692 xii. —[—]—*CREELEMAN v. TUPPER* (1893), 25 N. S. R. 334.—CAN.

692 xiii. —[—]—*JOHNSTON v. MILLER* (1898), 31 N. S. R. 83.—CAN.

692 xiv. —[—]—*COLLIER v. MICHIGAN CENTRAL RY. CO.* (1900), 27 A. R. 630.—CAN.

692 xv. —[—]—*FORD v. METROPOLITAN RY. CO.* (1902), 4 O. L. R. 29; 1 O. W. R. 318.—CAN.

692 xvi. —[—]—*CENTRAL VERMONT RY. CO. v. FRANCHERE* (1903), 35 S. C. R. 68.—CAN.

692 xvii. —[—]—*DUNN v. DUNN* (1867), 5 Nfld. L. R. 210.—NFLD.

g. — *With consent of parties.*—Where the damages awarded by the jury are excessive, but plff. is entitled to recover, the ct., in the exercise of their control over the verdict, may suggest a reduction of the damages; or, where the suggestion is not accepted, may order a new trial on the ground of excessive damages alone.—*CLARKE v. FULLERTON* (1871), 8 N. S. R. 348.—CAN.

h. —[—]—New trial granted, unless the parties should consent to reduce the verdict of \$128.—*ARCHBOLD v. MERCHANTS' MARINE INSURANCE CO.* (1883), 4 R. & G. 98.—CAN.

k. —[—]—The amount awarded plff. for damages was clearly excessive, & a new trial was ordered unless the parties agreed to a reduction of the damages to \$500.—*STEPHENS v. TORONTO RY. CO.* (1906)

693. ————]—On showing cause against a rule nisi for a new trial, on the ground of misdirection, pltf.'s counsel consented to abandon that part of his demand to which the misdirection applied—the ct., without the assent of def., discharged the rule for a new trial & made the rule absolute as a rule for reducing the damages.—*MOORE v. TUCKWELL* (1845), 1 C. B. 607; 15 L. J. C. P. 153; 135 E. R. 679.

Annotations.—*Refd.* *Barber v. Deutsche Bank* (Berlin) London Agency, [1919] A. C. 304. *Mentd.* *Hughes v. Hughes* (1846), 15 M. & W. 701; *Towne v. D'Heinrich* (1853), 13 C. B. 892.

694. ————]—The jury having found a verdict for pltf. for £80, the ct., upon a rule to reduce the damages to a nominal sum, proposed to make the rule absolute for a new trial unless pltf. would consent to a verdict for £40:—*Held*: the pltf. was still entitled to the costs of the rule, though he assented to the reduction.—*WILSON v. LANCA-SHIRE & YORKSHIRE RY. CO.* (1861), 9 C. B. N. S. 632; 30 L. J. C. P. 232; 3 L. T. 859; 7 Jur. N. S. 862; 9 W. R. 635; 142 E. R. 248.

Annotations.—*Mentd.* *Borries v. Hutchinson* (1866), 18 C. B. N. S. 445; *G. W. Ry. v. Redmayne* (1866), 12 Jur. N. S. 692; *Lord v. Mid. Ry.* (1867), L. R. 2 C. P. 339; *British Columbia & Vancouver's Island Spar, Lumber & Saw Mill Co. v. Nettleship* (1868), 37 L. J. C. P. 235; *Horne v. Mid. Ry.* (1873), 28 L. T. 312; *Simpson v. L. & N. W. Ry.* (1876), 45 L. J. Q. B. 182; *Schulze v. G. E. Ry.* (1887), 19 Q. B. D. 30; *Wertheim v. Chicoutimi Pulp Co.*, [1911] A. C. 301.

695. ————]—*FLEMING v. BANK OF NEW ZEALAND*, No. 553, *ante*.

696. ————]—*But not defendant.*—Where pltf. is entitled to substantial damages, & a verdict for pltf. cannot be impeached except on the ground that the damages are excessive, the ct. has power to refuse a new trial, on pltf. alone, & without def., consenting to the damages being reduced to such an amount as the ct. would consider not excessive had they been given by the jury.—*BEIT v. LAWES* (1884), 12 Q. B. D. 356; 53 L. J. Q. B. 249; 50 L. T. 441; 32 W. R. 607, C. A.

Annotations.—*Overd.* *Watt v. Watt*, [1905] A. C. 115. *Refd.* *Barber v. Deutsche Bank* (Berlin) London Agency, [1919] A. C. 304.

697. ————]—*WATT v. WATT*, No. 648, *ante*.

11 O. L. R. 19; 6 O. W. R. 657.—*CAN.*

i. ————]—*Held*: the sum awarded was excessive, & damages were assessed, of consent, at £100.—*McKERNAN v. GLASGOW CORPN.*, [1919] S. C. 407.—*SCOT.*

m. ————]—*Necessity for consent of both parties.*—The ct. had no jurisdiction, without def.'s consent to make the new trial dependent upon the consent of pltf. to reduce the damages.—*HOCKLEY v. GRAND TRUNK RY. CO.* (1905), 6 O. W. R. 57; 10 O. L. R. 363.—*CAN.*

n. ————]—*BARTER v. SPRAGUE'S FALLS MANUFACTURING CO.* (1907), 3 E. L. R. 353; 38 N. B. R. 207.—*CAN.*

o. ————]—*COLLARD v. ARMSTRONG* (1913), 24 W. L. R. 742.—*CAN.*

p. ————]—A jury's award was held to be excessive, & a new trial was ordered, unless the parties consented to the damages being reduced to \$6,000.—*GIDDINGS v. CANADIAN NORTHERN RY. CO.*, [1920] 2 W. W. R. 849.—*CAN.*

q. ————]—*New trial ordered in spite of plaintiff's assent to reduction.*—*Held*: the damages were excessive, & the ct. ordered a new trial, though pltf. was willing to assent to reduce the amount of the verdict.—*KEY v. THOMSON* (1869), 1 Han. 295.—*CAN.*

698 i. *Matter at issue a question for*

jury.—Where the judge who tries a cause recommends a verdict for pltf. with nominal damages, but the jury give substantial damages, such verdict cannot be treated as perverse.—*CHILVERS v. GREAVES* (1843), 5 Man. & G. 578; 6 Scott, N. R. 539; 134 E. R. 691.

699. ————]—*DRAPER v. DE TORRI* (1849), 14 L. T. O. S. 179.

700. ————]—*BEELEY v. SPODE* (1851), 17 L. T. O. S. 51.

701. ————]—*Acting upon wrong principle.*—The ct. will not grant a new trial on the ground that the damages are excessive, unless it is very manifest that the jury, in assessing the damages, have either been actuated by an improper motive or that they have proceeded upon a wrong principle.—*CREED v. FISHER* (1854), 9 Exch. 472; 22 L. T. O. S. 307; 18 Jur. 228; 156 E. R. 202.

Annotations.—*Refd.* *Rollin v. Steward* (1854), 2 C. L. R. 959; *Humphrey v. Nowland* (1862), 15 Moo. P. C. C. 343.

702. ————]—*ADAMS v. MIDLAND RY. CO.*, No. 585, *ante*.

703. ————]—*EVANS v. DAVIES*, No. 589, *ante*.

704. ————]—*SWANBOROUGH v. METROPOLITAN RY. CO.* (1872), 36 J. P. Jo. 741.

705. *Discretion of court to grant new trial—Application for third trial refused.*—*CLERK v. UDALL* (1702), 2 Salk. 649; 91 E. R. 552.

Annotation.—*Fold.* *Chambers v. Robinson* (1726), 2 Stra. 691.

706. ————]—New trial granted for excessive damages, but the same damages being given a second time, another trial cannot be had.—*CHAMBERS v. ROBINSON* (1726), 2 Stra. 691; 93 E. R. 787.

Annotations.—*Dhtd.* *Beardmore v. Carrington* (1764), 2 Wils. 244. *Mentd.* *Burdy v. Hosler* (1733), 2 Barn. K. B. 369; *Hall v. Howes* (1736), *Lee temp. Hard.* 244; *Wicks v. Fentham* (1791), 4 Term Rep. 247.

707. *Death of party awarded damages—Immediately after verdict.*—An action for negligence was brought by pltf., a child of seven years old, by his next friend to recover damages for injuries done to him by the horse of def. The jury found a verdict for £150. Nine days after the trial the child died. Judgment was afterwards signed by

(1905), 38 N. S. R. 416.—*CAN.*

698 x. ————]—The sum of \$15,000 awarded by a jury to pltf., as damages for personal injuries having been considered excessive, & a new trial ordered, the jury at the new trial assessed the damages at \$11,500:—*Held*: while the amount was large, it was not so excessive as to justify the ct. in disturbing the verdict.—*CARTY v. BRITISH COLUMBIA ELECTRIC RY. CO.* (1911), 19 W. L. R. 905; 2 D. L. R. 276; 1 W. W. R. 523.—*CAN.*

698 xi. ————]—The damages awarded by the jury not being so excessive as to warrant the ct. in interfering, the verdict must stand.—*GORDON v. CANADIAN NORTHERN RY. CO.* (1912), 20 W. L. R. 705; 2 W. W. R. 114; 2 D. L. R. 183.—*CAN.*

698 xii. ————]—The question of damages is peculiarly one for the jury.—*QUILLINAN v. STUART* (1917), 38 O. L. R. 623.—*CAN.*

705 i. *Discretion of court to grant new trial—Application for third trial refused.*—*Qu.*: whether a third trial would have been granted for excessive damages.—*CHRISTIE v. ST. JOHN'S CITY* (1891), 30 N. B. R. 492.—*CAN.*

705 ii. ————]—Although the damages may have been larger than the evidence warranted, the ct. should not, upon that ground, direct a third trial.—*PICKERING v. GRAND TRUNK PACIFIC RY. CO.* (1914), 28 W. L. R. 857; 24 Man. L. R. 544.—*CAN.*

jury.—The question of damages having been left open to the jury, & the verdict being for pltf., the ct. refused a new trial on the ground of excessive damages.—*SMITH v. MIL-LIDGE* (1844), 2 Kerr, 408.—*CAN.*

698 ii. ————]—The ct., although not altogether satisfied with the verdict, refused a new trial, there being evidence sufficient to uphold it, the question being one entirely within their province.—*KNOX v. CLEVELAND* (1859), 8 C. P. 176.—*CAN.*

698 iii. ————]—Where the jury do not appear to have assessed the damages on a wrong principle or acted under the influence of improper motives or bias, the ct. will not disturb their finding, even if the damages are larger than they might have been disposed to give as jurors.—*GODARD v. FREDERICTON BOOM CO.* (1866), 1 Han. 544.—*CAN.*

698 iv. ————]—*CROZIER v. PHENIX INSURANCE CO.* (1871), 2 Han. 200.—*CAN.*

698 v. ————]—*MORTON v. BARTLETT* (1874), 2 Pug. 215.—*CAN.*

698 vi. ————]—*WOODMAN v. BLAIR* (1879), 30 C. P. 452.—*CAN.*

698 vii. ————]—*ELLIS v. ABELL* (1884), 10 A. R. 226.—*CAN.*

698 viii. ————]—*BOOKER v. WEL-LINGTON COLLIERY CO., LTD.* (1902), 9 B. C. R. 265.—*CAN.*

698 ix. ————]—*MCLEAN v. CAMPBELL*

Sect. 4.—Review of assessment—new trial: Sub-sect. 3, B. (a), (b) & (c).]

the next friend. An appln. to stay proceedings, or for a new trial, was then made on the ground of the death of pltf. since the trial:—*Held*: although the damages were presumably given on the supposition that the child would continue to live, the case was not one in which the ct. would grant a new trial.—*KRAMER v. WAYMARK* (1866), L. R. 1 Exch. 241; 4 H. & O. 427; 35 L. J. Ex. 148; 14 L. T. 368; 12 Jur. N. S. 395; 14 W. R. 659.

708. Misleading speech of counsel.]—CHATTILL v. DAILY MAIL PUBLISHING CO., LTD., No. 558, ante.

709. Improper rejection of evidence.]—Resps. contracted with appls. that the latter should make for them 145,000 eighteen-pounder steel cartridge clips from steel of a particular quality to be supplied by resps. Resps. having refused to supply the steel, appls. claimed that there had been a breach of the contract by resps., & they were consequently entitled as damages for the breach to be paid £474 odd, being the excess of the contract price over what would have been the cost to them of manufacture. Resps. admitted breach of the contract, but did not admit that appls. had in fact sustained any damage. At the trial one of the members of appls.' firm was called as a witness. In the cross-examination questions were being put to him by resps.' counsel with the object of establishing that appls.' mills during all the period within which the contract had to be fulfilled were fully employed on other equally profitable work, & that it would have been impossible for them to have undertaken the execution of the contract now sued on. This evidence *in limine* ruled inadmissible & irrelevant, & judgment was given for the full amount claimed:—*Held*: as appls. were bound to take all reasonable steps to mitigate the claim for damages, the learned judge, because he thought the case put forward could not be established, ought not to have shut out resps. from a reasonable chance of eliciting facts which were on the face of them possibly relevant. The ct. was not prepared to uphold appls.' proposition that under no circumstances the fact that they had made other profits by the use of their mills could be admissible in reduction of damages.—*HILL & SONS v. SHOWELL (EDWIN) & SONS, LTD.* (1918), 87 L. J. K. B. 1108; *sub nom. HALL (JOHN) & SON, LTD. v. SHOWELL (EDWIN) & SONS, LTD.*, 119 L. T. 651; 62 Sol. Jo. 715, H. L.

710. Repudiation of contract for personal services.]—TURPIN v. VICTORIA PALACE, No. 181, ante.

(b) Excess clearly Apparent.

711. General rule.]—I am as little disposed as any man to interfere with the province of a jury, & I should not be induced to send a case down again for excessive damages except where those

damages are enormous & disproportionate. I consider them such in this case on account of the limit which pltf. himself put on his demand in the first instance (*TINDAL, C.J.*).—*PRICE v. SEVERN* (1831) 7 Bing. 316; 5 Moo. & P. 125; 9 L. J. O. S. C. P. 99; 131 E. R. 122.

Annotation:—Mentd. Watt v. Watt, [1905] A. C. 115.

712. —.]—In an action for false imprisonment, where a verdict with £200 damages was given for one night's confinement in a prison, evidence of a trespass by deft. on the goods of pltf., arising out of the same transaction committed on the following day, was admitted for the purpose of showing that deft. was actuated by malice:—*Held*: to be no ground for granting a new trial. To induce the ct. to grant a new trial, on the ground of excessive damages, it must be shown that they are very excessive, or that a perverted view of the case has been taken by the jury.—*EDGEELL v. FRANCIS* (1840), 1 Man. & G. 222; 1 Scott, N. R. 118; 133 E. R. 314; *sub nom. EDGEELL v. FRANCIS, JAMES v. FRANCIS*, 4 Jur. 366; *sub nom. EDGIL v. FRANCIS, JAMES v. FRANCIS*, 9 L. J. C. P. 233.

713. —.]—The ct. will not grant a new trial merely because the damages are large, unless they are so excessive as to be monstrous & absurd, or unless the jury have been actuated by improper motives in arriving at a conclusion as to the amount.—CHILTON v. CROYDON RY. CO. (1848), 11 L. T. O. S. 108.

714. —.]—I have heard many eminent judges expressing a disinclination to interfere unless where the damages were most clearly excessive. I think that in this case the damages are not so clearly excessive as to justify us in disturbing the verdict on that ground (POLLOCK, C.B.).—WAKLEY v. COOKE (1849), 4 Exch. 511; 19 L. J. Ex. 91; 14 L. T. O. S. 158; 154 E. R. 1316.

Annotation:—Mentd. R. v. Ingham (1864), 5 B. & S. 257.

715. —.]—Action against a railway co. for giving pltf. into custody & causing him to be taken before a magistrate, on a charge of travelling in a carriage of the co. without having paid his fare, & with intent to avoid payment thereof.

The jury having given £50 damages, the ct. would not grant a new trial on the ground that they were excessive.

The rule was moved on the ground that the damages, £50, were excessive. They were liberal certainly, & we should have been better pleased if they had been smaller; but we do not think the excess so great as to induce us in our discretion to order a new trial on that ground (*BLACKBURN, J.*).—*GOFF v. GREAT NORTHERN RY. CO.* (1861), 3 E. & E. 672; 30 L. J. Q. B. 148; 3 L. T. 850; 25 J. P. 326; 7 Jur. N. S. 286; 121 E. R. 594.

Annotations:—Mentd. Seymour v. Greenwood (1861), 7 H. & N. 355; Poulton v. L. & S. W. Ry. (1867), L. R. 2 Q. B. 534; Allen v. L. & S. W. Ry. (1870), 19 W. R. 127; Edwards v. L. & N. W. Ry. (1870), L. R. 5 C. P. 445; Moore v. Met. Ry. (1872), L. R. 8 Q. B. 38; Walker v. Nottingham Board of Grdms. (1873), 28 L. T. 308; Kirkstall Brewery Co. v. Furness Ry. (1874), L. R. 9 Q. B. 468; Bank of New South Wales v. Owston (1879), 4 App. Cas. 270; Edwards v. Mid. Ry. (1880), 6 Q. B. D. 287; Knight

708 i. Misleading speech of counsel.]—Matter which is not in evidence should not be introduced by counsel in addressing jury, & if the ct. of appeal were satisfied that the jury were influenced by such statements it would have to find there had been a mis-trial.—RYAN v. CANADIAN PACIFIC RY. CO., [1919] 2 W. W. R. 368.—CAN.

PART VII. SECT. 4, SUB-SECT. 3.—B. (b).

711 i. General rule.]—A new trial

will not be granted on the ground of excessive damages, unless the damages are outrageous.—*WENTWORTH v. HALLETT* (1844), 2 Kerr, 560.—CAN.

711 ii. —.]—The ct. will interfere if the damages are clearly excessive.—SECORD v. GREAT WESTERN RY. CO. (1858), 15 U. C. R. 631.—CAN.

711 iii. —.]—GUTHRIE v. THIBEAU (1904), 36 N. S. R. 542.—CAN.

711 iv. —.]—It is well established that a ct. of appeal should not interfere with the verdict of a jury simply because the amount is more than the

ct. would give, yet it is quite as well established that a verdict of damages which cannot be supported by the evidence should be set aside by the appellate ct. in the same way as any other finding of fact.—*TINSLEY v. CANADA WEST COAL CO.* (1908), 9 W. L. R. 706.—CAN.

711 v. —.]—There is no power in the ct. to disturb, impeach or question the conclusion the jury arrive at, unless the verdict is plainly one against justice.—WHITE v. GRIEVE (1854), 4 Nfld. L. R. 28.—NFLD.

v. North Metropolitan Tram. Co. (1898), 78 L. T. 227; Lambert v. G. E. Ry., [1909] 2 K. B. 776; Percy v. Glasgow Corp., [1922] 2 A. C. 299.

716. —.]—FORRESTER v. TYRRELL (1893), 57 J. P. 532; 9 T. L. R. 257, C. A.

717. Damages greatly in excess of injury proved.]—In an action on the case for diverting pltf.'s water-course, where the jury under circumstances of aggravation gave £3,000 damages, the ct. granted a new trial on the ground that the damages given greatly exceeded the amount of the injury proved.—PLEYDELL v. DORCHESTER (EARL) (1798), 7 Term Rep. 529; 101 E. R. 1115. Annotations:—Mentd. Pulteney v. Warren (1801), 6 Ves. 73; Lopez v. De Tastet (1819), 8 Taunt. 712.

718. —.]—GREENLANDS, LTD. v. WILMSHURST & LONDON ASSOCN. FOR PROTECTION OF TRADE, No. 413, ante.

719. Award such as no reasonable jury could give.—Unless acting under delusive impression.]—The ct. will grant a new trial on the ground of excessive damages, if the facts of the case will warrant them in saying, that the verdict was not such as men in general, not acting under any delusive impression, would have given.—MACPHERSON v. LOVIE (1823), 1 L. J. O. S. K. B. 240.

720. —.]—PRAED v. GRAHAM, No. 418, ante.

721. —.]—JOHNSTON v. GREAT WESTERN RY., No. 751, post.

(c) Misconduct, Misdirection, Mistake of Jury.

722. Misconduct.—Undue motives.]—The ct. are not restrained from granting a new trial in a

case of criminal conversation for excessive damages if they are satisfied that the jury acted under the influence of undue motives or of gross error or misconception on the subject.—CHAMBERS v. CAULFIELD (1805), 6 East, 244; 2 Smith, K. B. 356; 102 E. R. 1280.

Annotations:—Reid. Narracott v. Narracott & Hesketh (1864), 3 Sw. & Tr. 408. Mentd. Wilson v. Wilson (1854), 5 H. L. Cas. 40; Hunt v. Hunt (1861), 31 Beav. 89.

723. —.]—The ct. will not, in an action for a breach of promise of marriage, grant a new trial on the ground of excessive damages, unless they be so large as to induce the ct. to infer that the jury were actuated by undue motives, or acted upon a misconception of the facts.—GOUGH v. FARR (1827), 1 Y. & J. 477; 148 E. R. 759.

724. —.]—SMITH v. WOODFINE, No. 298, ante.

725. —.]—BERRY v. DA COSTA, No. 299, ante.

726. — Perverse verdict.—Against weight of evidence.]—LEESON v. SMITH, No. 691, ante.

727. —.]—EDGEELL v. FRANCIS, No. 712, ante.

728. — Improper motives.]—CHILTON v. CROYDON RY. CO., No. 713, ante.

729. —.]—CREED v. FISHER, No. 701, ante.

730. — & vindictive feelings.]—In an action for libel, the determining the amount of damages is essentially the duty of the jury. In no such case will the ct. interfere, unless it appears

717 i. Damages greatly in excess of injury proved.]—A new trial will be granted in an action if the damages found by the jury are so large as to be out of proportion to the pecuniary loss which appears to have been suffered.—M'LEAN v. BOARD OF LAND & WORKS (1881), 7 V. L. R. 239.—AUS.

717 ii. —.]—A verdict was set aside on the ground that the damages were excessive, as bearing no reasonable proportion to the facts of the case.—REILLY v. THOMPSON & FAGAN, [1877] 1 L. R. 11 C. L. 238.—IR.

717 iii. —.]—Where there is no reasonable proportion between the damages & the circumstances of the case, the verdict will be set aside on the ground of excessive damages.—HARRIS v. ARNOTT (1890), 26 L. R. Ir. 55.—IR.

719 i. Award such as no reasonable jury could give.]—The ct. will not grant a new trial on the ground of excessive damages, unless, having regard to all the circumstances of the case, the ct. think that the damages are so large that no jury could reasonably have given them.—LEES v. EVANS (1891), 12 N. S. W. L. R. 7; 7 N. S. W. W. N. 98.—AUS.

719 ii. —.]—The ct. will grant a new trial on the ground of excessive damages if they think that, having regard to all the circumstances of the case, the damages are, so large that no reasonable jury, properly applying their minds to the relevant evidence, could have given them.—MILES v. COMMERCIAL BANKING CO. OF SYDNEY (1904), 1 C. L. R. 470.—AUS.

719 iii. —.]—HICKS v. GREGORY (1904), 6 W. A. L. R. 100.—AUS.

719 iv. —.]—Assessment of damages by a jury ought not to be set aside merely because the upper ct. would have given much less. The measure required in granting a new trial is that the verdict should have been unreasonable & almost perverse.—HOUGHTON v. CANADIAN NORTHERN RY. CO. (1915), 8 W. W. R. 254; 25 Man. L. R. 311.—CAN.

719 v. —.]—To render damages excessive in an action for detinue &

trespass under an illegal distress, the amount should be such that no reasonable proportion exists between it & the circumstances of the case.—M'GRATH v. BOURNE, [1876] 1 L. R. 10 C. L. 160.—IR.

719 vi. —.]—In all cases where damages cannot be accurately assessed, the verdict of the jury cannot be interfered with unless it can be shown to the satisfaction of the ct. that the damages are so large that no twelve sensible men could reasonably have given them.—HORSNELL v. AUCKLAND ELECTRIC TRAMWAYS CO., LTD. (1909), 29 N. Z. L. R. 389.—N.Z.

PART VII. SECT. 4, SUB-SECT. 3.—B. (c).

r. Misconduct.]—The finding of a jury on the amount of damages will not be disturbed, unless it can be shown that there has been undoubted mistake or misconduct on their part.—SMITH v. EMERALD HILL COYRN. (1881), 7 V. L. R. 431.—AUS.

s. —.]—Upon motion for a new trial for excessive damages, the ct., on the ground that the jury had not exercised a sound discretion, made the rule absolute on terms.—BATCHELOR v. BUFFALO & BRANTFORD RY. CO. (1855), 5 C. P. 127, 470.—CAN.

t. —.]—In an action for the malicious issue of a writ of execution, under which cattle of pltf. were taken & sold, the jury, contrary to the instructions of the judge that they must find simply for damages, returned as their verdict a paper awarding pltf. the full value of the cattle, together with \$100 as damages. The verdict was set aside with costs, & the cause sent for a new trial.—MCKAY v. WOODILL (1885), 6 R. & G. 88; 3 C. L. T. 143.—CAN.

a. —.]—The omission of a jury to answer material questions submitted to them is a ground for a new trial.—CROCKETT v. CAMPBELLTON (1909), 39 N. B. R. 160; 6 E. L. R. 519.—CAN.

723 i. — Undue motives.]—The finding of damages set aside, because the jury, without further evidence,

had increased them, in order to reimburse pltf. the costs he was obliged to pay to another deft., for whom they found a verdict.—GRAHAM v. WITTINGTON (1787), Vern. & Scr. 292.—IR.

722 ii. —.]—It must appear from the amount of damages as compared with the facts of the case laid before the jury, that the jury acted under the influence either of undue motives or of some gross error or misconception on the subject. The case must be very gross & the damages enormous for the ct. to interpose; & in a case of uncertain damages a new trial will not be granted, because if the ct. had to fix the damages they might have given less.—CURTIS v. BOWRING BROTHERS (1860), 4 Nfld. L. R. 423.—NFLD.

722 iii. —.]—Where the jury in assessing the damages in an action took into consideration the question of costs:—Held: this was sufficient ground for ordering a new trial.—RUSSELL v. WENIWESE (1868), 16 W. R. 710.—IR.

722 iv. —.]—In an action brought to recover damages for breach of covenant by tenant in not erecting certain buildings on the demised land—there remaining to the tenant thirty years of an unexpired term, the value of the buildings to be erected being fixed at £2,000, the jury found a verdict for the landlord £750, evidently basing their finding on the £2,000, the value of the work to be done, rather than on the damages that might arise from its non-performance:—Held: new trial must be granted.—THOMAS v. BENNETT (1869), 5 Nfld. L. R. 252.—NFLD.

b. Misdirection.]—Where the damages are large, & to a great extent sentimental, this may well be considered in deciding whether there has been a substantial wrong caused by a clear misdirection.—WINFIELD v. KEAN (1882), 1 O. R. 193.—CAN.

c. —.]—Held: a misdirection may be cured by the subsequent remarks.—DAY v. CANADIAN PACIFIC RY. CO. (1922), 86 D. L. R. 838; 2 W. W. R. 398.—CAN.

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clearly that the jury have given their verdict from vindictive or improper feelings. Where no such considerations exist, the verdict will not be interfered with. The amount itself might be so large as to suggest that it might be excessive; but that must depend upon the circumstances of each particular case.—**ROBERTS v. OWEN** (1889), 53 J. P. 502.

731. Misdirection.—As to proper measure of damages.]—If a judge at *Nisi Prius* does not inform the jury what is the proper measure of damages on an issue on which it is admitted that pltf. is entitled to a verdict & to damages, the ct. will direct a new trial, although the point was not taken by pltf.'s counsel at the trial.—**KNIGHT v. EGERTON** (1852), 7 Exch. 407; 155 E. R. 1007.

Annotation:—*Mentd.* **Perren v. Monmouthshire Ry.** (1853), 11 C. B. 855.

732. ———.]—In an action under Fatal Accidents Act, 1846 (c. 93), by the wife, husband, parent or child of a person killed by misfeasance, the jury, in estimating damages, cannot take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only, & the judge, in such a case, having left it in the option of the jury to give damages on all or any of these grounds though intimating his opinion that there was no ascertainable damage on any ground but the last, a new trial was granted for misdirection.—**BLAKE v. MIDLAND RY. CO.** (1852), 18 Q. B. 93; 21 L. J. Q. B. 233; 18 L. T. O. S. 330; 10 Jur. 562; 118 E. R. 35.

Annotations:—*Consd.* **Franklin v. S. E. Ry.** (1858), 3 H. & N. 211. *Held.* **Hadley v. Baxendale** (1854), 9 Exch. 341; **Lynch v. Knight** (1861), 5 L. T. 291; **Rowley v. L. & N. W. Ry.** (1873), L. R. 8 Exch. 221; **Barnett v. Cohen** (1921) 2 K. B. 461. *Mentd.* **Stanton v. Collier** (1854), 3 E. & B. 274; **Hebdon v. West** (1863), 3 B. & S. 579; **Read v. G. E. Ry.** (1868), 9 B. & S. 714; **The George & Richard** (1871), L. R. 3 A. & E. 466; **Griffiths v. Dudley** (1882), 47 L. T. 10; **Kenrick v. Lawrence** (1890), 25 Q. B. D. 99; **Day v. Markham** (1904), 6 W. G. C. 115; **British Columbia Electric Ry. v. Gentile**, [1914] A. C. 1034; **Union S.S. Co. of New Zealand v. Robin**, [1920] A. C. 654.

733. ———.]—**HADLEY v. BAXENDALE**, No. 101. *ante*.

734. ———.]—At the trial of an action under Fatal Accidents Act, 1846 (c. 93), brought for the benefit of the mother, widow, & children of R., claiming damages from defts. for having

by their negligence caused the death of R., it was proved that deceased was under a covenant to pay his mother an annuity of £200 during their joint lives. The judge directed the jury that they might, if they thought proper, calculate the mother's damages by ascertaining what was the sum which would purchase an annuity of £200 for a person of her age, according to the average duration of human life; & that in calculating the widow's & children's damages they might, if they thought proper, take as a guide the period of the probable duration of life of a person of the age of the deceased:—*Held*: the direction to the jury as to the calculation of the mother's damages was wrong.—**ROWLEY v. LONDON & NORTH WESTERN RY. CO.** (1873), L. R. 8 Exch. 221; 42 L. J. Ex. 153; 29 L. T. 180; 21 W. R. 869, Ex. Ch.

Annotations:—*Consd.* **Phillips v. L. & S. W. Ry.** (1879), 5 C. P. D. 280. *Mentd.* **Johnston v. G. W. Ry.**, [1904] 2 K. B. 250.

735. ———.]—**BARNETT v. HART** (1903), 48 Sol. Jo. 14, C. A.

736. ———.]—**Defendant refusing plaintiff's offer to rectify mistake.]—**Deft. having refused an offer of pltf. to rectify an alleged defect in the assessment of damages, viz. that it included damages done by rabbits:—*Held*: he was not entitled to a new trial on account of misdirection by the judge in directing them to include such damages.—**THOMAS v. FREDRICKS** (1847), 10 Q. B. 775; 16 L. J. Q. B. 393; 11 Jur. 942; 116 E. R. 204.

Annotation:—*Mentd.* **Knowlman v. Bluett** (1874), L. R. 9 Exch. 307.

737. ———.]—**Only if substantial wrong or miscarriage shown.—R. S. C., Ord. 39, r. 6.]—**In an action for libel the judge misdirected the jury in favour of pltf. upon a material part of the libel & the jury gave a verdict for large damages. The C. A. thought that the nature of the libel was such that the jury would have been entitled to give, & would probably have given, the same verdict, even if the direction had been the other way, & refused deff.'s application for a new trial on the ground that in their opinion no "substantial wrong or miscarriage" had been occasioned by the misdirection, within the meaning of r. 6 of the above Ord.:—*Held*: since the assessment of damages is the peculiar province of the jury in an action for libel, & since the jury had not had deff.'s real case submitted to them & might, in assessing the damages, have been influenced by

731 i. ———.]—*As to proper measure of damages.]—*Deft. is entitled to apply for a new trial on the ground that the jury has been wrongly directed on the question of damages although no exception has been taken to the direction at the trial.—**BANKS v. WILLIAMS** (1910), 10 S. R. N. S. W. 220.—**AUS.**

731 ii. ———.]—Where no rule was laid down by the sheriff for the guidance of the jury as to the measure of damages, the ct. set aside the assessment, being unable to ascertain by the evidence how the jury had arrived at the amount.—**KINNEAR v. ROBINSON** (1871), 2 Han. 73.—**CAN.**

731 iii. ———.]—Where the principle upon which the jury should proceed in estimating damages was not made clear to them, a new trial was ordered without costs.—**PETTIT v. KERR** (1889), 5 Man. L. R. 359.—**CAN.**

731 iv. ———.]—A direction to the jury that offensive questions put by deff.'s counsel on cross-examination, after consultation with his client & a warning by the judge, might be considered in estimating damages in an action for assault & battery, is erroneous, & where the jury, under the

influence of such direction, found a verdict for \$250, it was set aside.—**DRISCOLL v. COLLINS** (1892), 31 N. B. R. 604.—**CAN.**

731 v. ———.]—Where the instructions given to the jury are erroneous, there must be a new trial.—**LLOYD v. DARTMOUTH TOWN** (1897), 30 N. S. R. 208.—**CAN.**

731 vi. ———.]—Where the amount of the verdict showed either that the charge was too general in its terms, or the jury misunderstood the principles upon which damages should be assessed:—*Held*: there must be a new trial on the question of damages.—**RUNCIMAN v. STAR LINE S.S. CO.** (1900), 35 N. B. R. 123.—**CAN.**

731 vii. ———.]—Where there has been a misdirection at the trial the ct. above has no discretion to refuse to set aside the verdict.—**PARKER v. CATHCART** (1866), 17 I. C. L. R. 778.—**IR.**

731 viii. ———.]—In an action of deceit claiming damages for a false representation, which had caused pltf. to purchase a property at a higher price than he would otherwise have given, the judge directed the jury that the measure of damages was the difference between what pltf. gave for

the property & what he would have given had there been no such representation, cautioning the jury that they were not implicitly to accept pltf.'s statement as to what he would have given:—*Held*: his direction, though verbally inaccurate, was, taken with the caution given, practically equivalent to a direction to award the difference in price which the representation would have made in the estimate of a reasonable bidder; & a new trial refused.—**SMITH v. MACKENZIE** (1881), 1 N. Z. L. R. C. A. 1.—**N.Z.**

737 i. ———.]—*Only if substantial wrong or miscarriage shown.]—***LAMB v. JOHNSTON** (1914), 15 S. R. N. S. W. 65.—**AUS.**

737 ii. ———.]—In an action for breach of promise of marriage:—*Held*: misdirection as to damages would form no evidence for a new trial, the jury having found against the cause of action.—**MORRISON v. SHAW** (1877), 40 U. C. R. 403.—**CAN.**

737 iii. ———.]—*Held*: there was misdirection, but, as no substantial wrong or miscarriage was occasioned by it a new trial should not be granted.

the misdirection, there had been a substantial wrong or miscarriage within the above Ord., & there must be a new trial.—*BRAY v. FORD*, [1896] A. C. 44; 65 L. J. Q. B. 213; 73 L. T. 609; 12 T. L. R. 119, H. L.

Annotations.—*Distd. Floyd v. Gibson* (1909), 100 L. T. 761. *Consd. Barber v. Deutsche Bank (Berlin) London Agency*, [1919] A. C. 304. *Mentd. Hamilton v. Seal*, [1904] 2 K. B. 262; *Bath v. Standard Land Co.*, [1911] 1 Ch. 618; *Greenlands v. Wilmshurst & London Assocn. for Protection of Trade*, [1913] 3 K. B. 507; *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Hill v. Showell* (1918), 87 L. J. K. B. 1106.

738. ————]—In an action against a local authority for damages for trespass committed under circumstances of aggravation it is a misdirection in respect of which a new trial may be ordered, to tell the jury that the damages should be measured by the out-of-pocket expenses to which pltf. was put:—*Held*: there must be a new trial, as there has been a miscarriage of justice.—*DAVIS v. BROMLEY URBAN DISTRICT COUNCIL* (1903), 67 J. P. 275; 1 L. G. R. 668, C. A.

739. ————]—Where the Judge at the trial omitted to direct the jury sufficiently that, though they might give punitive damages for malice, they must not give damages for another cause of action:—*Held*: not a ground for granting a new trial, by reason of the above Ord.—*ANDERSON v. CALVERT* (1908), 24 T. L. R. 399, C. A.

740. ————]—In an action for damages for personal injuries caused by the negligence of deft. the judge misdirected the jury by leaving it open to them to treat the injury to pltf.'s sight & hearing as being permanent, there being no evidence of any such permanent injury proper to be left to the jury:—*Held*: the amount of damages being reasonable & proper in respect of the injuries which pltf. had admittedly suffered, "no substantial wrong or miscarriage" was occasioned by the misdirection within the meaning of r. 6 of the above Ord. & a new trial ought not to be granted.—*FLOYD v. GIBSON* (1909), 100 L. T. 761, C. A.

Annotation.—*Mentd. Greenlands v. Wilmshurst & London Assocn. for Protection of Trade*, [1913] 3 K. B. 507.

741. ————]—In an action for libel for statements alleged to have been published by defts. in regard to the nonpayment of several bills of exchange accepted by pltf's. & held by defts., pltf's. proved two libels in respect of one of the bills. In regard to the other bills pltf's. proved items of special damage amounting to £460 arising from the statements complained of, but failed to prove that defts. were responsible for those statements. The trial judge, in summing up, directed the jury to disregard the statements in the other bills; but, in dealing with the damages, told them—apparently by inadvertence that they might consider the items of special damage. The jury returned a verdict for pltf's. for £3,000, & judgment was entered accordingly. Pltf's. consenting to a reduction in the amount of damages awarded by £460:—*Held*: applying r. 6 of the above Ord., that, inasmuch as the misdirection had occasioned no substantial wrong or miscarriage, a new trial ought not to be ordered, but that the judgment in pltf's. favour ought to be restored, subject to the reduction agreed to by pltf's.—*BARBER (LIONEL) & Co. v. DEUTSCHE BANK (BERLIN) LONDON AGENCY*, [1919] A. C. 304; 88 L. J. K. B. 194; 120 L. T. 289; 35 T. L. R. 120, H. L.

—*HENDERSON v. SCOTT* (1892), 24 N. S. R. 232.—*CAN.*

737 iv. ————]—If, in charging a jury, the judge makes a statement calculated unnecessarily to magnify

the importance of the matter in dispute, & suggests excessive damages, a new trial will not be granted, even though the judge was in error in making the statement, if it appears

from the verdict found that the jury, in assessing the damages, were not influenced by the charge.—*CORMIER v. BOUDREAU* (1902), 35 N. B. R. 645.—*CAN.*

742. Mistake—Misconception—Of gross character.—*CHAMBERS v. CAULFIELD*, No. 722, *ante*.

743. ————]—One award intended to cover two actions—*Affidavit of juryman swearing to error.*—*MATHER v. BAILEY* (1814), 1 Price, 1; 145 E. R. 1311.

744. ————]—*GOUGH v. FARR*, No. 723, *ante*.

745. ————]—Or obvious error.—*SMITH v. WOODFINE*, No. 298, *ante*.

746. ————]—*BERRY v. DA COSTA*, No. 299, *ante*.

747. ————]—In computation.—Where the amount of the damages to which pltf. is entitled is mere matter of computation, & the jury has given an excessive amount, the ct. will review the verdict.—*SOEWERRY v. LOCKERBY* (1837), 1 Jur. 796.

748. ————]—Acting upon wrong principle.—*CREED v. FISHER*, No. 701, *ante*.

749. ————]—Award in excess of amount claimed.—*CHATTELL v. DAILY MAIL PUBLISHING CO., LTD.*, No. 558, *ante*.

750. ————]—No evidence that amount claimed inadequate.—An U. D. C. who were building a *kursaal* under powers conferred upon them by a private Act, by a resolution employed pltf. as architect in connection with the proposed building. There was no contract under seal. After pltf. had done some of the work, but before it was finished, he was dismissed. In an action for damages for breach of contract, & alternatively, on a *quantum meruit*, the jury awarded damages on the *quantum meruit* in excess of the amount claimed by pltf. in his particulars:—*Held*: it was not competent to the jury to award damages in excess of the amount claimed by the particulars in the absence of any evidence by pltf. that the amount claimed by him was inadequate.—*HODGE v. MATLOCK BATH & SCARTHIN NICK URBAN DISTRICT COUNCIL & NUTTALL* (1910), 75 J. P. 65; 27 T. L. R. 120; 8 L. G. R. 1127, C. A.

Annotations.—*Mentd. Hoare v. Kingsbury U. D. C.* (1912), 107 L. T. 492; *Baker v. Holme Cultram U. C.* (1915), 85 L. J. K. B. 799.

751. ————]—Taking wrong matter into consideration.—In an action for damages for personal injuries sustained by pltf. while travelling on defts.' line the jury gave a verdict for pltf. with £3,000 damages. £450 of this represented expenses & loss of income incurred at the date of the trial & £2,550 was compensation for prospective loss in professional earnings. Pltf. was twenty-eight years of age. He had been trained as a marine engineer, & he had prospects of obtaining the post of superintendent engineer, as he had relations who were shipowners, but at the time of the accident he was in the employment of his father's firm at a salary of between £2 & £3 a week. There was evidence that pltf. was competent to perform the duties of a superintendent engineer, but that since the accident he would not be able for physical reasons to do so; that the salary attached to the office of superintendent engineer varied from £800 to £1,000 a year, sometimes amounting to £1,500; & that pltf. had applied to a co. for such a post on their staff with a salary of £600 rising annually, & had been refused on account of his injury. The judge at the trial told the jury that pltf. had lost the possibility of such a livelihood as he had expected, but he was able to earn something though not in any way

Sect. 4.—Review of assessment—new trial: Sub-sect. 3, B. (c) & (d).]

equal to what he would have earned but for the accident; that there were the accidents of life & other elements which had to be taken into consideration which ought to prevent the jury giving him such a sum as would be simply for him an investment & enable him to do nothing; still he was entitled to a fair sum considering the position that he was fitted for & the position that he was in:—*Held*: it could not be said that the amount of the damages was such that no twelve men could have reasonably awarded. The jury had not been misdirected by the judge, & it could not be said that the jury had taken into consideration matters which they ought not to have taken into consideration, or had applied a measure of damages which they ought not to have applied. There was no ground for a new trial.—*JOHNSTON v. GREAT WESTERN RY.*, [1904] 2 K. B. 250; 73 L. J. K. B. 508; 91 L. T. 157; 52 W. R. 612; 20 T. L. R. 455; 48 Sol. Jo. 435, C. A.

Annotations:—*Refd.* Price v. Glynea & Castle Coal & Brick Co. (1915), 85 L. J. K. B. 1278. *Mentd.* Barber v. Deutsche Bank (Berlin) London Agency, [1919] A. C. 304.

752. — Applying wrong measure of damages.]

—*JOHNSTON v. GREAT WESTERN RY.*, No. 751, *ante*.

753. — "Impossible verdict" — Conditional instead of final.]—The jury found damages for "£25,000 & all securities to be returned to deft. bank." The jury had no power to give a verdict of this kind (*LORD FINLAY, C.*).

The judge did not explain the impossibility of a conditional instead of an appropriate & final verdict to the jury, & unfortunately when the jury returned to ct. he was unable to be in his place to ask the jury to retire & to put their verdict in an unobjectionable form (*LORD SHAW*).

The verdict "£25,000 & the securities to be returned to the bank" was an impossible verdict (*LORD WRENBURY*).—*BANBURY v. BANK OF MONTREAL*, [1918] A. C. 626; 87 L. J. K. B. 1158; 119 L. T. 446; 34 T. L. R. 518, H. L.

Annotations:—*Mentd.* Dey v. Mayo, [1920] 2 K. B. 346; *Calmenson v. Merchants' Warehousing Co.* (1921), 125 L. T. 129; *Everett v. Griffiths*, [1921] 1 A. C. 631.

(d) Actions of Tort.

754. Whether new trial granted—Personal tort.]

—In personal torts the ct. will very rarely grant a new trial for excessive damages.—*FABRIGAS v. MOSTYN* (1774), 2 Wm. Bl. 929; 96 E. R. 549.

Annotations:—*Refd.* Goldsmith v. Sefton (1796), 3 Anst. 808; Price v. Severn (1831), 7 Bing. 316.

PART VII. SECT. 4, SUB-SECT. 3.—B. (d).

754 i. — Personal tort.]—In actions for personal torts, the jury, although their power is not despotic, have great latitude on the question of damages, & the ct. will not interfere to disturb a verdict on the ground of excessive damages, unless the damages given are outrageous or flagrantly excessive, & out of all proportion to the position of the parties & the circumstances of the case. In such cases the jury may properly give extra damages of a vindictive, exemplary, or punitive character.—*McCOMBS v. Low*, 1 J. R. 49.—N.Z.

754 ii. ——*THOMS v. CALEDONIAN RY. Co.*, [1913] S. C. 804.—SCOT.

d. Whether new trial granted—Tort.]—In an action of tort, where there exists no measure for damages, the jury are sole judges of the amount of damages; & the ct. will not interfere with their finding, unless there has been misconduct or error on their part.—*SMITH v. IFFLA* (1881), 7 V. L. R. 435.—AUS.

a. ——*In actions for torts the ct. will not set aside a verdict for excessive damages except upon very clear & manifestly strong grounds.*—*McDONALD v. CAMERON* (1847), 4 U. C. R. 1.—CAN.

f. ——*In an action of tort, when deft. has a verdict, & the damages suffered are but small, the ct. will only grant a new trial, where, as in this case, the ordinary rights of property seem to have been lost sight of.*—*SHERWOOD v. GIBSON* (1848), 5 U. C. R. 205.—CAN.

g. ——*In actions of tort, the mere fact of the damages being high & more than the ct. would have given, is not a sufficient ground for disturbing the verdict.*—*BREWING v. BERRYMAN* (1875), 2 Pug. 515.—CAN.

h. ——*Where an action for damages arises out of the doing of violence to another man's rights, the amount of damages is not to be weighed in scales of gold.*—*McGUIRE v. BRIGHTON TOWNSHIP* (1912), 23 O. W. R. 223; 4 O. W. N. 137; 7 D. L. R. 314.—CAN.

755. ——*In personal torts, the ct. will seldom grant a new trial for excessive damages.*—*GILBERT v. BURTENSHAW* (1774), 1 Cowp. 230; Loft, 771; 98 E. R. 1059.

Annotations:—*Refd.* Goldsmith v. Sefton (1796), 3 Anst. 808. *Mentd.* Brady v. Cubitt (1778), 1 Doug. K. B. 31; *Pemberton v. Pemberton* (1807), 13 Ves. 290; *Perrott v. Perrott* (1811), 14 East, 423; *Colvin v. Fraser* (1829), 2 Hag. Ecc. 266; *Beardley v. Lacey* (1897), 78 L. T. 25.

756. ——*GOLDSMITH v. SEFTON (LORD)* (1796), 3 Anst. 808; 145 E. R. 1046.

757. — Unless damages clearly outrageous.]

—It is very dangerous for judges to intermeddle in damages for torts. It must be a glaring case indeed of outrageous damages in a tort, & which all mankind at first blush must think so, to induce a ct. to grant a new trial for excessive damages (*LORD MANSFIELD, C.J.*).—*HUCKLE v. MONEY* (1763), 2 Wils. 205; 95 E. R. 768.

Annotations:—*Consd.* Price v. Severn (1831), 7 Bing. 316. *Refd.* Goldsmith v. Sefton (1796), 3 Anst. 808.

758. ——*New trials may be granted in actions for torts, in case of outrageous damages.*

—*SHARPE v. BRICE* (1774), 2 Wm. Bl. 942; 96 E. R. 557.

Annotation:—*Refd.* Williams v. Currie (1845), 1 C. B. 841.

759. ——*WILLIAMS v. CURRIE*, No. 319, *ante*.

760. — & extravagant.]—*GOLDSMITH v. SEFTON (LORD)* (1796), 3 Anst. 808; 145 E. R. 1046.

761. — & disproportionate.]—The ct. will not grant a new trial for excessive damages in a case of tort, unless they be outrageously disproportionate to the nature of the injury, or the circumstances of the parties.—*LEITH v. POPE* (1779), 2 Wm. Bl. 1327; 96 E. R. 777.

762. ——*PRICE v. SEVERN*, No. 711, *ante*.

763. — Unless improper topics urged on jury — Or plaintiff of dishonest character.]—The ct.

will not generally interfere on the ground that large damages have been given, unless it should appear that improper topics have been urged before the jury, or that pltf. is a person of dishonest character.—*DUBOIS v. KEATS* (1840), as reported in 9 L. J. Q. B. 66; 4 Jur. 148.

Annotations:—*Mentd.* Huggins v. Bailey (1847), 9 L. T. O. S. 453; *Fitzjohn v. Mackinder* (1861), 9 C. B. N. S. 505.

764. — Judgment by default—Plaintiff calls no evidence at execution of writ of inquiry.]—An attorney brought an action for defamation. Deft. suffered judgment by default. At the execution of the writ of inquiry, counsel attended for both

k. ——*The ct. will be reluctant to set aside a verdict in an action of tort on the ground that the damages are excessive, where there is evidence of malice, & the nature of the case is such that malice is a legitimate consideration for the jury in assessment of damages.*—*REEVES v. PENROSE* (1890), 26 L. R. Ir. 141.—IR.

757 i. — Unless damages clearly outrageous.]—The ct. does not favour the setting aside of verdicts in cases of torts for excessive damages, unless such excess, to use the words of the authorities, be outrageous, or unless the ct. be satisfied that the jury acted under the influence of undue motives or gross error or misconception.—*FOWLE v. SMITH* (1873), Cong. Dig. 935.—CAN.

757 ii. ——*On an appeal against a judgment for damages for a deliberate delict, the ct. does not scrutinise the evidence in support of damages so closely as in actions for breach of contract, involving no turpitude on the deft.'s part.*—*STURMAN v. VAN ROOYEN* (1893), 10 S. C. 35.—S. AF.

parties, but no evidence was given. The jury gave a verdict for £40. The ct. would not set aside the inquiry on the ground of excessive damages.—*TRIPP v. THOMAS* (1824), 3 B. & C. 427; 1 C. & P. 477; 5 Dow. & Ry. K. B. 276; 3 L. J. O. S. K. B. 42; 107 E. R. 792.

765. New trial refused—No certain or general rule for assessment—Personal injury.—*BRITTON v. SOUTH WALES RY. CO.*, No. 685, *ante*.

766. ————]—Verdict was given against a steam-packet co. for £900 damages for accident to a passenger, whereby he lost a leg. A rule for new trial was granted on the ground of misdirection, but not on the ground of excessive damages, it being impossible for the ct. to estimate what was sufficient compensation for so serious an injury.—*CATLIN v. DIAMOND STEAM PACKET CO.* (1849), 7 L. T. 534.

767. ———— Assault.—*SIPPORA v. BASSET* (1664), 1 Sid. 225; 82 E. R. 1071.

Annotation :—*Mentd.* Anon. (1729), 1 Barn. K. B. 302.

768. ———— & battery.—*GREY v. GRANT* (1764), 2 Wils. 252; 95 E. R. 794.

769. —————*HOOPER v. PARKER* (1850), 16 L. T. O. S. 151.

770. ———— Criminal conversation.—A verdict in criminal conversation is not to be set aside for excessive damages.—*WILFORD v. BERKELEY* (1758), 1 Burr. 609; 97 E. R. 472.

Annotations :—*Refd.* Gilbert v. Berkinshaw (1774), Lofft, 771; *Duberley v. Gunning* (1792), 4 Term. Rep. 651.

771. —————The ct. will not grant a new trial in an action for criminal conversation, merely because the damages appear to them to be excessive.

—*DUBERLEY v. GUNNING* (1792), 4 Term Rep. 651; 100 E. R. 1226.

Annotations :—*Distd.* Jones v. Sparrow (1793), 5 Term Rep. 257. *Consd.* Goldsmith v. Setton (1796), 3 Anst. 808; Price v. Severn (1831), 7 Bing. 316. *Mentd.* Bernstein v. Bernstein, [1893] P. 292.

772. ———— Libel.—The ct. refused to grant a new trial on the ground that the damages were excessive, where the jury had given £750 in an action for defamatory words spoken of a beneficed clergyman to his curate.—*HIGHMORE v. HARRINGTON (EARL & COUNTESS)* (1857), 3 C. B. N. S. 142; 140 E. R. 693.

773. ———— Seduction.—*TULLIDGE v. WADE*, No. 311, *ante*.

774. ———— Trespass—Aggravating circumstances.—In an action of trespass against custom house officers for entering pltf.'s house & searching for prohibited goods where they found none, the jury found £200 damages against them, though they did very little or no damage. The ct. refused to grant a new trial.—*REDSHAW v. BROOK* (1769), 2 Wils. 405; 95 E. R. 887.

775. —————In an action of trespass against custom house officers for entering pltf.'s house, & searching for run-goods where they found none, the jury assessed £100 damages on a writ of inquiry. The ct. refused to set aside the inquiry.

The entering pltf.'s house under colour of legal authority, aggravates the trespass committed by defts. (*GOULD, J.*).—*BRUCE v. RAWLINS* (1770), 3 Wils. 61; 95 E. R. 934.

Annotations :—*Consd.* Price v. Severn (1831), 7 Bing. 316. *Mentd.* Longman v. Fenn (1791), 1 Hy. Bl. 541.

776. —————*MEREST v. HARVEY*, No. 318, *ante*.

777. —————Where in trespass for a forcible entry into a mansion house under colour of making a distress for rent, & remaining there for three or four days, the defence was *lib. ten.*, & a justification under a distress for rent, to enforce a claim to the property, for which there was not

the slightest foundation, & the jury gave £1,000 damages, the ct. refused to grant a new trial on the ground of excessive damages.—*BLAND v. BLAND* (1835), 1 Har. & W. 167.

778. —————Trespass for breaking pltf.'s house & seizing his goods. Defts. were the sheriffs of Middlesex, & S. a bailiff of the sheriffs. S., severing from the other defts. pleaded not guilty, & a justification under a *fi. fa.* upon a judgment recovered against pltf., & a warrant from the sheriff to him & another bailiff. On the trial, it appeared that under the warrant to E., a seizure was made by E.'s son, by the authority of E. Afterwards, & before any sale, pltf.'s solr. went to the office of E., & being unable to see E., who was ill, he there paid the full amount in satisfaction of the execution to the son, who thereupon, in E.'s name, withdrew the man whom he had left in possession, & gave notice to the execution creditor that the money was ready for him at his father's office. There was contradictory evidence as to the payment over of the amount to E., who died on the same day, & the money was not paid to the execution creditor. The other defts., as sheriffs, afterwards issued a fresh warrant to S. & G., another bailiff, treating the first warrant as a nullity, & pltf.'s goods were again seized under it, & a man left in possession for several days by G., S. taking no part in the seizure. The jury did not agree as to whether the money had been paid over to E., but they were of opinion that the son executed the warrant by the direction of E.; that he had authority from E. to act for him in his office, & that the money had been received under that authority. The learned judge directed the jury that, being of that opinion, they might find a payment of the money to the sheriff, & thereupon a verdict was found for pltf., damages £400 :—*Held* : as against the sheriff, the damages, under the circumstances, could not be considered excessive, but as against S. they were excessive, except upon the doctrine that, in an action of tort, the measure of damages is the sum which ought to be awarded against the most guilty of several defts.—*GREGORY v. COTTERELL* (1852), 1 E. & B. 360; 22 L. J. Q. B. 217; 17 Jur. 525; 118 E. R. 470; *subsequent proceedings* (1855), 5 E. & B. 571, Ex. Ch.

Annotation :—*Mentd.* Salisbury v. Gladstone (1859), 5 Jur. N. S. 369.

779. —————*WARNER v. DENT* (1843), 2 L. T. O. S. 96.

780. ———— Unlawful imprisonment.—Pltf. was arrested at the suit of the now deft. in a fictitious action without any colour of reason. In an action for false imprisonment he was awarded £80 damages. A motion in arrest of judgment for excessive damages was denied.—*HERBERT v. MORGAN* (1724), 8 Mod. Rep. 296; 88 E. R. 211.

781. —————A new trial on the ground of damages being excessive, was refused in an action of trespass & imprisonment under a Secretary of State's warrant, where £1,000 damages were given for six days imprisonment & the entering pltf.'s house & seizing his books & papers.—*BEARDMORE v. CARRINGTON* (1764), 2 Wils. 244; 95 E. R. 790.

Annotation :—*Refd.* *Duberley v. Gunning* (1792), 4 Term Rep. 651.

782. New trial granted—Assault & battery.—A new trial will be granted on account of excessive damages in an action for an assault & battery.—*JONES v. SPARROW* (1793), 5 Term Rep. 257; 101 E. R. 144.

Annotation :—*Refd.* Goldsmith v. Setton (1796), 3 Anst. 808.

783. ———— Damages excessive in opinion of trial judge.—*NEWTON v. HOUGHTON*, No. 684, *ante*.

Sect. 4.—Review of assessment—new trial: Sub-sect. 3, C. (a).]

C. Damages Inadequate.

(a) In General.

784. General rule.]—A new trial will be granted in an action for personal injuries sustained through deft.'s negligence, where the damages found by the jury are so small as to show that they must have omitted to take into consideration some of the elements of damage.

The verdicts of juries as to the amount of damages are subject, & must, for the sake of justice, be subject, to the supervision of a ct. of first instance, &, if necessary, of a ct. of appeal in this way, that is to say, if in the judgment of the ct. the damages are unreasonably large or unreasonably small then the ct. is bound to send the matter for reconsideration by another jury (*JAMES, L.J.*).—*PHILLIPS v. LONDON & SOUTH WESTERN RY. CO.* (1879), 5 Q. B. D. 78; 41 L. T. 121; 43 J. P. 749; 28 W. R. 10, C. A.; *subsequent proceedings*, 5 C. P. D. 280, C. A.

Annotations:—*Consd. Johnston v. G. W. Ry.*, [1904] 2 K. B. 250. *Refd. Price v. Glyne & Castle Coal & Brick Co.* (1915), 85 L. J. K. B. 1278. *Mentd. Watt v. Watt*, [1905] A. C. 115.

785. Mere inadequacy insufficient.]—ANON. (1588), 2 Leon. 214; 74 E. R. 489.

786. — Unless result of surprise.]—MARKHAM v. MIDDLETON (1745), 2 Stra. 1259; 93 E. R. 1167.

Annotations:—*Mentd. Seddon v. Tutop* (1796), 6 Term Rep. 607; *Godson v. Smith* (1818), 2 Moore, C. P. 157; *Bagot v. Williams* (1824), 5 Dow. & Ry. K. B. 87; *Stafford v. Clark* (1824), 2 Bing. 377.

787. ——*HALL v. STONE* (1722), 1 Stra. 515; 93 E. R. 871.

Annotation:—*Mentd. Stafford v. Clark* (1824), 2 Bing. 377.

788. ——*ELKAN v. GREAT NORTHERN RY. CO.* (1886), 2 T. L. R. 851, C. A.

789. — Unless result of trick.]—New trial or writ of inquiry not granted for too small damages, unless where there is a trick.—ANON. (1698), 2 Salk. 647; 91 E. R. 549.

790. ——*In trespass for shooting a dog, the only witness called to prove the value, stated it to be 50s., & that was not contradicted; yet the jury found a verdict for 20s. The ct. refused to interfere, either by increasing the damages, or by granting a new trial.*—*CANN v. FACEY* (1835), 4 Ad. & El. 68; 1 Har. & W. 482; 5 Nev. & M. K. B. 405; 5 L. J. K. B. 1; 111 E. R. 713.

Annotations:—*Mentd. Richardson v. Barnes* (1849), 4 Exch. 128; *Palmer v. Richards* (1851), 6 Exch. 335; *Huxley v. West London Extension Ry.*, *Hughes v. Merrett*, *Wood v. Madge* (1886), 17 Q. B. D. 373.

791. — Uncontroverted evidence at trial of greater value.]—*DONNELLY v. BAKER* (1744), Barnes, 154; 94 E. R. 853.

792. ——*Upon the execution of a writ of inquiry, in an action for dilapidations, two surveyors were called on each side: those called for pltf. estimated the dilapidations, the one at £119, the other at £124; those called for deft. estimated them the one at £63 15s., the other at £68;*

the jury returned a verdict for £36 10s. —Held: the inquisition must be set aside without costs, unless deft. would consent to the verdict being entered for £63 15s.—*WEEDING v. MASON* (1857), 2 C. B. N. S. 382; 29 L. T. O. S. 81; 140 E. R. 465.

793. ——*HAYWARD v. NEWTON* (1732), 2 Barn. K. B. 177; 2 Stra. 940; 94 E. R. 432.

Annotations:—*Refd. Barker v. Dixie* (1736), *Lee temp. Hard.* 279; *Armitage v. Haley* (1843), 12 L. J. Q. B. 323; *Gibbs v. Tunaley* (1845), 1 C. B. 640.

794. ——*BURGES v. NIGHTINGALE* (1736), Barnes, 230; 94 E. R. 890.

795. ——*BARKER v. DIXIE* (1736), *Lee temp. Hard.* 279; 2 Stra. 1051; 95 E. R. 180.

796. ——*G—(LORD) v. HEATH* (1739), Barnes, 445; 94 E. R. 996.

797. — Unless measure of damages certain.]—*RUSSEL v. BALL* (1745), Barnes, 455; 94 E. R. 1001.

798. ——*No new trial for the smallness of damages, unless it be a case where the ct. have the means of seeing by figures that the damages are too small.*—*FAYERMAN v. KING* (1828), 6 L. J. O. S. K. B. 330.

799. ——*Deft. covenanted by his marriage settlement, to pay off, within a year, certain incumbrances on his estate, to the amount of £19,000. On his failing to do so, & being sued by the trustees on his covenant, he suffered judgment by default. The estates were of sufficient value, & no special damage was averred. The jury having assessed the damages at 1s. —Held: there must be a new inquisition, as pltf. were, at law, entitled to damages to the full amount of the incumbrances; & deft. must seek relief in equity.*

If pltf. are only to recover nominal damages the covenant becomes of no value at law. There must be a new inquiry (LORD TENTERDEN, C.J.).—*LETHBRIDGE v. MYTTON* (1831), 2 B. & Ad. 772; 9 L. J. O. S. K. B. 330; 109 E. R. 1332.

Annotations:—*Refd. Carr v. Roberts* (1833), 5 B. & Ad. 78; *Wigzell v. School for Indigent Blind* (1882), 8 Q. B. D. 357.

800. — In actions of tort.]—It is a general rule, that the ct. will not set aside a verdict, in an action for a tort, on account of the smallness of the damages.—*MAURICET v. BRECKNOCK* (1780), 2 Doug. K. B. 509; 99 E. R. 325.

Annotation:—*Refd. Armitage v. Haley* (1843), 12 L. J. Q. B. 323.

801. — Actions of replevin.]—*BROWN v. RAY*, No. 657, *ante*.

See, further, DISTRESS.

802. — Unless mistake apparent.]—The ct. will not set aside a verdict, & grant a new trial, on the ground of smallness of damages, unless in case of misconception of law, or of apparent mistake.—*RENDALL v. HAYWARD* (1839), 5 Bing. N. C. 424; 2 Arn. 14; 7 Scott, 407; 8 L. J. C. P. 243; 132 E. R. 1162; *sub nom. RUNDALL v. HAYWARD*, 3 Jur. 363.

Annotations:—*Apld. Forsdike v. Stone* (1868), L. R. 3 C. P. 607. *Consd. Falvey v. Stanford* (1874), L. R. 10 Q. B. 54; *Phillips v. South Western Ry.* (1879), 4 Q. B. D. 406. *Refd. Armitage v. Haley* (1843), 12 L. J. Q. B. 323; *Gibbs v. Tunaley* (1845), 1 C. B. 640; *Kelly v. Sherlock* (1866), L. R. 1 Q. B. 686.

PART VII. SECT. 4, SUB-SECT. 3.—C. (a).

785 i. Mere inadequacy insufficient.]—A new trial should not be granted on the ground of the inadequacy of the damages.—*DAVIES BROTHERS, LTD. v. BOND* (1913), 13 C. L. R. 518.—AUS.

785 ii. ——*The ct. will not grant a new trial for smallness of damages.*—*ATKINS v. THORNTON* (1830), Dra. 251.—CAN.

785 iii. ——*DOE d. PROCTER v. ALLEN* (1840), (1823–1900), 1 Ont. Dig. 1915.—CAN.

785 iv. ——*THORPE v. GRIER*

(1845), 1 U. C. R. 528.—CAN.

785 v. ——*HODGKINSON v. BROWN* (1847), 3 U. C. R. 461.—CAN.

785 vi. ——*SHIPMAN v. GRAYDON* (1856), 5 C. P. 465.—CAN.

785 vii. ——*MCADAM v. ROSS* (1890), 22 N. S. R. 264.—CAN.

785 viii. ——*WITHERS v. BULMER*, [1921] 3 W. W. R. 637.—CAN.

i. — Delay.]—The ct. refused to entertain a motion to increase the damages in dower where no point had been reserved, & where the motion was not until the second term after the assizes at which the case was

tried.—*WATSON v. TERWILLIGER* (1844), 1 U. C. R. 21.—CAN.

791 i. — Uncontroverted evidence at trial of greater value.]—Damages assessed at a less sum than the evidence appeared to warrant. New assessment ordered.—*LEONARD v. PAWLING* (1833), 3 O. S. 17.—CAN.

802 i. — Unless mistake apparent.]—A new trial will sometimes be granted if it appears clear to the ct. that the damages are too small, or that the smallness of the damages has arisen from some mistake of the judge.—*PRICE v. ERB* (1878), 1 P. & B. 708.—CAN.

803. — Contingent damages — No objection taken at trial.]—In trespass for breaking & entering pltf.'s dwelling-house, etc., defts. justified the breaking & entering as officers of the sheriff under a *ca. sa.* against F., that for six months before the trespass F. had resided in pltf.'s house; & that at the time of the trespasses defts. had good ground to suspect & believe, from the information of the attorney who sued out the writ, that F. was then in the house. At the trial the judge expressed his opinion that the plea afforded a defence; but said he would direct the jury to assess damages, in case the ct. should be of a different opinion. The jury assessed the damages at one farthing:—*Held*: the plea afforded no defence; but that neither party having objected to the assessment of damages, pltf. was not entitled to a new trial, on the ground of misdirection.—*MORRIS v. MURREY* (1844), 13 M. & W. 52; 2 Dow. & L. 199; 1 New Pract. Cas. 27; 13 L. J. Ex. 261; 3 L. T. O. S. 184; 153 E. R. 22.

Annotations:—*Fold. Davis v. Falk* (1847), 9 L. T. O. S. 50; *Booth v. Clive* (1851), 10 C. B. 827.

804. — — — — —.]—Where the jury have found a verdict for deft., with leave given to pltf. to enter a verdict for a sum at which his damages have been contingently assessed at the trial, the ct. will not afterwards grant a new trial in order that there may be a fresh assessment of damages, unless pltf.'s counsel has objected to such contingent assessment at the trial.—*BOOTH v. CLIVE* (1851), 10 C. B. 827; 20 L. J. C. P. 151; 138 E. R. 327.

Annotations:—*Mentd. White v. Morris* (1852), 11 C. B. 1015; *Read v. Coker* (1853), 13 C. B. 850; *Arnold v. Hamel* (1854), 9 Exch. 404; *Hermann v. Seneschal* (1862), 13 C. B. N. S. 392.

805. — Though unreasonably small in opinion of court—Unless judge at trial dissatisfied.]—*GIBBS v. TUNALEY*, No. 669, *ante*.

806. — No suggestion of jury being actuated by improper motives.]—The ct. refused, in an action for the negligent construction of a building, whereby it fell & injured pltf., to grant a new trial, on the ground that the jury had given merely nominal damages—there being no reason for supposing them to have been actuated by improper motives.—*HOWARD v. BARNARD* (1851), 11 C. B. 653; 18 L. T. O. S. 63; 138 E. R. 631.

807. — — — — —.]—*HARRIS v. HUNT* (1850), 16 L. T. O. S. 151.

808. — — — — —.]—The ct. refused to grant a rule for a new trial on the ground of the insufficiency of the damages where the jury had given only one farthing damages in an action of trespass for taking pltf. before a magistrate upon an unfounded charge

of felony, merely because a question of character was involved.—*APPS v. DAY* (1853), 14 C. B. 112; 139 E. R. 47.

809. — Whether rule confined to actions of slander.]—In case for negligent driving, with a plea of not guilty, where the jury found for pltf. with one farthing damages, although it was proved that his leg had been broken by the accident, the ct. granted a new trial on payment of costs. The rule that the ct. will not grant a new trial merely on account of the smallness of the damages does not extend to the case of a severe personal injury.

The damages found by the jury are in truth no damages at all. The rule must be made absolute for a new trial on payment of costs. The rule that the ct. will not grant a new trial merely on account of the smallness of the damages, must be considered as applying only to actions of slander (LORD DENMAN, C.J.).—*ARMYTAG v. HALEY* (1843), 4 Q. B. 917; 7 Jur. 671; 114 E. R. 1143; *sub nom. ARMITAGE v. HAYLEY*, 1 Dav. & Mer. 139; 12 L. J. Q. B. 323; 1 L. T. O. S. 312.

Annotations:—*Reid. Nichol v. Bestwick* (1858), 28 L. J. Ex. 4; *Kelly v. Sherlock* (1866), L. R. 1 Q. B. 686.

810. — Whether rule applicable in cases of personal injuries.]—*ARMYTAG v. HALEY*, No. 809, *ante*.

811. — — — — —.]—In an action for injury by negligence of deft. the jury found a verdict for pltf., with 6d. damages, though it appeared that pltf. had paid £4 10s. for surgical attendance, rendered necessary by the injury. The ct. granted a new trial.—*TIDD v. DOUGLAS* (1859), 32 L. T. O. S. 279; *sub nom. TEDD v. DOUGLAS*, 5 Jur. N. S. 1029.

812. — — — — —.]—*PHILLIPS v. LONDON & SOUTH-WESTERN RY. CO.*, No. 784, *ante*.

813. — — — — —.]—*BURROWS v. LONDON GENERAL OMNIBUS CO.* (1894), 10 T. L. R. 298, C. A.

814. — No misdirection.]—*KINGSTON v. HAYCHURCH*, No. 363, *ante*.

815. — — — — —.]—In an action of slander, the under-sheriff, in answer to a question from the jury on executing a writ of inquiry, erroneously said, that any amount of damages would entitle pltf. to the costs; whereupon they gave 1s. damages:—*Held*: this was not such a misdirection as would entitle the plaintiff to a new inquiry, or to have the damages increased to 40s.—*GRATER v. COLLARD* (1838), 6 Dowl. 503; 1 Will. Woll. & H. 294; 2 Jur. 568.

816. — Though verdict unsatisfactory—If founded on reason.]—In an action for not accepting goods pursuant to a contract, pltf.'s case was such that, if he got a verdict at all, he was entitled

805 i. — Though unreasonably small in opinion of court—Unless judge at trial dissatisfied.]—Although there is no absolute rule invalidating a verdict certified by the judge at the trial to be perverse, yet such certificate affords ground for setting aside the verdict when coupled with other circumstances appearing in the report suggestive of perversity, such as the award of nominal damages when not apparently warranted by the evidence, though these circumstances would not *per se*, & in the absence of such a certificate, be sufficient to disturb the verdict.—*QUINLAN v. MURNANE* (1885), 18 L. R. Ir. 53.—*IR.*

m. — Unless there are special circumstances & clear case is made.]—The ct. will not grant a new trial at the instance of pltf. on account of the smallness of the damages, except in very clear cases & under very peculiar circumstances.—*McDONALD v. McDONALD* (1847), 4 U. C. R. 133.—*CAN.*

a. — — — — —.]—The pltf. in an

action for \$10,000 for damages obtained judgment in the Superior Ct. for \$2,000, deft. appealed & the judgment was reduced below \$2,000.—*Held*: the amount of damages awarded by the trial judge in his discretion should not be interfered with by a ct. of appeal, unless clearly unreasonable & unsupported by the evidence, or if there be some error in law or fact or partiality on the part of the judge.—*COSETTE v. DUN* (1890), 18 S. C. R. 222.—*CAN.*

b. — — — — —.]—Where, in an action for damages, the amount found by the jury is not an illusory amount, it will not be set aside as inadequate unless the ct. is affirmatively satisfied that no reasonable proportion exists between that amount & the circumstances of the case.—*M'ADOREY v. HUSTON* (1905), 39 I. L. T. 148.—*IR.*

c. — New trial on terms.]—Where the damages given were complained of as being too small, a new trial was granted with costs to abide

the event, viz. the event of the pltf's recovering more than the amount of the first verdict.—*JONES v. McDOWELL* (1854), 12 U. C. R. 214.—*CAN.*

d. — — — — —.]—Where the damages given were complained of as being too small, a new trial was granted with costs to abide the event, viz. the event of the pltf's recovering more than the amount of the first verdict.—*CRAIG v. CORCORAN* (1865), 24 U. C. R. 406.—*CAN.*

e. — New trial necessary on other grounds.]—*Held*: although a new trial would not have been granted for smallness of damages on the first two counts, yet, as there must be a new trial on the last two counts, & as no additional expense could be incurred thereby, justice would be done by granting a new trial on the whole record, without costs.—*ANDERSON v. MATTHEWS* (1879), 30 C. P. 166.—*CAN.*

f. — Discretion of court —

Sect. 4.—Review of assessment—new trial: Sub-sect. 3, C. (a), (b), (c) & (d).]

to £40. The jury found a verdict for pltf., damages 1s. The ct. expressed itself dissatisfied with the verdict, which was almost absurd, but declined to put the parties to the expense of a new trial. In such cases, though a verdict may appear absurd, the ct. will not disturb it, if they can find any reason for the jury's decision.—*NICHOL v. BESTWICK* (1858), 28 L. J. Ex. 4; 32 L. T. O. S. 108.

817. — — — — —.]—G. was charged with felony by B., & given into custody. Afterwards G. was tried & acquitted at the assizes, & then sued B. for false imprisonment. B. pleaded a justification, stating the circumstances as reasonable & probable cause that G. had committed felony; & the jury gave a verdict for pltf., damages 1s.:—*Held*: there was no ground for granting a new trial on account of the damages being too small, for juries are entitled in such cases, by a compromise, to express their opinions.—*GARDNER v. BEIL* (1859), 23 J. P. 728.

818. — — — — —.]—Where a verdict which, in the opinion of the judge who tried the cause, ought to have been for deft., is found for pltf., with a farthing damages, the ct. will not, at the instance of pltf., set it aside & grant a new trial on the ground that it found for pltf. at all, the verdict ought to have been for more than nominal damages under the circumstances.—*HOLLAND v. GREAT WESTERN RY. CO.* (1863), 1 New Rep. 274.

819. — — — — —.]—Where sufficient in opinion of judge at trial.]—*MOXON v. TOWNSHEND* (MARQUIS) (1887), 3 T. L. R. 392, C. A.

820. — — — — —.]—Evidence as to damage slight or doubtful.]—In an action on a bailment for negligence, the evidence as to damage being slight or doubtful, a verdict for pltf. for nominal damages will not be set aside as necessarily absurd, unreasonable, or inconsistent.—*MOSTYN v. COLES* (1862), 7 H. & N. 872; 31 L. J. Ex. 151; 10 W. R. 355; 158 E. R. 723.

(b) Verdict arrived at by Compromise.

821. Jury differing as to amount to be awarded—Splitting the difference.]—In an action on a bill of exchange for £50, deft. pleaded that certain goods were accepted by pltf. in satisfaction of the bill. There was conflicting evidence as to this fact, & the jury found a verdict for pltf., with £25 damages:—*Held*: if this finding could have been accounted for only on the supposition that the jury, differing as to the verdict, by way of compromise among themselves, split the difference, deft. would be entitled to a new trial.—*HALL v. POYSER* (1845), 13 M. & W. 600; 14 L. J. Ex. 98; 153 E. R. 251.

Damages not assessed by a jury.]—Damages for the sale & conversion of shares of the capital stock of a mining co. unlisted & having no market value, to which pltf. was entitled under a contract with deft., were assessed by a referee upon a reference at 40 cents a share, which was the highest price at which shares of the co. had been sold. It appeared that the circumstances in regard to that sale were exceptional. Upon deft.'s appeal to a judge the damages were reduced to 36 cents a share, the price obtained by deft. Upon pltf.'s appeal to a Div. Ct. the damages as reduced by the judge were increased by the sum of \$1,500, the ct. holding that it should act as a jury & assess the damages at a fair sum, taking into consideration the fact of a sale at a higher price than that obtained by deft.—*GOODALL v. CLARKE* (1910),

21 O. L. R. 614; 18 O. W. R. 185; 2 O. W. N. 567.—*CAN.*

g. — — — — —.]—T. & Co., whisky merchants, brought an action against a public-house keeper for interdict against the sale of other whisky as of pursuer's manufacture or blending, & for £500 as damages on account of sales so made. The lord ordinary awarded £10 damages:—*Held*: the fair inference was that defender's fraudulent conduct had produced the result which it was intended to produce of substantially injuring pursuer's trade, & the damages should be assessed at £100.—*THOMSON & CO. v. DAILLY* (1897), 24 R. (Ct. of Sess.) 1173.—*SCOT.*

h. — — — — —.]—A sailing vessel having been rescued by two

822. Jury evading issues submitted to them—Finding for plaintiff without substantial damages.]—

1. In actions of tort, where the jury have made a compromise, &, instead of deciding the issue of guilty or not guilty, have agreed to find for pltf. without substantial damages, or have evaded the duty of applying their minds to the consideration of the amount of damages, so that there has been no real assessment of them, the ct. will grant a new trial.

2. In an action for a series of libels in a newspaper deft. pleaded not guilty, & gave notice under Libel Act, 1843 (c. 96), s. 1, of his intention to give in evidence in mitigation of damages an apology which he had offered to pltf. The libels were of a gross & offensive character, extending over a long period, but the conduct of pltf. afforded matter of mitigation. There was no proof of actual pecuniary damage; but the apology was tardy & meagre. The jury gave a verdict for pltf., with one farthing damages. On a rule for a new trial, on the ground that the damages were inadequate:—*Held*: it was a question for the jury what compensation in damages pltf. was entitled to, & the case not being within any exception to the general rule the ct. would not interfere.—*KELLY v. SHERLOCK* (1866), L. R. 1 Q. B. 680; 7 B. & S. 480; 35 L. J. Q. B. 209; 30 J. P. 805; 12 Jur. N. S. 937.

Annotations:—As to (1) *Appl. Falvey v. Stanford* (1874), L. R. 10 Q. B. 54. *Reid, Cooke v. Brogden* (1885), 1 T. L. R. 497. *Generally, Mentd. Bryce v. Rusden* (1886), 2 T. L. R. 435.

823. — — — — —.]—A new trial will be granted for inadequacy of damages in an action for slander where the smallness of the amount shows that the jury have made a compromise, & instead of deciding the issues submitted to them have agreed to find for pltf. for nominal damages only.—*FALVEY v. STANFORD* (1874), L. R. 10 Q. B. 54; 44 L. J. Q. B. 7; 31 L. T. 677; 23 W. R. 162.

See, also, No. 832, post.

(c) Misconception of Point of Law.

824. General rule.]—*RENDALL v. HAYWARD*, No. 802, *ante*.

825. — — — — —.]—In an action for slander a new trial will not be granted on the ground that the damages were insufficient, unless there has been a mistake in point of law on the part of the presiding judge, or a mistake in the calculation of figures or misconduct by the jury.—*FORSDIKE v. STONE* (1868), L. R. 3 C. P. 607; 37 L. J. C. P. 301; 18 L. T. 722; 16 W. R. 976.

Annotations:—*Distd. Phillips v. South Western Ry.* (1879), 4 Q. B. D. 406. *Mentd. Tyne Alkali Co. v. Lawson* (1877), 36 L. T. 100; *Barker v. Lewis & Peat*, [1913] 3 K. B. 34.

826. Wrongful admission of evidence by sheriff.]—*TUTTON v. ANDREWS* (1740), Barnes, 448; 94 E. R. 998.

steam tugs, their owners brought actions for salvage. The lord ordinary awarded £850 to the larger & £350 to the smaller tug. On a reclaiming note the ct. increased the amount awarded to the larger tug to £1,200 but refused to interfere with the award to the smaller.—*LIVERPOOL STREAM TUG CO., LTD. v. CORNFOT* (1900), 2 F. (Ct. of Sess.) 1060; 37 Sc. L. R. 804; 8 S. L. T. 95.—*SCOT.*

PART VII. SECT. 4, SUB-SECT. 3.—C. (b).

k. General rule.]—A verdict will not be set aside on the ground that it is a compromise verdict if it can be justified upon any hypothesis presented by the evidence.—*CURRIE v. ST. JOHN'S RY. CO.* (1903), 36 N. B. R. 194.—*CAN.*

(d) Misconduct, Mistakes, and Omissions of Jury.

Verdict arrived at by compromise, *see* Sect. 4, sub-sect. 3, C. (b), *ante*.

827. General rule.]—FORSDIKE *v.* STONE, No. 825, *ante*.

828. Mistake in point of law.]—WOODFORD *v.* EADES (1721), 1 Stra. 425; 93 E. R. 612.

*Annotations:—*Expld. & Distd. Barker *v.* Dixie (1736), Lee *temp.* Hard. 279. Distd. Fayerman *v.* King (1828), 6 L. J. O. S. K. B. 330.

829. Costs considered in estimating damages.]—Where a jury have given very small damages, under the apparent erroneous notion that these will carry costs, it is no ground for setting aside their verdict.

The subject of costs not being one which a jury are to take into their consideration, there is no ground for an appln. to this ct. (TINDAL, C.J.).—MEARS *v.* GRIFFIN (1840), 1 Man. & G. 796; Drinkwater, 2; 2 Scott, N. R. 15; 4 Jur. 1016; 133 E. R. 553.

830. —.]—The jury having found a verdict for £5 5s. in an action for a trifling assault, evidently acting upon information given to them by pltf.'s counsel that a verdict for less would not give pltf. her costs, the ct. granted a new trial without imposing any terms.

The question is whether in performing the

function of awarding damages it is apparent that the jury have misconducted themselves. I think it is apparent they have (WILLIAMS, J.).—POOLE *v.* WHITCOMB (1862), 12 C. B. N. S. 770; 3 F. & F. 72, n.; 6 L. T. 783; 10 W. R. 732; 142 E. R. 1345.

831. Omission to take all elements of damage into account—Personal injuries.]—PHILLIPS *v.* LONDON & SOUTH-WESTERN RY. CO., No. 784, *ante*.

832. —.]—KARAVIAS *v.* CALLINICOS, [1917] W. N. 323, C. A.

833. Award of single instead of treble value.]—Where the jury, in an action of debt on 2 & 3 Ed. 6, c. 13, which gives treble value for not setting out tithes, found damages which amounted only to the single value:—*Held*: the ct. could not amend the *postea* by entering the verdict for the treble value.

The statute requires that the treble value should be given by the jury. How can we supersede the office of the jury by amending the *postea* in a matter which exclusively falls under their consideration? We cannot amend the *postea*. There is nothing to show that the jury have only found the single value (*per* CURIAM).—SANDFORD *v.* PORTER, SANDFORD *v.* CLARKE (1820), 2 Chit. 351.

PART VII. SECT. 4, SUB-SECT. 3.—
C. (d).

828 i. Mistake in point of law.]—Where a disputed item, forming one distinct head of pltf.'s demand, has been improperly disallowed by the jury, the principle upon which the ct. refuses a new trial to the pltf., for smallness of damage does not apply.—MADDOCK *v.* GLASS (1848), 5 U. C. R. 229.—CAN.

828 ii. —.]—Where a trespass had been proved which entitled pltf. to some damages, & the jury having found for deft., the ct. set the verdict aside, & ordered a new trial.—CUNNINGHAM *v.* HADLEY (1865), 1 Old. 530.—CAN.

831 i. Omission to take all elements of damage into account—Personal injuries.]—Although it is unusual to interfere with a verdict of a jury on the ground of inadequacy of the damages found, still such verdicts are subject to the supervision of the ct., & where the amount awarded be so small that it is evident the jury must have overlooked some material element of damage in a case for personal injuries, a new trial will be granted.—CHURCH *v.* OTTAWA CITY (1894), 25

O. R. 298; 22 A. R. 348.—CAN.

831 ii. —.]—Upon application for a new trial on the ground of inadequate damages in the case of personal injuries, when it is evident that the jury has not given proper attention to all the elements of pltf.'s claim, a new trial will be granted.—RYAN *v.* CANADIAN PACIFIC RY. CO., [1919] 2 W. W. R. 368.—CAN.

831 iii. —.]—As to inadequacy of damage the ct. will not interfere with the verdict unless it is satisfied that the jury has omitted to consider some elements of the case; the ct. might arrive at such conclusion were the damages unreasonably small.—MCNICOL *v.* BURNS (P.) & CO., LTD. & HODSON, [1919] 3 W. W. R. 621.—CAN.

831 iv. —.]—Where the damages awarded by a jury in an action for personal injuries are so insignificant as to lead to the irresistible conclusion that the jury omitted to take into account some of the heads of damage, which were properly involved in pltf.'s claim, the ct. will order a new trial.—BLANCHFIELD *v.* MURPHY (1912), 47 I. L. T. 24.—IR.

831 v. —.]—At the trial of an action for serious personal injuries, caused by deft.'s negligence, deft. produced no witnesses, the jury assessed the damages at one shilling, & the judge did not express any dissatisfaction with their finding; the majority of the ct. being of opinion, upon the evidence, that the amount of damages bore no reasonable proportion to the nature of the injuries, & inferring therefrom that the jury had not estimated the damages at all:—*Held*: that the verdict should be set aside, & a new trial granted.—BEATTIE *v.* MOORE (1878), 2 L. R. Ir. 28.—IR.

831 vi. —.]—A new trial granted, on the ground of the damages being too small, where the action was for a serious injury sustained by pltf., & alleged to have been caused by deft.'s negligence, & the jury found for pltf., but gave 1s. damages. In such a case, where a real injury has been sustained, the jury is bound to consider the extent of the injury & to award damages which are reasonably proportioned to it.—BALLOCK *v.* ANSTICE (1902), 22 N. Z. L. R. 385.—N.Z.

DANCING.

See THEATRES AND OTHER PLACES OF ENTERTAINMENT.

DAY.

See TIME.

DEAD FREIGHT.

See SHIPPING AND NAVIGATION.

DEAF AND DUMB.

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DEAN AND CHAPTER.

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DEATH DUTIES.

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WILLS; *and titles passim.*

DEBENTURES.

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DEBT, ACKNOWLEDGMENT OF.

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DECLARATIONS, DYING.

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<i>Bills of Sale</i>	„ BILLS OF SALE.	<i>Documentary Evidence</i>	„ EVIDENCE.
<i>Bonds</i>	„ BONDS.	<i>Negotiable Instruments</i>	„ BILLS OF EXCHANGE, PROMISSORY NOTES AND NEGOTIABLE INSTRUMENTS.
<i>Contracts</i>	„ BUILDING CONTRACTS, ENGINEERS AND ARCHITECTS; CONTRACT.	<i>Registration of Deeds</i>	„ REAL PROPERTY AND CHATTELS REAL.
<i>Covenants running with the Land</i>	„ LANDLORD AND TENANT; REAL PROPERTY AND CHATTELS REAL.	<i>Shipping Documents</i>	„ SHIPPING AND NAVIGATION.
		<i>Testimentary Documents</i>	„ WILLS.

NOTE.—Under this title documents of a non-testamentary character are treated generally. For deeds and instruments of a particular nature, *see* titles *passim*.

Part I.—Deeds.

SECT. 1.—DEFINITION, ENUMERATION AND EFFECT.

1. Definition.]—Prisoner altered the name of a person ordained so as to change it to his own & made other alterations in Letters of Orders signed, sealed & issued under his episcopal seal by the Bishop of Bath & Wells:—*Held*: such document was not a deed within Forgery Act, 1861 (c. 98), s. 20, & therefore prisoner could not be convicted of felony under that sect.

In some of the definitions given a deed is described as being something of the nature of a contract. But the term is clearly not confined to contracts. A charter of feoffment, for instance, is a deed; so is a gift or grant, a power of attorney, a release, or a disclaimer. I would go further & say that any instrument delivered as a deed, & which either itself passes an interest or property, or is in affirmance or confirmation of something whereby an interest or property passes, is a deed. Many documents under seal are not deeds; for instance, an award, though sealed. Again, a will is often under seal. So is a certificate of magistrates, a certificate of admission to the College of Physicians, or to other learned bodies. So is a share certificate. Yet it can hardly be said that all these are deeds. The probate of a will is very similar; it is given under the seal, formerly of the ordinary, now of the College of Probate. It is a certificate of the will having been proved & administration granted; but I never heard it suggested that that is a deed. I think, then,

that a letter of orders is not a deed (BOVILL, C.J.).—*R. v. MORTON* (1873), L. R. 2 C. C. R. 22; 42 L. J. M. C. 58; 28 L. T. 452; 37 J. P. 581; 21 W. R. 629; 12 Cox, C. C. 456, C. C. R.

Annotations:—*Mentd.* *Christchurch Gas Co. v. Kelly* (1887), 3 T. L. R. 634; *R. v. Riley*, [1896] 1 Q. B. 309.

2. What amounts to a deed — Whether actual transfer of instrument necessary.]—An instrument under seal contained a covenant with trustees that the covenantor in his lifetime or his exors. within twelve months after his decease would invest £60,000 in the names of trustees upon charitable trusts. It was executed by the covenantor but was not communicated to the trustees:—*Held*: it was a deed, whether it was also testamentary or not.

The instrument has all the requisites of a deed; it is in the form of an indenture, it is sealed & delivered by the covenantor in the presence of the attesting witness, & the collateral circumstance, that it has been kept in the possession of the covenantor, does not render it less a deed (WIGHTMAN, J.).—*ALEXANDER v. BRAME* (1855), 7 De G. M. & G. 525; 3 Eq. Rep. 919; 25 L. T. O. S. 298; 1 Jur. N. S. 1032; 3 W. R. 642; 44 E. R. 205, L. J.J.; *reversd.* on other grounds, *sub nom.* *JEFFRIES v. ALEXANDER* (1860), 8 H. L. Cas. 594, H. L. *Annotations*:—*Refd.* *Patch v. Shore* (1862), 2 Drew. & Sm. 589. *Mentd.* *Marsh v. A.-G.* (1860), 3 L. T. 615; *Richards v. Davies* (1862), 13 C. B. N. S. 69; *Brook v. Badley* (1867), L. R. 4 Eq. 106; *Coleman v. Llanelly Ry. & Dock Co.* (1867), 17 L. T. 86; *Fox v. Lownds* (1875), L. R. 19 Eq. 453; *Re Robson, Emley v. Davidson* (1881), 19 Ch. D. 156; *Cotton v. Imperial & Foreign Agency & Investment Corp.*, [1892] 3 Ch. 454.

PART I. SECT. 1.

a. What amounts to a deed.— Whether a receipt executed with for-

malities of a deed.]—A receipt indorsed on a bill of sale & executed with the formalities required in the case of a deed is not necessarily a deed.—

HURREY v. BANK OF NEW SOUTH WALES (1883), 1 N. Z. L. R. C. A. 115. —N.Z.

Sect. 1.—Definition, enumeration and effect. Sect. 2: Sub-sects. 1 & 2. Sect. 3: Sub-sect. 1, A.]

3. — **Whether instrument a deed although under seal—General rule.**—*R. v. MORTON*, No. 1, ante.

4. — **Not an award.**—*DOD & HERBERT* (1855), *Sty.* 459; 82 E. R. 861.

See, also, ARBITRATION, Vol. II., pp. 466, 467, Nos. 1114–1116, 1120.

5. — **Power of attorney.**—A power of attorney under seal to transfer stock in the public funds is a deed, & the uttering of such a power of attorney, knowing it to be forged, is an uttering of a forged deed within Perjury Act, 1728 (c. 25), s. 1, & is a capital offence under that statute.—*R. v. FAUNTLEROY* (1824), 2 Bing. 413; 1 C. & P. 421; 1 Mood. C. O. 52; 10 Moore, C. P. 1; 3 L. J. O. S. K. B. 86; 130 E. R. 365.

Annotations: Rejd. R. v. Mather (1830), 1 Mood. C. C. 291; *R. v. Morton* (1873), 42 L. J. M. C. 58.

6. — **Not licence to use patented article.**—*Seemle*: a licence, under seal, to use a patented article, does not require a stamp.

The instrument is not a deed; it does not purport to be sealed & delivered as a deed; it rather resembles an award, or a warrant of a magistrate, which though under seal, are not deeds (*PARKE, B.*).—*CHANTER v. JOHNSON* (1845), 14 M. & W. 408; 14 L. J. Ex. 289; 153 E. R. 534.

7. — **Not agreement by company signed by directors.**—An agreement was signed by three directors, on behalf of a co., & by defts., & also sealed with the co.'s seal:—*Feld*: the seal was only a statutory authentication of the contract, & the instrument declared on was therefore not a deed, & consequently the agreement might be rescinded by parol.—*SOLVENCY MUTUAL GUARANTEE CO. v. FROANE* (1861), 7 H. & N. 5; 31 L. J. Ex. 193; 7 Jur. N. S. 899; 158 E. R. 369.

Annotation:—Mentd. Re Solvency Mutual Guarantee Co., Hawthorne's Case (1862), 6 L. T. 574.

8. — **Not letters of ordination.**—*R. v. MORTON*, No. 1, ante.

Effect of—Estoppel.—*See ESTOPPEL.*

— **Deed obtained by fraud.**—*See MISREPRESENTATION & FRAUD; ESTOPPEL.*

— **Mistake.**—*See ESTOPPEL; MISTAKE.*

— **Deed executed under duress.**—*See CONTRACT*, Vol. XII., Part III., Sect. 3, sub-sect. 2; *ESTOPPEL; FRAUDULENT & VOIDABLE CONVEYANCES.*

— **Deed executed by infant.**—*See INFANTS & CHILDREN.*

— **Deed executed by lunatic.**—*See LUNATICS & PERSONS OF UNSOUND MIND.*

— **Deed executed by married woman.**—*See ESTOPPEL; HUSBAND & WIFE.*

— **Deed executed by corporation.**—*See ESTOPPEL; CORPORATIONS*, Vol. XIII., pp. 354–369, Nos. 922–1008.

— **Illegality of object.**—*See CONTRACT*, Vol. XII., Part VI.; *ESTOPPEL.*

SECT. 2.—CONSIDERATION.

SUB-SECT. 1.—IN GENERAL.

9. **Whether consideration essential.**—An acknowledgment of satisfaction by deed is a good bar,

PART I. SECT. 2, SUB-SECT. 1.

9.1. **Whether consideration essential.**—A. executed an informal instrument intending to convey a freehold estate to his natural son; there was a defect in the conveyance:—*Held*: the ct.

would not supply such defect because there was a consideration either valuable or meritorious; the bill must be dismissed.—*BLAKE v. BLAKE*, [1817] *Beet.* 375.—*IR.*

16 L. *Validity of consideration—May*

without anything received.—*PINNEL'S CASE* (1602), 5 Co. Rep. 117 a; 77 E. R. 237; *sub nom. PENNY v. CORE*, Moore, K. B. 677.

Annotations:—Rejd. Fitch v. Sutton (1804), 5 East, 330; *Steinman v. Magnus* (1809), 11 East, 390; *Sibree v. Tripp* (1846), 15 M. & W. 23; *Foakes v. Beer* (1884), 9 App. Cas. 605. *Mentd. Fletcher v. Urtell* (1867), 2 Keb. 285; *Geang v. Swaine* (1867), 1 Lut. 464; *Young v. Rudd* (1895), 5 Mod. Rep. 86; *Colt v. Nettterville* (1725), 2 P. Wms. 304; *Roades v. Barnes* (1756), 1 Keny. 391; *Stock v. Mawson* (1798), 1 Bos. & P. 286; *Bramston v. Robins* (1826), 12 Moore, C. P. 68; *Webb v. Weatherby* (1835), 1 Bing. N. C. 502; *De Wolf v. Bevan* (1844), 13 M. & W. 160; *Curlewis v. Clark* (1849), 3 Exch. 375; *Bidder v. Bridges* (1887), 37 Ch. D. 406; *Underwood v. Underwood* (1894), 70 L. T. 390.

10. — **Where there are several considerations mentioned in a deed, though one is bad, the deed is good for the rest, unless where the deed is rendered void by Act of Parliament.**

A deed is open to the objection of being founded on a bad consideration, but I doubt whether it is open to the objection of want of a good consideration (*LE BLANC, J.*).—*BUNN v. GUY* (1803), 4 East, 190; 1 Smith, K. B. 1; 102 E. R. 803.

Annotations:—Mentd. Bozon v. Farlow (1816), 1 Mer. 459; *Hughes v. Statham* (1825), 6 Dow. & Ry. K. B. 219; *Hornor v. Graves* (1831), 9 L. J. O. S. C. P. 192; *Hitchcock v. Coker* (1837), 6 Ad. & El. 438; *Proctor v. Sargent* (1840), 2 Scott, N. R. 289; *Whittaker v. Howe* (1841), 3 Beav. 383; *Thornbury v. Beville* (1842), 1 Y. & C. Ch. Cas. 554; *Mallan v. May* (1843), 11 M. & W. 653; *Green v. Price* (1845), 9 Jur. 857; *Aubin v. Holt* (1855), 2 K. & J. 66; *Mumford v. Gething* (1859), 7 C. B. N. S. 305; *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A. C. 535.

11. — **A party cannot avoid his own voluntary deed, although he may his own voluntary promise** (*ABBOTT, C.J.*).—*IRONS v. SMALLPIECE* (1819), 2 B. & Ald. 551; 106 E. R. 467.

Annotations:—Rejd. Lunn v. Thornton (1845), 1 C. B. 379; *Ward v. Audland* (1847), 16 M. & W. 862; *Doe d. Seebkristo v. East India Co.* (1856), 10 Moo. P. C. C. 140; *Douglas v. Douglas* (1869), 22 L. T. 127. *Mentd. Reeves v. Capper* (1838), 5 Bing. N. C. 136; *Langton v. Horton* (1842), 1 Hare, 549; *Gale v. Burnell* (1845), 7 Q. B. 850; *Normansel v. Cremp* (1847), 8 L. T. O. S. 339; *Barton v. Gainer* (1858), 31 L. T. O. S. 237; *Winter v. Winter* (1861), 4 L. T. 639; *Re Harcourt, Danby v. Tucker* (1883), 31 W. R. 578; *Re Ridgway, Ex p. Ridgway* (1885), 15 Q. B. D. 447; *Cochrane v. Moore* (1890), 25 Q. B. D. 57; *Kilpin v. Ratley*, [1892] 1 Q. B. 582; *Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149.

12. — **Express covenant under seal.**—An express covenant shall bind to performance.

The distinction between implied covenants by operation of law & express covenants, is, that express covenants are taken more strictly. A man may, without consideration, enter into an express covenant under hand & seal (*LORD MANSFIELD, C.J.*).—*SHUBRICK v. SALMOND* (1765), 3 Burr. 1037; 97 E. R. 1022.

Annotations:—Rejd. M'Andrew v. Adams (1834), 3 L. J. C. P. 236; *Moel Tryvan Ship Co. v. Weir*, [1910] 2 K. B. 844. *Mentd. Harper v. M'Carthy* (1806), 2 Bos. & P. N. R. 258.

13. — **The covenant being under seal requires no consideration to make it binding** (*SHADWELL, V.-C.*).—*CLOUGH v. LAMBERT* (1839), 10 Sim. 174; 3 Jur. 672; 59 E. R. 579.

Annotations:—Rejd. Fletcher v. Fletcher (1844), 4 Hare, 67; *Re Cavendish Browne's Settmt. Trusts, Horner v. Rawle* (1916), 61 Sol. Jo. 27. *Mentd. Wilson v. Wilson* (1848), 1 H. L. Cas. 538.

14. — **Deed of compromise.**—A deed entered into by parties apprized of their rights, in order to put an end to a suit, although upon inadequate consideration, shall not be set aside.—*STEPHENS v. BATEMAN (LORD)* (1778), 1 Bro. C. C. 22; 28 E. R. 962, L. C.

15. — **Enforcement in equity.**—A deed

be challenged.—Although a valuable consideration be specified in a deed, it is a question for the jury whether such same consideration is real or fictitious.—*Doe d. BARLOW v. HATFIELD* (1843), 3 Kerr. 122.—*CAN.*

which, on the face of it, does not show a fair & reasonable consideration cannot be supported in equity. An inadequate money consideration cannot be combined with a consideration of "natural love & affection" for the purpose of supporting a deed.—*HUGHES v. SEANOR* (1869), 18 W. R. 108; *on appeal* (1870), 18 W. R. 1122, L. C.

In settlements.—See SETTLEMENTS.

16. Validity of consideration — May be challenged.—*BUNN v. GUY*, No. 10, *ante*.

17. Effect of failure of consideration — Total failure.—Where debt. covenants by deed, reciting a consideration, to pay an annual sum to pltf., the covenant is good, though the consideration appears to be void.—*MAY v. TRY* (1677), *Freem. K. B.* 447; 89 E. R. 334; *sub nom.* *MAYHUR v. TRY*, 3 Keb. 764; *sub nom.* *MAYSHEW v. TRY*, 3 Keb. 780.

18. — — ——When a deed contains several independent covenants some of which are illegal & void, the others may nevertheless be enforced.

The failure of consideration is nothing in the case of a contract under seal (*PARKE, B.*).—*WALLIS v. DAY* (1837), 2 M. & W. 273; *Murp. & H.* 22; 6 L. J. Ex. 92; 1 Jur. 73; 150 E. R. 759.

Annotations :—*Mentd.* *Allsopp v. Wheatecroft* (1872), L. R. 15 Eq. 59; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Davies v. Davies* (1887), 36 Ch. D. 359; *Maxium Nordenfeldt Guns & Ammunition Co. v. Nordenfeldt*, [1893] 1 Ch. 630; *Phillips v. Stevens* (1899), 15 T. L. R. 325; *McEllistirm v. Ballymacelligott Co-op. Agricultural & Dairy Soc.*, [1919] A. C. 548.

19. — Partial failure.—*BUNN v. GUY*, No. 10, *ante*.

20. — — ——*WALLIS v. DAY*, No. 18, *ante*.

21. Sufficiency of consideration — Whether monetary consideration essential.—A bargain & sale "for divers causes & considerations" without money, is not good, though it be recited that the bargainee was bound by recognizance for the bargainor.—*WARD v. LAMBERT* (1595), *Cro. Eliz.* 394; 78 E. R. 639.

Annotation :—*Mentd.* *Foster v. Foster* (1862), 1 Keb. 319.

22. — Voluntary covenant.—A voluntary covenant is sufficient to support a creditor's suit against the representatives of the covenantor.—*WATSON v. PARKER* (1843), 6 Beav. 283; 12 L. J. Ch. 221; 7 Jur. 143; 49 E. R. 835; *subsequent proceedings* (1846), 1 Coop. temp. Cott. 54.

Annotation :—*Mentd.* *Drake v. Drake* (No. 1) (1858), 25 Beav. 641.

16 II. — — ——A. conveyed absolutely to defts. in consideration of 5s.:—*Held*: the conveyance being impeached it was competent to show the existence of consideration other than the 5s. expressed.—*BANK OF TORONTO v. ECCLES* (1860), 10 C. P. 282; *affd.* 2 E. & A. 53.—*CAN.*

17 I. Effect of failure of consideration—Total failure.—Where an instrument which should be registered was deprived of its value as a security by one party's refusal to register it:—*Held*: it was no longer a sufficient consideration to bind the other party.—*CODNER v. WADE* (1829), 2 Nfld. L. R. 1.—*NFLD.*

21 I. Sufficiency of consideration—Whether monetary consideration essential.—To constitute a valuable consideration to support a deed, it is not necessary that it should be a money consideration.—*CROCKFORD v. EQUITABLE INSURANCE CO.* (1863), 5 All. 651.—*CAN.*

21 II. — — ——A. entered into an agreement whereby he conveyed land to his son, "on account of natural love," the son to give his father one-half of the produce, if demanded:—*Held*: valuable consideration.—*LEECH v. LEECH* (1865), 11 Gr. 572.—*CAN.*

21 III. — — ——No pecuniary consideration is necessary to support

23. — Inadequate money consideration—Combined with natural love & affection.—*HUGHES v. SEANOR*, No. 15, *ante*.

SUB-SECT. 2.—VOLUNTARY PROMISES AND CONVEYANCES.

See SETTLEMENTS; SPECIFIC PERFORMANCE; TRUSTS & TRUSTEES.

Voluntary assignments.—See CHOSSES IN ACTION, Vol. VIII., pp. 456, 457, Nos. 288–298, & pp. 496–500, Nos. 613–638.

— **Under 13 Eliz. c. 5.**—See FRAUDULENT & VOIDABLE CONVEYANCES.

Conveyance of land without consideration.—See REAL PROPERTY & CHATTELS REAL.

SECT. 3.—WHEN A DEED IS NECESSARY.

SUB-SECT. 1.—AT COMMON LAW.

A. In General.

24. Assignment of right created by deed.—*LINCOLN COLLEGE'S CASE* (1505), 3 Co. Rep. 53 a; 76 E. R. 757.

Annotations :—*Feld.* *Noke v. Awder* (1595), *Cro. Eliz.* 373; *Re Casey's Patents, Stewart v. Casey*, [1892] 1 Ch. 104. *Mentd.* *Denny v. Lemman* (1615), *Hob.* 135; *Spirit v. Hince* (1634), *Cro. Car.* 368; *Lyn v. Wyn* (1665), *O. Bridg.* 122; *Bouls v. Horton* (1672), *Freem. K. B.* 56; *Wakeman v. Blackwell* (1676), 1 Mod. Rep. 218; *Williamson v. Hancock* (1676), 1 Mod. Rep. 192; *R. v. London Bp.* (1693), 1 Show. 441; *Smith v. Tyndal* (1705), 2 Salk. 685; *Taylor v. Horde* (1757), 1 Burr. 60; *Wolferstan v. Lincoln Bp.* (1763), 2 Wils. 174; *Malins v. Freeman* (1838), 6 Scott, 187; *Gosling v. Veley* (1850), 14 L. T. O. S. 526; *Crofts v. Middleton* (1856), 8 De G. M. & G. 192.

25. Contract by instrument under seal.—(1) If a contract is required to be by instrument under seal, it must be intended that it should be by deed (*PARKE, B.*).

(2) An instrument which has a blank in it, which prevents it from having any operation when it is sealed & delivered, cannot become a valid deed by being afterwards filled up (*PARKE, B.*).

(3) There is no case which shows that an instrument which, when executed is incapable of having any operation & is no deed can afterwards become a deed by being completed & delivered by a

an assignment of the equity of redemption to a mtgee.—*ORR v. DUFFY* (1830), 3 Ir. L. Rep. 1st ser. 230.—*IR.*

b. — Whether necessity of equal value with property conveyed.—In order to constitute a valuable consideration to support a conveyance, it is not necessary that the money paid should be of equal value with the property conveyed, provided the transaction is *bona fide*.—*PAYSON v. GOOD* (1846), 3 Kerr. 272.—*CAN.*

c. Absence of consideration — Who may set up.—Want of consideration for a deed, can only be set up by the grantor or those claiming under him.—*HICKMAN v. NORTH BRITISH INSURANCE CO.* (1870), 2 Han. 235.—*CAN.*

d. — Whether grantor when absence occasioned by own act.—A man executed to his son-in-law a deed of his farm, subject to a life estate in the grantor, in consideration of the grantee's agreeing to assist the grantor in working the place during his life, & to indemnify him against certain mtges. The father-in-law filed a bill to set aside the deed on the ground that the conveyance incorrectly mentioned the consideration, & that the true consideration was not in writing; but as it appeared that his son-in-law had recommended a writing, & the grantor had voluntarily preferred to dispense with

it, the ct. declined to cancel the transaction.—*CAMERON v. SUTHERLAND* (1870), 17 Gr. 286.—*CAN.*

e. — Onus probandi.—An action of ejectment was brought by a son for land which his father had deeded to him. The consideration named in the deed was \$400, but it was admitted that the money paid had not been paid. The judge instructed the jury that as the deed acknowledged the payment of the consideration money the burden of proving want of consideration was on deft.:—*Held*: the instruction to the jury was likely to mislead.—*HARVEY v. HARVEY* (1888), 21 N. S. R. 172.—*CAN.*

f. Whether amount mentioned in deed conclusive evidence.—The amount mentioned in a conveyance as the consideration money is not conclusive evidence of the true consideration in favour of vendor.—*SHANK v. COULT-HARD* (1872), 19 Gr. 324.—*CAN.*

PART I. SECT. 3. SUB-SECT. 1.—A.

24 I. Assignment of right created by deed.—Def., owner in fee, conveyed to D. D. then leased to pltf., & afterwards, by writing, without deed, assigned to deft. all the rent to become due under the lease:—*Held*: there could be no assignment of the rent without deed.—*DOVE v. DOVE* (1868), 13 C. P. 424.—*CAN.*

Secl. 3.—When a deed is necessary: Sub-sect. 1, A. & B. (a).]

stranger, in the absence of the party who executed, & unauthorised by instrument under seal (PARKE, B.).—HIBBLEWHITE v. M'MORINE (1840), 6 M. & W. 200; 9 L. J. Ex. 217; 4 Jur. 769; *sub nom.* HEBBLEWHITE v. M'MORINE, 2 Ry. & Can. Cas. 51.

Annotations:—*As to (2) Consd. Re North British Australasian Co. & Joint Stock Companies Acts, 1856 & 1857, Ex p. Swan* (1859), 7 Q. B. N. S. 400; *Taylor v. Great Indian Peninsular Ry.* (1859), 28 L. J. Ch. 285; *Burgis v. Constantine*, [1908] 2 K. B. 484. *Reid. L. & B. Ry. v. Fairclough* (1841), 2 Man. & G. 674; *Enthoven v. Hoyle* (1852), 18 L. T. O. S. 317; *France v. Clark* (1884), 26 Ch. D. 247; *Soc. Générale de Paris v. Walker* (1885), 11 App. Cas. 20; *Magnus v. Queensland National Bank* (1887), 36 Ch. D. 26. *As to (3) Reid. Swan v. North British Australasian Co.* (1862), 7 H. & N. 603; *Powell v. London & Provincial Bank*, [1893] 2 Ch. 555. *Generally, Reid. Davidson v. Cooper* (1844), 13 M. & W. 243; *Fazakerly v. McKnight* (1858), 26 L. J. Q. B. 30; *Tupper v. Foulkes* (1861), 9 C. B. N. S. 797. *Mentd. De Medina v. Norman* (1842), 9 M. & W. 820; *Sims v. Marryat* (1851), 17 Q. B. 281.

Assignment of chose in action.]—See CHOSSES IN ACTION, Vol. VIII., p. 425, Nos. 44–46.

B. Creation or Conveyance of Incorporeal Hereditaments.

(a) In General.

26. General rule.]—A right to come & remain for a certain time on the land of another can be granted only by deed; & a parol licence to do so, though money be paid for it, is revocable at any time, & without paying back the money.

That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed, is a proposition so well established, that it would be mere pedantry to cite authorities in its support. All such inheritances are said emphatically to lie in grant, & not in livery, & to pass by mere delivering of the deed. In all the authorities & text-books on the subject, a deed is always stated or assumed to be indispensably requisite; & although the older authorities speak of incorporeal inheritance, yet there is no doubt but that the principle does not depend on the quality of interest granted or transferred, but on the nature of the subject-matter; a right of common, for instance, which is a *profit à prendre*, or a right of way, which is an easement, or right in nature of an easement, can no more be granted or conveyed for life or for years without a deed, than in fee simple (ALDERSON, B.).—WOOD v. LEADBITTER (1845), 13 M. & W. 838; 14 L. J. Ex. 161; 4 L. T. O. S. 433; 9 J. P. 312; 9 Jur. 187; 153 E. R. 351.

Annotations:—*Consd. Hurst v. Picture Theatres*, [1915] 1 K. B. 1. *Reid. Adams v. Andrews* (1850), 15 Q. B. 284; *Roffey v. Henderson* (1851), 17 Q. B. 574; *Taplin v. Florence* (1851), 10 C. B. 744; *Frogley v. Lovelace* (1859), *John*, 333; *Vaughan v. Hampson* (1875), 33 L. T. 15; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Ward v. Livesey* (1887), 5 R. P. C. 102; *Aldin v. Latimer, Clark, Muirhead*, [1894] 2 Ch. 437; *Kerrison v. Smith*, [1897] 2 Q. B. 445; *Jones v. Tankerville*, [1909] 2 Ch. 440. *Mentd. Langford v. Brighton, Lewes & Hastings Ry.* (1845), 4 Ry. & Can. Cas. 69; *Mayfield v. Robinson* (1845), 7 Q. B. 486; *Thomas v. Fredricks* (1847), 10 Q. B. 775; *Washbourne v. Burrows* (1847), 16 L. J. Ex. 266; *Hewitt v. Isham* (1851), 7 Exch. 77; *Electric Telegraph Co. v. Salford Overseers* (1855), 11 Exch. 181; *Wright v. Stavert* (1860), 2 E. & E. 721; *Davies v. Marshall* (1861), 10 C. B. N. S. 697; *Evans v. Robins* (1862), 1 H. & C. 302; *Hill v. Tupper* (1863), 32 L. J. Ex. 217; *Wakley v. Froggatt* (1863), 2 H. & C. 669; *Cornish v. Stubbs* (1870), L. R. 5 C. P. 334; *Francis v. Cockerell* (1870), 22 L. T. 203; *Wells v. Kingston-upon-Hull Corpn.* (1875), L. R. 10 C. P.

402; *Smith v. Lambeth Assessment Committee* (1882), 52 L. J. M. C. 1; *Butler v. M. S. & L. Ry.* (1888), 21 Q. B. D. 207; *Hall v. Metcalfe*, [1892] 1 Q. B. 208; *Thomas v. Jennings* (1896), 66 L. J. Q. B. 5; *Lowe v. Adams*, [1901] 2 Ch. 598; *L. C. C. v. Dundas*, [1904] P. 1; *Warr v. L. C. C.* (1904), 73 L. J. K. B. 362; *Said v. Butt*, [1920] 3 K. B. 497.

27. —.]—The grant of an incorporeal hereditament could only be effectually granted by deed (BAYLEY, J.).—BRYAN v. WHISTLER (1828), 8 B. & C. 288; 2 Man. & Ry. K. B. 318; 6 L. J. O. S. K. B. 302; 108 E. R. 1050.

Annotations:—*Reid. Wood v. Leadbitter* (1845), 13 M. & W. 838; *Taplin v. Florence* (1851), 10 C. B. 744; *Ashby v. Harris* (1868), L. R. 3 C. P. 523. *Mentd. Kerrison v. Smith* (1897), 66 L. J. Q. B. 762; *North Manchester Overseers v. Winstanley*, [1908] 1 K. B. 835.

28. —.]—Declaration, in *assumpsit*, alleged that pltf. agreed to grant & let, & deft. to take, a messuage at D. in the parish of M., with exclusive licence to shoot & sport over the manor of D. in the parishes of M. & L. & to fish in the waters thereof, during the term; to hold the messuage, right, liberties, & premises, for the term, at a rent; mutual promises; & that pltf. let the messuage, right, liberties, & premises to deft., who entered into & upon the same, & became & was possessed thereof for the term; breach, non-payment of rent. On general demurrer:—*Held*: bad, inasmuch as the agreement showed a demise of an incorporeal hereditament, which could only be by deed, & the letting as subsequently alleged, if otherwise available to support the action, should have appeared to be by deed.—BIRD v. HIGGINSON (1837), 6 Ad. & El. 824; 6 L. J. Ex. 282; 1 J. P. 322; 112 E. R. 316, Ex. Ch.; *affg.* (1835), 2 Ad. & El. 696.

Annotations:—*Reid. Ratton v. Davis* (1841), 1 Gal. & Dav. 21; *Doe d. Morgan v. Powell* (1844), 7 Man. & G. 980. *Mentd. Worley v. Harrison* (1835), 3 Ad. & El. 669; *Hayselden v. Staff* (1836), 6 Nev. & M. K. B. 659; *R. v. Hockworthy* (1838), 7 Ad. & El. 492; *Upward v. Knight* (1839), 7 Scott, 311; *Clarke v. Allatt* (1847), 4 C. B. 335; *Thomas v. Fredricks* (1847), 10 Q. B. 775; *Callander v. Howard* (1850), 10 C. B. 290; *Howell v. Rodbard* (1850), 4 Exch. 309; *Thames Haven Dock & Ry. v. Brymer* (1850), 5 Exch. 696; *Partridge v. Gardner* (1851), 6 Exch. 621; *Cannon v. Rimington* (1852), 12 C. B. 514; *Brown v. Peto*, [1900] 2 Q. B. 653.

29. —.]—The judge admitted in evidence an unsealed instrument purporting to be the lease of a ferry. We are clearly of opinion that it is not a lease, because it can have no operation as such, purporting to be a grant of an incorporeal hereditament, without seal (LORD DENMAN, C.J.).—MAYFIELD v. ROBINSON (1845), 7 Q. B. 486; 14 L. J. Q. B. 265; 5 L. T. O. S. 389; 9 Jur. 826; 115 E. R. 572.

Annotation:—*Mentd. Stratton v. Pettit* (1855), 16 C. B. 420.

30. —.]—An interest of freehold or quasi freehold character cannot be created by parol or by mere written agreement.—DOSSEE v. DOE d. EAST INDIA CO. (1859), 1 L. T. 345; *sub nom.* AMUNDOMOHEY DOSSEE v. EAST INDIA CO., 8 W. R. 245, P. C.

31. Assignment of right in gross.]—SLOWMAN v. WEST (1623), Palm. 387; 81 E. R. 1136.

32. Rentcharge—Assignment in gross.]—ANON. (1340), Jenk. 26; 145 E. R. 19.

33. —Release.]—A declaration* on a promise in consideration of relinquishing a rent must show that the relinquishment was by deed.—GREGORY v. NEVILL (1593), Cro. Eliz. 292; 78 E. R. 546.

34. —Creation or grant—Partition.]—Re

PART I. SECT. 3, SUB-SECT. 1.—B. (a).

26 I. General rule.]—The owner of lands authorised two persons by an instrument in writing not sealed, to

dig for minerals, they agreeing to give the owner a part of all the minerals they might take:—*Held*: the interest intended to be conveyed was an incorporeal freehold or tenement, & could only be created by deed.—ROSS

v. FOX (1867), 13 Gr. 683.—CAN.

26 II. —.]—If a licence amount to a grant of an incorporeal right, it should be under seal.—MCKENZIE v. McGLAUGHLIN (1865), 8 O. R. 111.—CAN.

STODDARD (1622), Toth. 31; Duke, 81; 21 E. R. 114.

Annotation.—*Reid. Jenner v. Harper* (1714), 1 P. Wms. 247.

35. Right to construct & use drains.]—Declaration stated, that one A. was seised in fee of an inn, & yard thereto adjoining, & by indenture demised the same to pltf. for a term of years, which was undetermined; that deft. was possessed of a certain other yard adjoining the premises of pltf., as tenant thereof to A. B.; & that deft. & his landlord granted to A., his heirs & assigns, licence to make at the costs of A., a drain from the inn, across a certain part of the yard of deft., into the yard of pltf.; & that A., his heirs, etc. should have the foul water collected in the scullery of the inn, to flow from the same, through the said drain, across the yard of deft., & into the yard of pltf., for so long time as need & occasion should require for the convenient occupation of the messuage or its appurtenances. Breach, that deft., without notice, obstructed the drain. Another count stated the grant to be for so long time as deft. should continue in possession or occupation of the land, or so long as the same should be requisite for the convenient occupation of the messuage. It appeared in evidence that the licence to construct & continue the drain was by parol:—*Held*: as the right claimed in the declaration was a freehold right, assuming that it was an easement only upon the land of another, & not an interest in the land, it could not be created without deed.—*HEWLINS v. SHIPPAM* (1826), 5 B. & C. 221; 7 Dow. & Ry. K. B. 783; 4 L. J. O. S. K. B. 241; 108 E. R. 82.

Annotations.—*Folld. Cocker v. Cowper* (1834), 1 Cr. M. & R. 418. *Apld. Wood v. Leadbitter* (1845), 13 M. & W. 838; *Aldin v. Latimer, Clark, Muirhead*, [1894] 2 Ch. 437. *Reid. Liggins v. Inge* (1831), 7 Bing. 682; *Wallis v. Harrison* (1838), 1 Horn & H. 405; *Perry v. Fitzhove* (1846), 8 Q. B. 757; *Taplin v. Florence* (1851), 10 C. B. 744; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Hurst v. Picture Theatres*, [1915] 1 K. B. 1. *Mentd. Mounsey v. Ismay* (1865), 12 L. T. 26; *Met. Ry. v. Fowler*, [1892] 1 Q. B. 165.

36. —.]—A verbal licence is not sufficient to confer an easement for having a drain in the land of another to convey water, and such licence may be revoked though it has been acted upon.—*COCKER v. COWPER* (1834), 1 Cr. M. & R. 418; 5 Tyr. 103; 149 E. R. 1143.

Annotations.—*Consd. Wood v. Leadbitter* (1845), 13 M. & W. 838. *Apld. Aldin v. Latimer, Clark, Muirhead*, [1894] 2 Ch. 437.

37. Annuity secured by transfer of lands.]—In 1792, a sum of £32,000 was raised by way of tontine, viz., by subscribers for various amounts, who were to receive during the lives of *cestuis que vie* nominated by them respectively annuities proportioned to the amounts respectively subscribed which were secured by conveying to trustees freehold lands of large value, upon trust to raise an annuity of £880, & divide it among the subscribers during the lives of their *cestuis que vie*. Each subscriber had a debenture handed to him, in which the amount of his subscription & of his annuity at that date, & the name & age of the *cestui que vie*, were set forth; & also that it was expressly provided in the deed that any person holding the debenture might give a receipt for the annuity due on the debenture, & that no payment could be made to any subscriber without his producing the debenture at the time of payment:—*Held*: the annuity to which a subscriber was thus entitled was an interest in lands which could not pass by delivery of the debenture but required a deed.—*Re O'HARA'S TONTINE & TRUSTEE RELIEF ACT* (1857), 30 L. T. O. S. 128; 3 Jur. N. S. 1145; 6 W. R. 45.

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38. Grant of advowson.]—*PANNELL v. HODGSON* (1576), Cary, 52; 21 E. R. 28.

39. —.]—*CRISP'S CASE* (1589), Cro. Eliz. 164; 78 E. R. 422.

40. Appointment of church warden — Office for year.]—The office of churchwarden was by common law, & yet that is for a year without any deed or writing; so it is of a parish clerk, he is by common law an officer, & is in for life without deed (*per CUR.*).—*ANON.* (1713), Sess. Cas. K. B. 12; 93 E. R. 11.

41. Appointment of parish clerk—Office for life.]—*ANON.*, No. 40, *ante*.

42. Demise of tithes.]—*ANON.* (1607), 1 Brownl. 98; 123 E. R. 690.

43. —.]—*BALTHORP v. BELLAMY* (1627), Benl. 202; 73 E. R. 1058.

44. —.]—*BERNARD v. EVENS* (1661), 1 Lev. 24; 1 Keb. 5; 83 E. R. 279; *sub nom. BARNARD v. EWEN*, 1 Keb. 21; T. Raym. 14.

See, further, ECCLESIASTICAL LAW.

45. Demise of tolls — Bridge toll.]—In a document of the reign of Ed. II., & in other documents down to the time of Charles I. certain bridge tolls were called traverse; & it appeared that the tolls had passed by grants conveying likewise the manor & castle of H. of which S. & those preceding him were also owners. S. & those preceding him, had for 20 years performed the repairs of the bridge, including excavations in the soil at the bottom of the river, & the planking of the carriage way, but had not repaired the carriage way. The tolls were actually received by E. who paid rent for them to S., under a parol agreement by which E. contracted with S. for the receipt of the tolls at such rent:—*Held*: S. was nevertheless the ratable party, since the agreement did not profess to demise the lands, & the tolls, as such, could not pass from him without deed.—*R. v. SALISBURY (MARQUIS)* (1838), 8 Ad. & El. 716; 3 Nev. & P. K. B. 476; 1 Will. Woll. & H. 444; 7 L. J. M. C. 110; 2 Jur. 658; 112 E. R. 1009.

Annotation.—*Consd. L. & N. W. Ry. v. Buckmaster* (1875), L. R. 10 Q. B. 444.

— **By corporation.]**—*See CORPORATIONS*, Vol. XIII., p. 375, Nos. 1062–1064.

46. Demise of sporting rights—Fishery.]—Where a subject is owner of a several fishery in a navigable river, where the tide flows & reflows, granted to him, as must be presumed, before Magna Carta, by the description of *separatam piscariam*, that is an incorporeal & not a territorial hereditament, & a term for years in it cannot be created without deed.—*SOMERSET (DUKE) v. FOGWELL* (1826), 5 B. & C. 875; 8 Dow. & Ry. K. B. 747; 5 L. J. O. S. K. B. 49; 108 E. R. 325.

Annotations.—*Mentd. Holford v. Bailey* (1849), 13 Jur. 278; *Whitstable Free Fishers & Dredgers v. Gann, Gann v. Johnson* (1861), 11 C. B. N. S. 387; *Marshall v. Ulcewater Steam Navigation Co.* (1863), 3 B. & S. 732; *Bridgewater's Trustees v. Bootle Surveyors* (1866), 7 B. & S. 348; *A.-G. v. Emerson*, [1891] A. C. 649; *Hindson v. Ashby*, [1896] 2 Ch. 1; *Ecroyd v. Coulthard* (1897), 77 L. T. 357; *Beaufort v. Aird* (1904), 20 T. L. R. 602.

47. —.]—*BIRD v. HIGGINSON*, No. 28, *ante*.

48. —.]—A landlord was restrained by injunction from interfering with his tenant in the exercise of the exclusive right of sporting & killing game according to an agreement not under seal, until a lease should be executed under seal according to such agreement, pursuant to the decree in the cause.—*FROGLEY v. LOVELACE (EARL)* (1859), John. 333; 70 E. R. 450.

Annotations.—*Consd. Hurst v. Picture Theatres*, [1915] 1 K. B. 1. *Reid. Jones v. Tankerville*, [1909] 2 Ch. 440.

49. — Shooting.]—Declaration or a written agreement, not under seal, by pltf. to let land to

Sect. 3.—When a deed is necessary: Sub-sect. 1, B.
(a), (b) & (c), C., D. & E.]

deft. for two years, & by deft. to make satisfaction for damage done to tenants by game on their farms, over which he was to be at liberty to preserve the game:—*Held*: the agreement to make compensation was not void, although the right of shooting, being an incorporeal hereditament, did not pass by it.—*THOMAS v. FREDRICKS* (1847), 10 Q. B. 775; 16 L. J. Q. B. 393; 11 Jur. 942; 116 E. R. 294.

Annotation:—*Mentd.* Knowlman v. Bluet (1874), L. R. 9 Exch. 307.

50. ————]—*LOWE v. ADAMS*, [1901] 2 Ch. 598; 70 L. J. Ch. 783; 85 L. T. 195; 50 W. R. 37; 17 T. L. R. 763.

Annotations:—*Refd.* Jones v. Tankerville, [1909] 2 Ch. 440. *Mentd.* Hurst v. Picture Theatres, [1915] 1 K. B. 1.

Grant of Court Leet.—*See* COPYHOLDS, Vol. XIII., p. 35, No. 366.

(b) Easements.

See EASEMENTS & PROFITS À PRENDRE.

(c) Reversionary Interests.

51. To pass reversion—Yearly tenant.—A reversion of a tenancy from year to year cannot pass without a deed.—*BRAWLEY v. WADE* (1824), 1 M'Cle. 664; 148 E. R. 278.

52. — Tenant for years.—Where the owner of certain lands, by deed, describing them as in the possession of himself, & granted, assigned, transferred, & set over, directed, limited, & appointed the same to C. for li'e, but no livery of seisin was made:—*Held*: the deed operated as a valid grant of the reversion of that part of the premises in the occupation of A.

Where the right of possession is in a tenant for years the right of the landlord is a reversion expectant on the determination of the tenancy & lies in grant & not in livery (*BAYLEY, J.*).—*DOE d. WERE v. COLE* (1827), 7 B. & C. 243; 1 Man. & Ry. K. B. 33; 6 L. J. O. S. K. B. 20; 108 E. R. 714.

Annotation:—*Mentd.* Copestake v. Hoper, [1906] 2 Ch. 10.

53. — Benefit of covenant in lease.—*BADELEY v. VIGURS* (1854), 4 E. & B. 71; 23 L. J. Q. B. 377; 23 L. T. O. S. 297; 1 Jur. N. S. 159; 2 C. L. R. 1027; 119 E. R. 28.

C. Licence to enter on and make use of Land and Buildings.

See, generally, DISTRESS; EASEMENTS & PROFITS À PRENDRE; LANDLORD & TENANT; MINES & MINERALS; REAL PROPERTY & CHATELS REAL; THEATRES & OTHER PLACES OF ENTERTAINMENT; TRESPASS.

54. General rule.—A right to come & remain for a certain time on the land of another can be granted only by deed, & a parol licence to do so, though money be paid for it, is revocable at any time, & without paying back the money.—*WOOD v. LEADBITTER*, No. 26, ante.

55. ————]—A parol licence from A. to B. to go upon land, is countermandable at any time, whilst it remains executory; & if A. conveys his interest in the land to another, the licence is determined without notice to B.—*WALLIS v. HARRISON* (1838), 4 M. & W. 538; 1 Horn & H. 405; 8 L. J. Ex. 44; 2 Jur. 1019; 150 E. R. 1543.

Annotations:—*Refd.* Roffey v. Henderson (1851), 17 Q. B. 574. *Refd.* Wood v. Leadbitter (1845), 13 M. & W. 838. *Mentd.* Smith v. Colbourne, [1914] 2 Ch. 533.

PART I. SECT. 3, SUB-SECT. 1.—C.

54.1. General rule.—A licence coupled with the grant of an easement, the grant not being by deed, is void.—

BEAVER v. REED (1851), 9 U. C. R. 152.

—CAN.

60.1. Use of wall for bill-posting.—An agreement was made between the

56. ————]—*Qu.*: whether there can be an irrevocable licence to enter upon land, without its amounting to an interest in land, which therefore can pass only by deed.—*WILLIAMS v. MORRIS* (1841), 8 M. & W. 488; 11 L. J. Ex. 126; 151 E. R. 1131.

57. ————]—**Effect of Judicature Act, 1873 (c. 66).**—The position of matters now is that the ct. is bound under the above Act to give effect to equitable doctrines. The question we have to consider is whether, having regard to equitable consideration, *Wood v. Leadbitter*, No. 26, ante, is now law, meaning that *Wood v. Leadbitter* is a decision which can be applied in its integrity in a ct. which is bound to give effect to equitable consideration. In my opinion it is not. What was relied on in *Wood v. Leadbitter*, & rightly relied on at that date, was that there was not an instrument under seal, & therefore there was not a grant, & therefore the licensee could not say that he was not a mere licensee, but a licensee with a grant. That is now swept away. It cannot be said as against pltf. that he is a licensee with no grant merely because there is not an instrument under seal which gives him a right at law (*BUCKLEY, L.J.*).—*HURST v. PICTURE THEATRES, LTD.*, [1915] 1 K. B. 1; 83 L. J. K. B. 1836; 111 L. T. 972; 30 T. L. R. 642, C. A.

Annotations:—*Refd.* British Actors Film Co. v. Glover, [1918] 1 K. B. 299; *Joel v. International Circus & Christmas Fair* (1920), 124 L. T. 459; *Said v. Butt*, [1920] 3 K. B. 497. *Mentd.* Cox v. Coulson, [1916] 2 K. B. 177.

58. To remove fixtures—After completion of tenancy—Under licence from landlord.—An action was brought against the tenant of a house by his immediate predecessor in the tenancy, for obstructing & not permitting pltf. to enter the premises & remove certain fixtures annexed to the freehold, pursuant to a licence which the landlord had given in that behalf, before deft. had been let into possession, & while the interest of the landlord was reversionary. One of the pleas traversed the licence:—*Held*: the licence could only be proved by an instrument under seal.—*ROFFEY v. HENDERSON* (1851), 17 Q. B. 574; 18 L. T. O. S. 154; 16 Jur. 84; 117 E. R. 1401; *sub nom.* *RUFFEY v. HENDERSON*, 21 L. J. Q. B. 49.

Annotations:—*Refd.* London & Westminster Loan & Discount Co. v. Drake (1859), 6 C. B. N. S. 798; *Thomas v. Jennings* (1896), 66 L. J. Q. B. 5. *Mentd.* Leader v. Homewood (1858), 5 C. B. N. S. 546.

59. ————]—I am strongly disposed to agree that if the contract found by the jury was sought to be treated as a grant of a licence to enter upon the premises at a future time & to sever the fixtures from the freehold, it would be invalid as not being in writing & under seal (*HAWKINS, J.*).—*THOMAS v. JENNINGS* (1896), 66 L. J. Q. B. 5; 75 L. T. 274; 45 W. R. 93; 12 T. L. R. 637; 40 Sol. Jo. 731.

60. Use of wall for bill posting—& erection of hoarding.—Pltf. & deft. agreed orally that deft. should let his wall to pltf. for bill posting at £2 10s. a year, pltf. to erect a hoarding on which the bills were to be posted. Pltf. erected the hoarding, posted bills & made several payments. Deft. gave notice to pltf. that the hoarding must be removed & nearly a month later deft. took it down:—*Held*: although the permission to post bills was a licence & therefore, not being by deed, was revocable, the action was maintainable for breach of contract & therefore pltf. was wrongly

owner of a house & pltf., the owner agreeing to sell, & pltf., to take, for a term of five years, all the advertising privileges on a wall of the house, at

61. —.]—By an agreement in writing dated in July, 1913, & made between deft., therein described as "the licensor" & the pltf's. therein described as "the licensees," deft. gave pltf's. permission to affix posters & advertisements to the flank walls of a picture house proposed to be erected on his property by a co. about to be formed, for a period of four years from Nov. 1, 1913, or the first day the picture house should be opened for business, at a rent of £12 *per annum*, & deft. agreed that he would not, while the licence remained in force permit any other person to affix any advertisement to the walls, & would, if required by pltf's., take proceedings against any person affixing advertisements thereto. By an agreement for a lease of the site dated in Aug. 1913, & made between deft. & a trustee for the picture house co., deft. agreed to assign to the trustee all his interest in the agreement of July, & the trustee agreed to obtain the ratification by the co. when formed of that agreement. The co. was incorporated in Sept. 1913, & shortly afterwards the agreement of Aug. was ratified & the lease from deft. to the co. was executed. The lease contained no reference to the agreement of July. The co. having refused the permission granted by that agreement, the licensees brought an action for damages, for breach of the agreement against the licensor:—*Held*: the agreement did not create an interest in the land, but created merely a personal obligation on the part of the licensor to allow the licensees the use of the wall for advertisements, & as he had put it out of his power to fulfil his obligation under the agreement he was liable in damages for breach of contract.—KING v. ALLEN (DAVID) & SONS, BILLPOSTING, LTD., [1916] 2 A. C. 54; 85 L. J. P. C. 229; 114 L. T. 702. H. L.

62. Release of right in chattels.]—JENNOR & HARRIES CASE (1587), 1 Leon. 283; 74 E. R. 258.
Annotations:—Mentd. Leefe v. Saltingston (1674), Freem. K. B. 176; Goodtitle d. Pearson v. Otway (1753), 2 Wils. 6; Mansergh v. Campbell (1858), 3 De G. & J. 232.

63. Vested right of action.]—A right of action once vested can only be destroyed by a release under seal, or by the receipt of something in satisfaction of the wrong done; therefore in the case of an excessive distress for rent, a tenant does not waive his right of action, though he afterwards enters into a written agreement with his landlord concerning the sale of the effects seized.—WILLOUGHBY v. BACKHOUSE (1824), 2 B. & C. 821; 4 Dow. & Ry. K. B. 539; 2 L. J. O. S. K. B. 174; 107 E. R. 587.
Annotations:—Mentd. Baylis v. Usher (1830), 4 Moo. & P. 790; Roe v. Mutual Loan Fund Assocn. (1887), 56 L. T. 631.

See AGENCY, Vol. I., pp. 281, 282, Nos. 128-133, 136, 138.

a yearly rent. The document was not sealed:—*Held*: the agreement amounted merely to a revocable licence.—**CONNOR-RUDDY Co. v. ROBINSON-WHYTE Co.** (1909), 19 O. L. R. 138; 14 O. W. R. 284.—**CAN.**

67. — [To deliver deed.]—On Feb. 23, 1896, a deed of gift was executed by Mrs. S. by her attorney, S. L., by which in consideration of natural love & affection she gave to her daughter Miss S. all the pictures, chattels, & effects in her house, 5, Chesterfield Gardens, which were set out in a list made by her late husband. In 1898 her solr., amongst other business matters, read over the deed of gift to her & made the following note of the interview so far as it related to the deed: "Attending you as to the deed of gift to Miss S. & you desired us to retain same on her behalf. You would have a copy made of the original inventory & would send us the original to keep with the deed. Also as to the P. A. given to 'S. L.' & reminding you this had been prepared by Mr. M. & had never been in our possession." Shortly afterwards she sent the inventory to her solr. with a note on it in her handwriting as follows: "Mr. S.'s catalogue with annotations of pictures & works of art at 5, Chesterfield Gardens, now the property of Miss S." Mrs. S. subsequently changed her house & parted with some of the articles. She & her daughter lived together till 1901, when the daughter, in consequence of her mental condition, had to be placed under medical care. In an affidavit as to her daughter's property made in lunacy proceedings in 1902 Mrs. S. did not mention the articles the subject of the deed of gift. By her will made in 1910 Mrs. S. gave her pictures, furniture, & effects upon trust for her daughter for life & then for other persons. Mrs. S. died in Apr. 1911. It turned out that the power of attorney was not sufficiently wide to authorise S. L. to execute the deed of gift; & the trustees took out a summons to determine whether the chattels passed under the will or whether Mrs. S. had delivered or redelivered the deed so as to make it a valid operative instrument:—*Held*: in 1898 there was such an acknowledgment by Mrs. S. of the deed of gift that became a deed binding on her; that what passed must be treated as a delivery or redelivery of the deed; her knowledge that she was doing something to validate the transaction was immaterial; & the pictures & furniture passed to the daughter.

_____.]—*See* AGENCY, Vol. I., p. 281,
Nos. 128-130.

66 i. Power of attorney—Authority of agent—To execute deed.—An authority to execute a deed must be by deed.—*NELLES v. MALTRY* (1884), 5 O. R. 263.—**CAN.**

which need not be under seal.—Where an agent is authorised to sign an agreement which does not need to be under seal, the appointment of the agent need not be under seal.—**NATIONAL TRUST CO. v. NADON** (1915), 30 W. L. R. 588; 7 W. W. R. 1067.—**CAN.**

Sect. 3.—When a deed is necessary: Sub-sect. 1, *E., F., G., H. & I.*; sub-sects. 2 & 3. **Sect. 4:** Sub-sects. 1 & 2.]

68. — Authority to manage property—By co-owner.]—Persons of full age & ordinary intelligence entitled to property in equal undivided shares may commit the management of that property to one of their number with authority either qualified or absolute, to deal with it, & such arrangement need not be by deed, but may be established by proof of conduct.—**BLAKE v. BAYNE**, [1908] A. C. 371; 77 L. J. P. C. 97; 99 L. T. 35, P. C.

Annotation:—*Mentd. Vanneck v. Benham*, [1917] 1 Ch. 60.

Assignment of chose in action.]—See CHOSSES IN ACTION, Vol. VIII., p. 425, Nos. 44–46.

69. Warrant of attorney.]—Although a warrant of attorney may be contained in a deed, it is not necessary that it should be a deed (*per cur.*).—**KINNERSLEY v. MUSSEN** (1813), 5 Taunt. 264; 128 E. R. 691.

Annotation:—*Reid. Naylor v. Mortimore* (1864), 17 C. B. N. S. 207.

F. Gifts or Gratuities.

Gift of chattel without delivery.]—See GIFTS.

70. Gratuity—Grant of superannuation allowance.]—A superannuation allowance, granted by a resolution of the Board of Directors of the East India Co. to a retired clerk, under the authority of East India Co. Act, 1813 (c. 155), s. 93, is only a gratuity, & the grant, to be binding on the co., must be by deed.—**INNES v. EAST INDIA CO.** (1856), 17 C. B. 351; 25 L. J. C. P. 154; 26 L. T. O. S. 221; 2 Jur. N. S. 189; 4 W. R. 245; 139 E. R. 1108.

Annotations:—*Consd. Marchant v. Lee Conservancy Board* (1873), L. R. 8 Exch. 290. *Mentd. Re Keely, Ex p. Hawker* (1872), 20 W. R. 322; *Re Hayson, Booth v. Trail* (1883), 49 L. T. 471; *Lucas v. Harris* (1886), 18 Q. B. D. 127; *Wells v. Wells* (1914), 30 T. L. R. 437.

G. Contracts of Corporations.

See CORPORATIONS, Vol. XIII., pp. 285, 387, 388, 390, 394, 396, 397; Nos. 170, 1143, 1146, 1160, 1188, 1201, 1207.

H. Assignment of Letters Patent.

See PATENTS & INVENTIONS.

I. Apprenticeship Contracts.

See INFANTS & CHILDREN; MASTER & SERVANT.

SUB-SECT. 2.—BY STATUTE.

27 Hen. VIII., c. 16—Bargain & sale of freeholds.]—See REAL PROPERTY & CHATTELS REAL.

32 Hen. VIII., c. 28—Leases by ecclesiastical persons.]—See ECCLESIASTICAL LAW.

12 Car. II., c. 24—Appointment of guardian—By father.]—See INFANTS & CHILDREN.

Guardianship of Infants Act, 1886 (c. 27)—Appointment of guardian—By mother.]—See INFANTS & CHILDREN.

Bankruptcy Act, 1914 (c. 59)—Disentailing assurances of bankrupt's lands.]—See BANKRUPTCY & INSOLVENCY, Vol. V., p. 689, Nos. 6093, 6094.

Bills of Sale 1878 Amendment Act, 1882 (c. 43)—Bills of sale.]—See BILLS OF SALE, Vol. VII., p. 51, Nos. 268–271.

Clerical Disabilities Act, 1870 (c. 91)—Relinquishment of Holy Orders.]—See ECCLESIASTICAL LAW.

Companies Acts—Transfer of shares.]—See COMPANIES.

Conveyancing Act, 1881 (c. 41).]—See REAL PROPERTY & CHATTELS REAL; MORTGAGES; POWERS; HUSBAND & WIFE.

Conveyancing Act, 1882 (c. 39)—Disclaimer of power.]—See POWERS.

Ecclesiastical Leases Act, 1842 (c. 27)—Leases.]—See ECCLESIASTICAL LAW.

Ecclesiastical Leasing Act, 1842 (c. 108)—Leases.]—See ECCLESIASTICAL LAW.

Fines & Recoveries Act, 1833 (c. 74)—Disentailing assurances of freehold.]—See REAL PROPERTY & CHATTELS REAL.

Disentailing equitable estates in copyholds.]—See COPYHOLDS, Vol. XIII., p. 62, Nos. 758–760.

Consent of protector of settlement to disentailing assurance.]—See REAL PROPERTY & CHATTELS REAL.

Equitable estates in copyhold.]—See REAL PROPERTY & CHATTELS REAL.

Dispositions by married women.]—See HUSBAND & WIFE; REAL PROPERTY & CHATTELS REAL.

Glebe Exchange Act, 1815 (c. 147)—Conveyances.]—See ECCLESIASTICAL LAW.

Land Transfer Acts, 1875 (c. 87), & 1897 (c. 65)—Instruments of transfer, etc.]—See REAL PROPERTY & CHATTELS REAL; SALE OF LAND.

Married Women's Reversionary Interests Act, 1857 (c. 57)—Dispositions.]—See HUSBAND & WIFE.

Merchant Shipping Act, 1844 (c. 66)—Transfers, mortgages, & transfer of mortgages of British ships.]—See SHIPPING & NAVIGATION.

Apprenticeship to sea service.]—See SHIPPING & NAVIGATION.

Mortgage Debenture Acts, 1865 (c. 78), & 1870 (c. 20)—Mortgage debentures by companies.]—See COMPANIES.

Mortmain & Charitable Uses Acts, 1888 (c. 42), & 1891 (c. 73)—Assurances for charitable uses.]—See CHARITIES, Vol. VIII., pp. 265–281.

National Debt Act, 1870 (c. 71)—Power of attorney for transfer of shares—Transferable in books of Bank of England.]—See BANKING, Vol. III., p. 123, No. 4.

Public Health Act, 1875 (c. 55)—Contracts made by Urban Authorities over £50.]—See CORPORATIONS, Vol. XIII., pp. 384–386, 390, 394, Nos. 1125–1135, 1164, 1192; LOCAL GOVERNMENT; PUBLIC HEALTH & LOCAL ADMINISTRATION.

Real Property Act, 1845 (c. 106)—Alienation of contingent interests in land.]—See REAL PROPERTY & CHATTELS REAL.

Assignment of chattel interests—Not copyholds.]—See REAL PROPERTY & CHATTELS REAL.

Disclaimer by married women.]—See HUSBAND & WIFE.

Exchange.]—See REAL PROPERTY & CHATTELS REAL; COMPULSORY PURCHASE OF LAND & COMPENSATION, Vol. XI., p. 116, 118, Nos. 102, 114.

Leases.]—See LANDLORD & TENANT; REAL PROPERTY & CHATTELS REAL.

Partition.]—See PARTITION.

Surrender of interests other than copyholds—Or interests created by law without writing.]—See REAL PROPERTY & CHATTELS REAL.

Alienation of right of entry.]—See LANDLORD & TENANT; REAL PROPERTY & CHATTELS REAL.

Settled Estates Act, 1877 (c. 18)—Leases.]—See SETTLEMENTS.

Settled Land Acts, 1882–1890—Leases.]—See SETTLEMENTS.

Trustees Appointment Act, 1850 (c. 28)—Choice

& appointment of trustees.]—See TRUSTS & TRUSTEES.

Trustee Act, 1893 (c. 53).—Appointment of new trustee.]—See TRUSTS & TRUSTEES.

Declaration of trustee's desire for discharge.]—See TRUSTS & TRUSTEES.

SUB-SECT. 3.—IN EQUITY.

Assignment of choses in action—Whether by writing or deed.]—See CHOSSES IN ACTION, Vol. VIII., p. 424, Nos. 35 *et seq.*

Voluntary assignments.]—See CHOSSES IN ACTION, Vol. VIII., p. 496, Nos. 613 *et seq.*

Easements—Creation of.]—See EASEMENTS & PROFITS A PRENDRE.

Equity—Principles affecting relief in.]—See EQUITY.

Gifts—How made.]—See GIFTS.

Incomplete or imperfect.]—See EQUITY; GIFTS; SETTLEMENTS; TRUSTS & TRUSTEES.

Leases & agreements for leases.]—See LANDLORD & TENANT.

Power of appointment—Valid execution or in equity.]—See POWERS.

Settlements—Creation of & contracts for.]—See SETTLEMENTS.

Voluntary.]—See SETTLEMENTS.

Sale of Land.]—See SALE OF LAND.

SECT. 4.—FORM OF DEEDS.

SUB-SECT. 1.—MATERIAL ON WHICH INSCRIBED AND MODE OF INSCRIPTION.

71. Essential requirements—Writing on paper or parchment—Sealing—Delivery.]—There are but three things of the essence & substance of a deed, that is to say, writing in paper or parchment, sealing & delivery, & if it has these three, although it wanted, *in cuius rei testimonium sigillum suum apposuit*, yet the deed is sufficient, for the delivery is as necessary to the essence of a deed, as the putting of the seal to it, & yet it need not be contained in the deed, that it was delivered. The order of making a deed is, first to write it, then to seal it, & after to deliver it, & therefore it is not necessary that the sealing or delivery be mentioned in the writing, forasmuch as they are to be done after. When a deed is delivered, it takes effect by the delivery, & not from the day of the date. Therefore be the deed without date, or of a false or impossible date, yet the deed is good (*per cur.*).—GODDARD'S CASE (1584), 2 Co. Rep. 4 b; 76 E. R. 396.

Annotations:—*Mentd.* Inkersalls v. Samms (1628), Cro. Car. 130; Terry v. Huntington (1668), Hard. 480; Foot v. Berklay (1670), 2 Keb. 654; Stone v. Bale (1693), 3 Lev. 348; Hall v. Cazenove (1804), 4 East, 477; Vooght v. Winch (1819), 2 B. & Ald. 662; Doe v. Huddart (1835), 2 Cr. M. & R. 316; Magrath v. Hardy (1838), 1 Arn. 352.

72. ——— On leaf in book.]—In an action of debt upon a bill ensealed of £200, debt, pleaded *non est factum*, & upon the evidence it appeared that this obligation was written in a book, & in the same leaf debt, put his hand & seal thereto:—*Held*: it was a good deed.—FOX v. WRIGHT (1598), Cro. Eliz. 613; 78 E. R. 855.

73. ———.]—GEARY v. PHYSIC, No. 74, *post*.

For sealing & delivery of deeds, see Sect. 5, sub-sect. 1, C. & D., *post*.

74. Manner of writing—Ink not necessary—Pencil.]—There is no authority for saying that where the law requires a contract to be in writing that writing must be in ink (ABBOTT, C.J.).—GEARY

v. PHYSIC (1826), 5 B. & C. 234; 7 Dow. & Ry. K. B. 653; 4 L. J. O. S. K. B. 147; 108 E. R. 87.

Annotation:—*Mentd.* Bennett v. Brumfit (1867), L. R. 3 C. P. 28.

75. ——— Lithograph.]—Under Middlesex Registry Act, 1708 (c. 20), the register of Middlesex is bound to register the memorial of a deed, though the body of such memorial is lithographed, if it be properly stamped & executed.—R. v. MIDDLESEX REGISTERS (1845), 7 Q. B. 156; 115 E. R. 447; *sub nom. Ex p. IVIMEY*, 14 L. J. Q. B. 200; 5 L. T. O. S. 71; *sub nom. Ex p. IVEEMEY*, 9 Jur. 371.

76. ——— Printed form.]—The M. Insurance Co. executed a deed poll which was a life policy for one year on the life of O. It was in the ordinary printed form of such policies, & commenced with a recital of the ordinary declaration in writing.

In construing a policy of insurance the ct. certainly cannot consider whether it be in writing or in print, or partly in writing & partly in print, but I think that the jury in determining the fact, whether the declaration was understood between the parties to be signed according to the recital, would have been perfectly justified in taking into consideration that this policy was in a printed form adapted to an original insurance, & not to a reinsurance (LORD CAMPBELL, C.J.).—POSTER v. MENTOR LIFE ASSURANCE CO. (1854), 3 E. & B. 48; 23 L. J. Q. B. 145; 22 L. T. O. S. 305; 18 Jur. 827; 2 C. L. R. 1404; 118 E. R. 1058.

SUB-SECT. 2.—DEEDS POLL AND INDENTURES.

77. Former rule as to indenture—Manual indenting—Description as indenture insufficient.]—To make a deed an indenture, there must be a manual act of indenting the parchment or paper. The words *hac indentura*, if the deed be not indented, do not make an indenture.—STILE'S CASE (1596), 5 Co. Rep. 20 b; 77 E. R. 80; *sub nom. FRAMPTON v. STILES*, Cro. Eliz. 472.

Annotation:—*Mentd.* Armit v. Bream (1704), 1 Salk. 76.

See, now, Real Property Act, 1845 (c. 108), s. 5.

78. Whether indenture operates as deed poll—Defeasance.]—HOLLINGSWORTH v. WHEELER (1596), 2 And. 58; 123 E. R. 544.

79. ——— Not made inter partes.]—COOKER v. CHILD (1673), 2 Lev. 74; 83 E. R. 456; *sub nom. COGER v. CHILDE*, 3 Keb. 94; *sub nom. COKER v. CHILDE*, 3 Keb. 115.

Annotations:—*Consd.* Gilby v. Copley (1683), 3 Lev. 139. *Reid.* Vernon v. Jefferies (1740), 7 Mod. Rep. 358; Barford v. Stuckey (1820), 5 Moore, C. P. 23. *Mentd.* Joddrell v. Heathcot (1709), 11 Mod. Rep. 258; Smith v. Scott (1859), 6 C. B. N. S. 771.

80. Whether deed poll operates as indenture—When made inter partes.]—Pltfs. had bought part of a building estate under conditions of sale which referred to stipulations contained in a "deed poll of mutual covenants which has been or is intended to be executed by the vendors, & shall be executed by each of the purchasers." The deed was executed by the vendors & pltfs. It recited that "it is intended that the respective purchasers shall set & subscribe their respective names & seals to this deed," "& whereas it was part of the various contracts, & it is intended to be a part of all future contracts for sale of the said plots or parcels of land respectively that the several purchasers respectively should execute this deed & should thereby be severally & respectively bound by all the stipulations hereinafter contained." The deed then witnessed that, "in consideration of the premises," the purchasers covenanted with each other, & with all persons entitled to the land, not to build except upon

Sect. 4.—Form of deeds: Sub-sects. 2, 3 & 4. Sect. 5: Sub-sect. 1, A.]

certain conditions. The deed contained no covenant by the vendors, who now proposed to sell some of the unsold lots upon conditions which were admittedly inconsistent with the original scheme, & without requiring that the purchasers should execute the deed poll:—*Held*: the deed poll must be treated as made *inter partes*. The intention of the vendors had been expressed in order to induce ptfs. to buy, & they were not at liberty to alter that intention now. If not bound by covenant, they were bound by implied agreement.—*MACKENZIE v. CHILDERS* (1889), 43 Ch. D. 265; 59 L. J. Ch. 188; 62 L. T. 98; 38 W. R. 243. *Annotations*.—*Reid*. Rowell v. Satchell, [1903] 2 Ch. 212. *Mentd.* Davis v. Leicester Corp., [1894] 2 Ch. 208.

81. Counterpart of indenture—Of equal value to principal part.]—The counterpart of a lease is sufficient proof to satisfy the proft in a declaration in an action for breach of covenant.—*PEARSE v. MORRICE* (1832), 3 B. & Ad. 396; 1 L. J. K. B. 148; 110 E. R. 142.

Annotation.—*Reid*. Burchell v. Clark (1876), 2 C. P. D. 88.

See, further, LANDLORD & TENANT.

Position of parties under.]—*See* Sect. 6, sub-sects. 2 & 3, *post*.

SUB-SECT. 3.—FORMAL PARTS.

Date.]—*See* sub-sect. 4, *post*.

Formalities in execution of deed.]—*See* Sect. 5, sub-sect. 1, *post*.

82. Parties—Who are parties—Whether persons executing—Whose names omitted from body of deed.]—A person whose name is not mentioned in the premises of a deed, is not a party to it.—*EAST SKIDMORE & FOAME v. VAUDSTEVAN* (1587), Cro. Eliz. 56; 78 E. R. 317.

83. ————.]—If it does not appear in the body of a deed who are the parties to it, the persons who execute it shall be considered as such.—*NURSE v. FRAMPTON* (1694), 1 Ld. Raym. 28; 1 Salk. 214; 91 E. R. 915.

84. — Who are necessary parties—Not person acting under power of attorney given in deed.]—*MOYLE v. EWER* (1602), Cro. Eliz. 905; Noy. 49; 78 E. R. 1127.

Annotation.—*Reid*. Storer v. Gordon (1814), 3 M. & S. 308.

85. ————.]—If A. being seised of lands, give a letter of attorney to B. to make leases, & he grant a lease to C. in his own name, in which C. covenants to pay rent to A.:—*Qu.*: whether A. can maintain an action of covenant against C. on this deed.

By a deed poll a man may demise to or covenant with another person, & an action lies, & yet there are no parties to such deed (*PRATT, C.J.*).

A letter of attorney may be contained in an indenture without making the attorney a party, because in that case no interest passes to the attorney (*EYRE, J.*).—*LOWTHER v. KELLY* (1723), 8 Mod. Rep. 115; 88 E. R. 91.

86. — Need not be named—If sufficiently described—"All his creditors."]—Parties to a deed need not be named if they are sufficiently designated by description.

In a deed of composition, made between S., of the one part, & "all his creditors" of the other part, the words "all his creditors" are sufficiently definite to constitute them parties to the deed, & to enable a non-assenting creditor to sue upon it.—

GRESTY v. GIBSON (1866), L. R. 1 Exch. 112; 4 H. & C. 28; 35 L. J. Ex. 74; 13 L. T. 676; 12 Jur. N. S. 319; 14 W. R. 284.

Annotations.—*Foll.* *Reeves v. Watts* (1866), L. R. 1 Q. B. 412. *Reid*. *Brooks v. Jennings* (1866), L. R. 1 C. P. 476; *Isaacs v. Green* (1867), L. R. 2 Exch. 352; *M'Laren v. Baxter* (1867), L. R. 2 C. P. 559; *Cairncross v. Wills* (1869), 20 L. T. 529.

87. ————.]—A deed of composition being an indenture made between the debtor W. & all the creditors of W., by which the debtor covenants with the several persons parties thereto respectively to pay a certain composition on their respective debts unto the several persons parties, etc., being all & every his present creditors; & the several creditors parties thereto, etc.; where their several debts, etc.—is a valid deed under the Bankruptcy Act, 1861, s. 192, & binding on non-assenting creditors; for every creditor is made a party by the general description of all the creditors of W., & can therefore sue on the covenant.—*REEVES v. WATTS* (1866), L. R. 1 Q. B. 412; 7 B. & S. 523; 35 L. J. Q. B. 171; 14 L. T. 478; 12 Jur. N. S. 505; 14 W. R. 672.

Annotations.—*Reid*. *Isaacs v. Green* (1867), 36 L. J. Ex. 253; *Latham v. Lafone* (1867), L. R. 2 Exch. 115; *M'Laren v. Baxter* (1867), L. R. 2 C. P. 559; *Solomon v. Laverick* (1868), 17 L. T. 545.

Contracts within Statute of Frauds.]—*See* CONTRACT, Vol. XII., Part IV., Sect. 2, sub-sect. 4, A.

Description of in bonds.]—*See* BONDS, Vol. VII., p. 164, Nos. 8 *et seq.*

88. Recitals—Whether necessary—Mortgage deed of reconveyance.]—A man cannot be required to execute a deed containing incorrect recitals. Where all the persons interested in an equity of redemption concur in the deed of reconveyance, the mtgee. cannot insist on having the dealings with the equity of redemption stated in the deed, or object to the deed because it contains no recitals whatever.—*HARTLEY v. BURTON* (1868), 3 Ch. App. 365; 16 W. R. 876, L. C.

89. — Effect of inaccuracy—No obligation to execute deed.]—*HARTLEY v. BURTON*, No. 88, *ante*.

Estoppel of parties.]—*See* BONDS, Vol. VII., p. 194, Nos. 339 *et seq.*, & ESTOPPEL.

Construction of.]—*See* Part III., Sect. 8, *post*.

Habendum.]—*See* Part III., Sect. 11, *post*.

90. Reddendum—Proper place for—After limitation of all estates.]—D., by indenture, in consideration of rent reserved, demised to Q., a cellar, to have & hold to him, his exors., etc., for one year, & if at the end of the one year both parties should agree that the present demise should be renewed & continued for a longer time, then to have & to hold the premises for three years more, rendering annually during the term £40 at the four usual feasts:—*Held*: the reservation of the rent should extend to the first year, for the proper place of a reservation is to come after the limitation of all the estates.—*LOFIELD'S CASE* (1612), 10 Co. Rep. 106 a; 77 E. R. 1086.

Annotations.—*Mentd.* *Fawkeners v. Bellingham* (1627), Cro. Car. 80; *Selbye v. Beoke* (1627), Litt. 17; *Polson v. Warren* (1628), Palm. 490; R. v. London Bp. (1694), 1 Ld. Raym. 23; *Riddell v. White* (1793), 1 Anst. 281.

91. Testimonium—Whether essential.]—*GODDARD'S CASE*, No. 71, *ante*.

92. — Forms no part of deed.]—*Semble*: words at the end of a deed following the *In cuius rei testimonium*, etc., form no part of the deed.—*PEARSE v. MORRICE* (1834), 2 Ad. & El. 84; 4

PART I. SECT. 4, SUB-SECT. 3.

86 1. Parties—Need not be named—If sufficiently described.]—It is not

absolutely necessary to set forth the parties to a deed by their names; it is enough to describe them so that

they can be accurately ascertained.—*LATOUCHE v. WHALEY* (1932), *Hayes & Jo.* 43.—*IR.*

Nev. & M. K. B. 48; 4 L. J. K. B. 21; 111 E. R. 32.

Annotations.—**Reid**. Willington v. Browne (1845), 8 Q. B. 189. **Mentd.** R. v. St. Gregory (1834), 2 Ad. & El. 99; Oldroyd v. Crampton (1837), 3 Hodg. 261.

93. ———.]—That the clause in *cujus rei testimonium*, so long as it was found at the close of the deed, never formed part of the deed itself, is evident from Sheppard's Touchstone (p. 55) where he says, "a deed is good, albeit these words in the close thereof, in *cujus rei testimonium sigillum meum apposui*, be omitted," citing the authorities, which show it is no more in fact than what it imports to be, the very attestation of the deed which has preceded it (TINDAL, C.J.).—BURDETT v. SPILSBURY, SKYNNER v. SPILSBURY (1843), 10 Cl. & Fin. 340; 6 Man. & G. 386; 8 E. R. 772; *sub nom.* BURDETT v. DOE d. SPILSBURY, SKYNNER v. DOE d. SPILSBURY, 7 Scott, N. R. 66; 8 Jur. 1, H. L.; *reusq.* S. C. *sub nom.* DOE d. SPILSBURY v. BURDETT, DOE d. SPILSBURY v. SKYNNER (1839), 9 Ad. & El. 936, Ex. Ch.; *restg.* (1835), 4 Ad. & El. 1.

Annotations.—**Mentd.** Curteis v. Kenrick (1838), 3 M. & W. 461; George v. Kelly (1839), 2 Curt. 1; Ricketts v. Loftus (1841), 4 Y. & C. Ex. 519; Hudson v. Parker (1844), 1 Rob. Ecol. 14; Barnes v. Vincent (1845), 3 Notes of Cases, 628; Vincent v. Sodor & Man (1851), 15 Jur. 365; Roberts v. Phillips (1855), 4 E. & B. 450; Newton v. Ricketts (1861), 9 II. L. Cas. 263; Shamu Patter v. Abdul Kadir Ravuthan (1912), 28 T. L. J. 583.

94. ———.]—No memorandum of attestation to a deed, made in execution of a power, stating the observance of all the particulars required by the deed creating the power, is needed to establish that the power has been, as to the forms required, duly executed. For such a purpose, there is no distinction between the execution of a will under Stat. Frauds & of a deed under a power.

A power authorised a deed to be made by two persons, "under their hands & seals, in the presence of, & attested by, two witnesses." The attestation of the deed exercising the power was in these words, "signed, sealed, & delivered in the presence of" two witnesses.—**Held**: this was a sufficient attestation.—NEWTON v. RICKETTS (1861), 9 H. L. Cas. 262; 31 L. J. Ch. 247; 5 L. T. 62; 7 Jur. N. S. 953; 10 W. R. 1; 11 E. R. 731, H. L.

95. ——— **Effect of part of deed written after.**—ANON. (1534), Moore, K. B. 3; Benl. 1; 72 E. R. 398.

96. ——— **Effect of declaration inserted in.**—There can be no doubt that the testing clause is not a proper place for the insertion of an important clause, or for any clause, unconnected with the testing of the deed. But words of much importance to the validity & effect of a deed may be so inserted (LORD GORDON).—CHAMBERS v. SMITH (1878), 3 App. Cas. 795, H. L.

Annotations.—**Consd.** Blair v. Assets Co., [1896] A. C. 409. **Mentd.** Re Bullock, Good v. Lickorish (1891), 60 L. J. Ch. 341.

97. ——— **On provisions in body of deed.**—A declaration inserted in the testing clause of a deed, which purports to affect or qualify any of the provisions in the body of the deed, has no

legal effect.—BLAIR v. ASSETS Co., [1896] A. C. 409; 12 T. L. R. 409, H. L.

— **In bonds.**—See BONDS, Vol. VII., p. 180, Nos. 181, 182.

SUB-SECT. 4.—DATE.

From what time deed effective.—See Sect. 7, *post*.

Deeds executed contemporaneously.—See Sect. 5, sub-sect. 8, *post*.

Interpretation of date.—See Part III., Sect. 6, *post*.

98. **Whether necessary.**—GODDARD'S CASE, No. 71, *ante*.

99. ———.]—Dates are not necessary to deeds (*per CUR.*).—TWEEDALE'S (MARQUIS) CASE (1793), 1 Anst. 143; 145 E. R. 826.

100. **Where date impossible or false—Deed not affected by.**—GODDARD'S CASE, No. 71, *ante*.

101. ———.]—(1) Any bond from which the intent of the parties can be collected, is good, notwithstanding the most gross incorrectness in the language.

(2) A deed with an impossible date may be stated to have been made at any time. No objection can be taken to an allegation that the date thereof is on a particular day, for the date shall be intended to mean the delivery. But an allegation that it bears date on a particular day, is bad.

(3) A bond is good though the name of the obligor be spelt differently in the body of the bond & in the signature.

The variance between the name signed & the name in the obligation is not material, because subscribing is no essential part of the deed; sealing is sufficient (*per CUR.*).—CROMWELL v. GRUMSDEN (1698), 1 Ld. Raym. 335; Comb. 477; Holt, K. B. 502; 12 Mod. Rep. 193; 2 Salk. 462; 91 E. R. 1119.

Annotations.—**As to** (1) **Reid**. Stoddart v. Palmer (1824), 4 Dow. & Ry. K. B. 624. **As to** (2) **Reid**. Holman v. Burrow (1702), 2 Ld. Raym. 794.

Clerical error—In affidavit attached to bill of sale.—See BILLS OF SALE, Vol. VII., p. 90, No. 514.

SECT. 5.—EXECUTION OF DEEDS.

SUB-SECT. 1.—FORMALITIES.

A. In General.

Formal parts of deed.—See Sect. 4, sub-sect. 3, *ante*.

102. **Order of making a deed.**—GODDARD'S CASE, No. 71, *ante*.

103. **Must be sealed & delivered.**—No instrument which is not delivered, can be a deed. Therefore an instrument which a statute directs to be signed & sealed will not be a deed, unless the Act directs it to be delivered also.—FELTHAM v. CUDWORTH (1702), *as reported in* 2 Ld. Raym. 760; 7 Mod. Rep. 10; 92 E. R. 8.

Annotations.—**Reid**. Iderton v. Castrique (1863), 32 L. J. C. P. 206; Spitzer v. Chaffers (1863), 14 C. B. N. S. 686.

177.—CAN.

103 ii. ———.]—A contract set up as a deed must have been sealed & delivered as a deed at common law.—RHODES v. ROBINSON (1868), 1 C. A. 133.—N.Z.

103 iii. ———.]—Pursuer sought to set up a deed which was undated, un-subscribed, untested, & undelivered.—**Held**: pursuer had failed to prove his case.—RANNIE v. OGG (1891), 18 R. (Ct. of Sess.) 903.—SCOT.

PART I. SECT. 5, SUB-SECT. 1.—A.

102 i. **Order of making a deed.**—A document was called an "agreement" & there was only one place in it where a covenant was spoken of. There was no *testimonium* clause preceding the signatures of defts. There was an attestation clause—"signed & sealed in the presence of." Opposite each of the signatures the word "seal" was printed, & upon the word "seal" there was imprinted in red ink a mark in the form of the commonly used small

red seals. These were all on the document, which was a printed form, long before the signatures.—**Held**: the document was not so executed as to give it the effect of a sealed instrument.—SAWYER & MASSRY v. BOUCHARD (1910), 13 W. L. R. 394.—CAN.

103 i. **Must be sealed & delivered.**—There is no absolute necessity to put the hand on a seal in executing, or make any declaration of delivery.—HATTON v. FISH (1850), 8 U. O. R.

Sect. 5.—Execution of deeds: Sub-sect. 1, A., B. & C.]

104. —.]—A deed in order to be a deed must be sealed & delivered. An agent to deliver a deed must be an agent appointed under seal (BOWEN, L.J.).

This is the argument that has been addressed to us: "A delivery need not be by a physical act. The man who delivers it need not take it into his own hands & say, 'I deliver this to you.' He may say when he has signed & sealed the deed, which may be in the next room, 'There is my deed which I have signed & sealed; go & take it up'; & it is said that will amount to a delivery. I do not deny that under such circumstances the acts might amount to a delivery, but no case has ever decided that because a man knew that people had been acting on a blank deed as if it were a perfect deed it must therefore be inferred that he knew the deed was filled up, that he knew how it was filled up, & that he must be taken to have redelivered it. That is carrying the doctrine far beyond any case (KAY, L.J.).—**POWELL v. LONDON & PROVINCIAL BANK**, [1893] 2 Ch. 555; 62 L. J. Ch. 795; 69 L. T. 421; 41 W. R. 545; 9 T. L. R. 446; 37 Sol. Jo. 476; 2 R. 482, C. A.

Annotations:—*Reid*, Fry v. Smellie, [1912] 3 K. B. 282; *Re Seymour*, Fielding v. Seymour, [1913] 1 Ch. 475.

105. Due execution will be presumed—After long enjoyment.]—Objections to the validity of instruments under which title is claimed, & of the want of due formalities at their inception, are answered by the fact of long enjoyment, which enables & obliges the ct., to presume against such objections in favour of the usage.—**WOLLEY v. BROWNHILL** (1824), 13 Price, 500; M'Cle. 317; 3 Eag. & Y. 1152; 147 E. R. 1061, Ex. Ch.

Annotations:—*Mentl.* Jesus College v. Gibbs (1835), 1 Y. & C. Ex. 145; Tomlinson v. Swinerton (1838), 2 Jur. 393; Eedalle v. Peacock (1859), John. 216.

106. ——— Seals removed.]—If a deed be produced from the right custody, & possession has gone in accordance with its provisions for a great number of years, it will be presumed to have been duly executed, though the seals appear to have been torn off, & no explanation is given of the cancellation; nor will it be necessary after such a lapse of time to prove seisin in the original grantor.—**DOE d. BRICE v. BRICE** (1844), 3 L. T. O. S. 50.

107. ——— Against executor of grantor—When document found among papers of testator.]—As against exors., an instrument bearing the undoubted signature of testator, found among his papers, & valid in other respects, ought to be presumed regular in all respects & the claimant under it need not explain the alterations apparent upon the face of the instrument.—**HOPE v. HARMAN** (1847), 16 Q. B. 751, n.; 8 L. T. O. S. 554; 11 Jur. 1097; 117 E. R. 1069.

Annotations:—*Reid*, Doe d. Richards v. Lewis, Richards v.

105 i. Due execution will be presumed—After long enjoyment.]—Deft., produced a deed, upwards of thirty-one years old, & it was admitted that deft. & those under whom he claimed had been in possession during all this period:—*Held*: from the fact that the possession of the land had gone in accordance with the deed for more than thirty-one years, it would be presumed that it had been properly executed.—**MONK v. FARLINGER** (1866), 17 C. P. 41.—**CAN.**

g. ——— When corporate seal attached.]—The production of a document within the powers of a corp., with the seal attached, is sufficient *prima facie* evidence of its proper

execution.—**WOODHILL v. SULLIVAN** (1864), 14 C. P. 265.—**CAN.**

h. ———.]—Where an instrument is under the seal of a company, & appears to have been executed in proper form, there is a strong tendency to support it.—**BANK OF NEW ZEALAND v. ROSE** (1892), 10 N. Z. L. R. 484.—**N.Z.**

k. Deed affecting property in England—Executed out of England—Subject to formalities required by English law.]—**RICHARDS v. GOOLD** (1827), 1 Mol 22, 24.—**IR.**

PART I. SECT. 5, SUB-SECT. 1.—B.

108 i. Whether signature necessary—

Lewis (1851), 17 L. T. O. S. 126; *Re Way's Trusts* (1864), 34 L. J. Ch. 49.

See, further, EXECUTORS & ADMINISTRATORS.

B. Signing.

See, now, Law of Property Act, 1922 (c. 16), s. 72 (4).

108. Whether signature necessary.]—**MABY v. SHEPHERD** (1622), Cro. Jac. 640; Godb. 283; 79 E. R. 551.

Annotations:—*Reid*, Evans v. King (1745), Willes, 554. *Mentl.* Clarke v. Istead (1686), 1 Lut. 894; Knight v. Wells Corp'n. (1694), 1 Lut. 508; R. v. Wooddale (1844), 8 Q. B. 549.

109. ——— Sealing sufficient—Variance between name signed & name in deed.]—**CROMWELL v. GRUMSDEN**, No. 101, ante.

110. ——— Application of Statute of Frauds.]—Signing is not necessary to a deed, for in former times they were only sealed & not signed, but now since the Stat. Frauds, etc. an assignment by writing, if it is no deed, yet it must be signed (**HOLT, C.J.**).—**R. v. GODDARD** (1703), 2 Ld. Raym. 920; 3 Salk. 171; 92 E. R. 114.

Annotations:—*Mentl.* R. v. Crowhurst (1724), 2 Ld. Raym. 1363; R. v. Taylor (1824), 3 B. & C. 502; R. v. Charlesworth (1861), 1 B. & S. 460.

111. ———.]—Pltf. by indenture assigned letters patent to defts. H. & N. who covenanted to pay pltf. a certain sum by instalments, extending over several years, provided, that if, at the expiration of twelve months from the date of the indenture, defts. should not approve of the patent, & should give notice of their disapprobation, & of their intention to sell the patent, then the payment of the first instalment should be suspended, & if, having given such notice defts. should within six months sell the patent, the covenant should cease. The deed was executed by N., but there was no signature of H., but only a seal for him in the usual way. H. & N. attempted to work the patent, but, being dissatisfied with it, sent pltf. a notice, signed by both, referring to the deed, & in the terms of the proviso:—*Held*: the contract having been performed on one side within a year, the case was not within the Stat. Frauds, 1076 (c. 3), s. 4, inasmuch as that enactment applies only to contracts not to be performed on either side within the year. *Scmble*: an agreement by deed is not within that statute.—**CHERRY v. HEMING** (1849), 4 Exch. 631; 19 L. J. Ex. 63; 14 L. T. O. S. 274; 154 E. R. 1367. **Annotations:—***Reid*, Smith v. Neale (1857), 2 C. B. N. S. 67; Bevan v. Carr (1885), 1 T. L. R. 363; Miles v. New Zealand Alford Estate Co. (1886), 32 Ch. D. 266; Reeve v. Jennings, [1910] 2 K. B. 522.

112. ———.]—So far is sealing from being equivalent to signing, that it is determined that sealing is not necessary, & that sealing without signing is not a sufficient execution of a will; the converse holding as to a deed, which cannot be without sealing & delivery. If signed, it may be a writing, but if delivered it may be a good deed,

Sealing sufficient.]—In covenant against two defts. the indenture sued upon had four seals, & was signed by one of the defts.:—*Held*: there was evidence of execution by both defts.—**JUDGE v. THOMSON** (1870), 29 U. C. R. 523.—**CAN.**

109 i. ——— Variance between name signed & name in deed.]—Where the signature to a deed under which pltf. claimed was spelt in a manner different from that in which it was shown grantor had spelt his name:—*Held*: the execution had not been proved.—**DUFFY v. SMITH** (1879), 26 Gr. 428.—**CAN.**

whether signed, or not, & if it is to be executed under a power with signature & sealing, both are required (LORD ELDON, C.).—WRIGHT v. WAKEFORD (1811), 17 Ves. 454; 34 E. R. 176, L. C.; *subsequent proceedings* (1812), 4 Taunt. 213.

Annotations.—**Reid.** Doe d. Mansfield v. Peach (1814), 2 M. & S. 576; Doe d. Hotchkiss v. Pearce (1816), 6 Taunt. 402; Moodie v. Reid (1816), 1 Madd. 516; Hougham v. Sandys (1827), 2 Sim. 95; Allen v. Bradshaw (1835), 1 Curt. 110; Tatnall v. Hankey (1838), 2 Moo. P. C. C. 342; Burdett v. Spilsbury (1843), 10 Cl. & Fin. 340; Re Wrey's Trust (1850), 17 Sim. 201; Vincent v. Sodor & Man Bp. (1851), 4 De G. & Sm. 294; Roberts v. Phillips (1855), 24 L. J. Q. B. 171; Morris v. Rhydydefed Colliery Co., Glamorganshire (1858), 5 Jur. N. S. 339; Newton v. Ricketts (1861), 9 H. L. Cas. 263; *In the Goods of Jenkyns* (1862), 32 L. J. P. M. & A. 71.

113. ————]—*Ex. p.* HODGKINSON (1815), 19 Ves. 291; Coop. G. 99; 34 E. R. 525, L. C.

Annotations.—**Mentd.** Re Mogg, *Ex p.* Mogg (1828), 6 L. J. O. S. Ch. 162; Butler v. Hobson (1838), 5 Bing. N. C. 128; Re English & Irish Church & University Assoc. Soc. (1863), 11 W. R. 681.

114. ————]—There is no authority for saying that a release to be effectual, must be signed as well as sealed & delivered (SIR JOHN LEACH, V.-C.).—TAUNTON v. PEPLER (1820), 6 Madd. 166; 56 E. R. 1055.

115. ————]—To an action of covenant against the assignee of a lease, of which the declaration averred that the party under whom debt. claimed executed the counterpart:—**Held**: a plea that the indenture was not executed by plffs., or by any agent of plffs. thereunto lawfully authorised in writing, was no answer.

The Stat. Frauds does not apply; there is a sealing by the lessee (TINDAL, C.J.).—AVELINE v. WHISSON (1842), 4 Man. & G. 801; 12 L. J. C. P. 58; 134 E. R. 330.

Annotation.—**Reid.** Cherry v. Heming (1849), 4 Exch. 631.

116. Where signing & sealing directed by statute—Instrument must also be delivered.]—FELTHAM v. CUDWORTH, No. 103, *ante*.

117. Whether signature by third party sufficient—Subsequent acknowledgment by party bound.]—

An indenture having been prepared for binding a boy apprentice, the apprentice & his father being unable to write, desired a third person to write their names opposite two of the seals & he did so. The indenture was not read to them. The apprentice immediately afterwards took the indenture to the master & left it with him, & afterwards stated that when he did so he considered himself bound, & he went into service under the indenture:—**Held**: the indenture was sufficiently executed & delivered.—R. v. LONGNOR (INHABITANTS) (1833), 4 B. & Ad. 647; 1 Nev. & M. K. B. 576; 1 Nev. & M. M. C. 128; 2 L. J. M. C. 62; 110 E. R. 599.

Annotation.—**Reid.** Tupper v. Foulkes (1861), 9 C. B. N. S. 797.

118. ————]—A deed was executed by a son of the debt., thus, "J. W. F. for T. F." debt. In

an action upon a covenant contained in the deed, debt. pleaded *non est factum*. It was proved, that, the deed being shown to debt. executed as above, he was asked whether his son had authority to execute it for him, & whether he adopted his son's act, to which debt. answered in the affirmative:—**Held**: this amounted to a re-delivery of the deed, & sustained the issue.—TUPPER v. FOULKES (1861), 9 C. B. N. S. 797; 30 L. J. C. P. 214; 3 L. T. 741; 7 Jur. N. S. 709; 9 W. R. 349; 142 E. R. 314.

Annotation.—**Consd.** Re Seymour, Fielding v. Seymour, [1913] 1 Ch. 475.

119. Sufficiency of signature—Engraved facsimile.]—An objector affixed his name to the notice of objection by means of a stamp on which was engraved a facsimile of his ordinary signature:—**Held**: the notice was signed by the person objecting, within Parliamentary Voters Registration Act, 1843 (c. 18), s. 17.

I see no distinction between using a pen or a pencil & using a stamp, where the impression is put upon the paper by the proper hand of the party signing (BOVILL, C.J.).—BENNETT v. BRUMFITT (1867), L. R. 3 C. P. 28; Hop. & Ph. 407; 37 L. J. C. P. 25; 17 L. T. 213; 31 J. P. 824; 16 W. R. 131.

Annotations.—**Reid.** Brydges v. Dix (1891), 7 T. L. R. 215; De Beauvais v. Green (1906), 22 T. L. R. 816.

120. Effect of signing in name other than that of party—Without consent.]—A person who executes a deed cannot avoid liability under it by signing a name which is not in fact his own, nor can he impose liability on the person whose name he uses, unless he is the duly constituted attorney of such person.—FUNG PING SHAN v. TONG SHUN, [1918] A. C. 403; 87 L. J. P. C. 22; 118 L. T. 380, P. C.

Signature of arbitration awards.]—See ARBITRATION, Vol. II., pp. 466, 467, Nos. 1114–1116, 1119.

Signature of bonds.]—See BONDS, Vol. VII., p. 179, Nos. 172–176.

C. Sealing.

See Law of Property Act, 1922 (c. 16), s. 72 (4).

121. Necessity for.]—GODDARD'S CASE, No. 71, *ante*.

122. ————]—VULGAR v. HIGGINS (1621), Palm. 173; 81 E. R. 1032.

123. ————]—WRIGHT v. WAKEFORD, No. 112, *ante*.

124. What amounts to—Wafer seal.]—A bond may be sealed with a wafer.—ANON. (1701), 12 Mod. Rep. 565; 88 E. R. 1523.

125. ———— Stamp on stamped paper.]—A wife, having a power to dispose by will, signed & sealed by her, of £300 in the hands of trustees, having made a will agreeable to the power, afterwards makes a testamentary paper, by which she gave it to her husband. This paper was not sealed (found annexed to the will by a wafer) & was on a stamp:

119 i. Sufficiency of signature.]—Where parties to a deed were described as trustees of the second & creditors of the third part, & when the deed was executed one of the trustees was also a creditor:—**Held**: such trustee must be considered to have executed the deed both as creditor & trustee.—HAMMOND v. BARKER (1848), 3 Kerr. 634.—CAN.

119 ii. ————]—A document is a nullity, where the executant signed only on the first page but did not sign on the other pages.—BANKU BEHARI SHAHA v. KRISHTO GOBINDO JOARDAR (1902), 1 L. R. 30 Cal. 433.—IND.

119 iii. ———— Whether "cyclostyle."]—A signature by "cyclostyle" will not satisfy the conditions regulating the subscription of probative deeds.—

WHYTE v. WATT (1893), 21 R. (Ct. of Sess.) 165; 31 Sc. L. R. 127; 1 S. L. T. 342.—SCOT.

PART I. SECT. 5, SUB-SECT. 1.—C.

121 i. Necessity for.]—Sealing is not essential.—TINNELLY v. MARTIN (1831), Glascock 33.—IR.

1. What amounts to—Whether circle with "seal" inscribed.]—A circular flourish with the word "seal" inscribed, is not a legal seal.—NAGLE v. KILTS (1825), Tay. 269.—CAN.

m. ————]—The *testimonium* clause in a power of attorney declared that the principal set his hand & seal to the instrument. The attestation clause declared that it was signed & sealed in the presence of a subscribing

witness, & opposite the signature of the principal was a visible impression made by the pen in the form of a scroll, in which was inscribed the word "seal":—**Held**: a sufficient sealing.—RE BELL & BLACK (1882), 1 O. R. 125.—CAN.

n. ———— Whether mark with poker.]—Deft. signed a deed, & afterwards merely marked the paper with the end of a poker, opposite to his name, not even acknowledging the mark as his seal:—**Held**: not a sealed instrument.—CLEMENT v. DONALDSON (1851), 9 U. C. R. 299.—CAN.

o. ———— Impression without wax.]—An impression upon the paper, without wax or any extraneous substance, is a sufficient seal.—FOSTER v. GEDES (1856), 14 U. C. R. 239.—CAN.

Sect. 5.—Execution of deeds: Sub-sect. 1, C. & D. (a).]

—**Held:** the stamp was equivalent to a seal.—**SPRANGE v. BARNARD** (1789), 2 Bro. C. C. 585; 29 E. R. 320.

126. — Impression of wooden block.]—It is not necessary that an order of justices should be sealed with wax. An impression made in ink with a wooden block, in the usual place of a seal, is sufficient, when the document purports to be given under the hands & seals of the justices, & is in fact signed & delivered by them.—**R. v. ST. PAUL, COVENT GARDEN** (1845), 7 Q. B. 232; 1 New Mag. Cas. 617; 14 L. J. M. C. 109; 9 J. P. 441; 9 Jur. 442; 115 E. R. 476.

Annotations:—**Reid.** *In the Goods of Morley* (1864), 3 New Rep. 691; *R. v. Garrett-Pegge, J.J., Ex p. Brown* (1811), 104 L. T. 649. **Mentd.** *R. v. St. Anne, Westminster* (1846), 7 Q. B. 241; *Headington Grdns. v. Ipswich Grdns.* (1890), 25 Q. B. D. 143.

127. — Impression unnecessary.]—**Re SANDILANDS**, No. 132, *post*.

128. May be presumed by jury—Where handwriting proved.]—If deft.'s handwriting to a deed is proved, the jury may presume the sealing & delivery.—**GRELLIER v. NEALE** (1792), Peake, 198, N. P.

129. — Where signing proved—& declaration in deed that deed was sealed.]—Proof that a party signed a deed, which bears on the face of it a declaration that the deed was sealed by the party, is evidence to be left to a jury that the party sealed & delivered the deed.

The attesting witness to a bond wrote the attestation without seeing the obligor execute. Another person gave evidence that the obligor signed the bond, but did not seal or deliver it:—**Held:** the signing the bond, which purported to be sealed with the obligor's seal, was evidence to be left to the jury of the sealing & delivery.—**TALBOT v. HODSON** (1816), 7 Taunt. 251; 2 Marsh. 527; 129 E. R. 101.

Annotations:—**Reid.** *Hall v. Bainbridge* (1848), 12 Jur. 795. **Mentd.** *Butler v. Brown* (1819), 3 Moore, C. P. 327.

130. Proof of—Where seal affixed—Not mentioned in testimonium.]—**ANON.** (1547), Ben. & D. 1; 123 E. R. 225.

131. — Mentioned in testimonium.]—A witness to prove the execution of a bond, did not recollect whether, at the time it was executed, it had any seal, & he swore that he did not read the attestation at the time he witnessed the execution, but there being a seal at the time of the trial, & the bond itself saying "sealed with our seals":—**Held:** this was sufficient proof, but this evidence would not have been sufficient, if there had been no seal on the bond at the time of the trial.—**BALL v. TAYLOR** (1824), 1 C. & P. 417, N. P.

132. — Where no seal affixed—Whether statement in attestation clause sufficient—Certificate of acknowledgment by married woman.]—A deed was sent out to Melbourne under a special commission for execution & acknowledgment by certain married women. When sent out, the deed

had pieces of green ribbon attached to the places where the seals should be, but no wax or other material to receive an impression, & it was returned to this country in the same state, but in all other respects duly executed. The attestation clause stated that the deed was "signed, sealed, & delivered," & two of the comrs. certified that the married women produced the deed before them & "acknowledged the same to be their respective acts & deeds":—**Held:** there was sufficient *prima facie* evidence that the deed was sealed, to warrant the ct. in allowing it to be received & filed with the other documents, by the proper officer, under Fines & Recoveries Act, 1833 (c. 74).

To constitute a sealing, neither wax, nor wafer, nor a piece of paper, nor even an impression, is necessary (**BOVILL, C.J.**).—**Re SANDILANDS** (1871), L. R. 6 C. P. 411; *sub nom. Re MAYER*, 40 L. J. C. P. 201; 24 L. T. 273; 19 W. R. 641.

Annotations:—**Consd.** *National Provincial Bank of England v. Jackson* (1886), 33 Ch. D. 1; *Re Balkis Consolidated Co.* (1888), 58 L. T. 300. **Distd.** *Re Smith, Oswald v. Shepherd* (1892), 67 L. T. 64.

133. — — — — —.]—On Jan. 18, 1883, A., a solr., obtained from his sisters, B. & C., their signatures to two deeds, by which, in alleged consideration in each case of the release of a debt of £400 & payment to them of £300 they conveyed their shares of freehold property, which was subject to a mtge. to K., to A. in fee. No money was at the time due from B. & C. to A., nor was any payment whatever made to them. The deeds were not read over or explained to B. & C., who had no idea that they were thereby conveying their property, & signed in full reliance on A.'s statement that he was going to clear off the mtge. & wanted to send the deeds to K. On the next day, A. deposited the deeds with a bank as security for an advance. In applying for the advance before the execution of the deeds, A. had told the managers that B. & C., who were joint owners with himself of the property, were going to convey & "were assisting with the deeds," but that nothing would be paid to them as consideration money, as the money was to be invested in a colliery in which A. was interested. The manager handed over the deeds to the solr. of the bank & merely told him that he was to exercise great care & diligence in investigating the title. The solr. being dead, it did not appear what inquiries were made by him, but the advance was made to A. A. having absconded, the property was claimed by the bank as equitable mtgees., & the claim was resisted by B. & C. on the ground that the conveyances, having been obtained by fraud & misrepresentation, were void as against them. They also relied on deeds which purported to be reconveyances of the property by A. to B. & C., of Jan. 18, 1883, which were attested but did not bear a seal, & which had only been discovered amongst A.'s papers after he absconded:—**Held:** (1) inasmuch as B. & C., though they might not understand the nature of the deeds, knew they were executing something which dealt in some way with their property, the deeds of Jan. 18,

1271. — Impression unnecessary.]—A deed had been duly signed, but, instead of wax or wafer being affixed, alts had been cut in the parchment, & a ribbon woven through, so as to appear on the face of the document at intervals, opposite one of which each of the parties to the deed signed:—**Held:** a seal.—**HAMILTON v. DENNIS** (1866), 12 Gr. 325.—**CAN.**

130 1. Proof of—Where seal affixed—Not mentioned in testimonium.]—Where a seal is set opposite to the name of the

party signing, the document must be treated as under seal, although the *testatum* is, "I hereby subscribe myself," & does not expressly affirm that the party seals it.—**WHITTIER v. MCLENNAN** (1856), 13 U. C. R. 638.—**CAN.**

133 1. — Where no seal affixed—Whether statement in attestation clause sufficient.]—The holder of a mtge. security indorsed on the mtge. indenture a memorandum assigning same to his wife; he signed, but did

not affix his seal thereto, although the memorandum was expressed to be under seal:—**Held:** not sufficient.—**TIFFANY v. CLARKE** (1858), 6 Gr. 474.—**CAN.**

133 ii. — — — — —.]—A deed had no trace of a seal, but contained the *testatum* clause in the usual form:—**Held:** the existence of seals might be presumed.—**MARTIN v. BARNES** (1863), 1 Old. 291.—**CAN.**

133 iii. — — — — —.]—Where a policy sued on was issued by a co.

1883, were not void but voidable only. But as the statements made by A. to the bank manager were such as to have clearly put the bank upon inquiry, which would, if made, have led to the detection of the fraud & to a refusal of the advance, & therefore to have affected the bank with constructive notice of the fraud, the equity of the bank must, on the ground of their negligence, be postponed to that of B. & O.; (2) the absence of a seal from the deeds of reconveyance, there being no evidence that they had ever been sealed, rendered them invalid.—*NATIONAL PROVINCIAL BANK OF ENGLAND v. JACKSON* (1886), 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597, C. A.

Annotations.—*As to* (1) *Consd. Howatson v. Webb*, [1907] 1 Ch. 537. *Refd. Farrand v. Yorkshire Banking Co.* (1888), 40 Ch. D. 182; *Lloyd's Bank v. Bullock*, [1896] 2 Ch. 192; *Bagot v. Chapman*, [1907] 2 Ch. 222. *As to* (2) *Refd. Re Smith, Oswell v. Shepherd* (1892), 67 L. T. 64.

134. — — —.]—By the articles of association of a co., transfers of its shares were to be made by deed. A., a shareholder, deposited certificates of certain of its shares with B., to secure a loan, & also signed & handed over to B. a blank transfer of the shares. There was no seal or wafer on the transfer opposite to A.'s signature, but only a circle printed on the paper inclosing the words "Place for a seal." The document purported to be attested by a witness as having been "signed, sealed, & delivered" in his presence, but there was no evidence proving that the document was signed, sealed, & delivered as a deed:—*Held*: in the absence of such evidence, the printed circle inclosing the words "Place for a seal," did not supply the place of a seal so as to make the document a deed, effectual to pass the shares.—*Re BALKIS CONSOLIDATED CO., LTD.* (1888), 58 L. T. 300; 36 W. R. 392; 4 T. L. R. 204.

135. — — —.]—The exor. of a testatrix discovered amongst her papers after her decease, which occurred in 1891, a bond dated in 1874, under the hand only of the obligor in the sum of £800, in favour of S., one of her nieces, conditioned for the transfer by the obligor in her lifetime, or by her exors. or administrators within six calendar months after her decease, into the name of S., for her separate use, or to her exors., administrators, or assigns, of the sum of £400, etc. Although the bond bore the words "sealed with my seal," which preceded the date, & the attestation clause stated that the bond was "signed, sealed, & delivered" by the obligor, it did not appear that a seal had in fact ever been affixed, there being no mark, wafer, or seal visible on the face of the document. The bond was, however, properly stamped. S. nevertheless claimed to be entitled to enforce the bond against the estate of the obligor, as, the document being properly stamped, & purporting to have been sealed, & the attestation clause being in the usual form, there was *prima facie* evidence that the document had been duly sealed, & the ct. would presume that it had been sealed:—*Held*: the ct. could not, under

the circumstances, presume that the bond had been sealed, & therefore, S., being a volunteer, was not entitled to enforce it.—*Re SMITH, OSWELL v. SHEPHERD* (1892), 67 L. T. 64, C. A.

136. — — — Where seal has been destroyed.—*Affidavit of presence of seal at time of execution.*—Although the notarial seal affixed to the acknowledgment of a warrant of attorney taken abroad, was broken to pieces & destroyed, the ct. allowed the recovery to pass, on an affidavit that the seal was duly affixed at the time the oath was administered.—*CAREW v. WHITE* (1829), 2 Moo. & P. 558; 7 L. J. O. S. C. P. 114.

See, also, No. 106, *ante*.

137. Where one seal used for several persons.—*One sealing by authority for others.*—*LOVELACE'S (LORD) CASE* (1632), W. Jo. 268, 270; 82 E. R. 140, 141.

Annotations.—*Mentd. Cooch v. Goodman* (1842), 2 Q. B. 580; *Escott v. Mastin* (1842), 4 Moo. P. C. C. 104; *Martin v. Mackonochie, Flamank v. Simpson* (1868), L. R. 2 A. & E. 116.

138. — — —.]—If A. execute a deed for himself & his partner, by the authority of his partner & in his presence, it is a good execution, though only sealed once.—*BALL v. DUNSTERVILLE* (1791), 4 Term Rep. 313; 100 E. R. 1038.

Annotations.—*Distd. Cooch v. Goodman* (1842), 2 Q. B. 580. *Refd. Burn v. Burn* (1797), 3 Ves. 573; *R. v. Austrey* (1817), 6 M. & S. 319.

139. — — — Same wax used by each party.—*R. v. HARRIS* (1702), 7 Mod. Rep. 55; 87 E. R. 1092.

140. — — — Seal must profess to be seal of each.]—It is true that one piece of wax may serve as a seal for several persons, if each of them impresses it himself, or one for all, by proper authority, or in the presence of all, but then it must appear by the deed, & profess, to be the seal of each (*LORD DENMAN, C.J.*).—*COOCH v. GOODMAN* (1842), 2 Q. B. 580; 2 Gal. & Dav. 159; 11 L. J. Q. B. 225; 6 Jur. 779; 114 E. R. 228.

Annotations.—*Mentd. Doe d. Marlow v. Wiggins* (1843), 4 Q. B. 367; *Pitman v. Woodbury* (1848), 3 Exch. 4; *Doe d. Lansdell & Pembury Churchwardens & Overseers v. Gower* (1851), 16 Jur. 100; *Wheatley v. Boyd* (1851), 7 Exch. 20; *Morgan v. Pike* (1854), 14 C. B. 473; *Maugham v. Sharpe* (1864), 17 C. B. N. S. 443.

Sealing of bonds.—*See BONDS*, Vol. VII., pp. 179-180, Nos. 177-180.

D. Delivery.

(a) In General.

Deed effective from date of delivery.—*See Sect. 7, post.*

Delivery as escrow.—*See Sect. 5, sub-sect. 2, post.*

Re-delivery.—*See (d), post.*

141. Necessary to perfect execution.]—*GODDARD'S CASE*, No. 71, *ante*.

142. — — —.]—A deed is not executed until it be formally delivered.—*CHAMBERLAIN v. STANTON* (1588), Cro. Eliz. 122; 78 E. R. 379.

143. — — —.]—*WILLIS v. JERMIN* (1590), Cro. Eliz. 167; 78 E. R. 424.

Annotation.—*Mentd. Philips v. Bury* (1694), Skin. 447.

without the corporate seal being affixed, & the attestation clause stated that the co. had thereunto affixed its seal:—*Held*: the policy was a valid contract to grant an insurance.—*WRIGHT v. SUN MUTUAL LIFE INSURANCE CO.* (1880), 5 A. R. 218; *affd.* 5 S. C. R. 466.—*CAN.*

137 i. Where one seal used for several persons.]—A deed was executed before a notary, whose seal was affixed opposite both his own & the grantor's names, & there was no other seal:—*Held*: the seal was sufficient, & that more than one person might lawfully

use the same seal.—*COMPTON v. CROSSMAN* (1860), 1 P. E. I. 174.—*CAN.*

137 ii. — — —.]—Where at the bottom of an instrument were the signatures of A., B., C., & D., but only two seals affixed, neither of which was placed opposite any of the signatures:—*Held*: the instrument was sufficient to pass the parcels therein mentioned to C. & D.—*FARRELL v. FARRELL* (1838), Craw. & D. Abr. C. 441.—*IR.*

PART I. SECT. 5, SUB-SECT. 1.—*D. (a).*

141 i. Necessary to perfect execution.]

—Delivery of a deed gives constructive possession.—*SIMPSON v. FOOTE* (1844), 2 Thom. 240.—*CAN.*

141 ii. — — —.]—Where there has been no delivery of a conveyance it is not a deed.—*POPE v. PRINCE EDWARD ISLAND CROWN LANDS COMR.* (1872), 1 P. E. I. 414.—*CAN.*

141 iii. — — —.]—A contract signed & sealed by the parties thereto:—*Held*: nevertheless, not binding because there was no delivery.—*DILLABAUGH v. MCLEOD* (1910), 16 W. L. R. 149.—*CAN.*

Sect. 5.—Execution of deeds: Sub-sect. 1, D. (a) & (b) i. & ii.]

144. —.]—FELTHAM v. CUDWORTH, No. 103, ante.

145. —.]—CLAVERING v. CLAVERING (1704), Prec. Ch. 235; 2 Vern. 473; 1 Eq. Cas. Abr. 24, pl. 6; 24 E. R. 114; affd. (1705), 7 Bro. Parl. Cas. 410, H. L.

Annotations:—*Consd. Worrall v. Jacob* (1817), 3 Mer. 256; *Doe d. Garnons v. Knight* (1826), 5 B. & C. 871. *Reid. Chadwick v. Doleman* (1705), 2 Vern. 528; *Cecil v. Butcher* (1821), 2 Jac. & W. 565; *Roberts v. Williams* (1841), 11 L. J. Ch. 65. *Mentd. Clavell v. Littleton* (1710), Prec. Ch. 305; *Birch v. Blagrove* (1755), Amb. 264; *Doe d. Richards v. Lewis, Richards v. Lewis* (1852), 11 C. B. 1035; *Re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461.

146. —.]—WRIGHT v. WAKEFORD, No. 112, ante.

147. —.]—A deed has no operation until delivery (BAYLEY, J.).—STYLES v. WARDLE (1825), 4 B. & C. 908; 7 Dow. & Ry. K. B. 507; 107 E. R. 1297; sub nom. WARDEN v. STYLES, 4 L. J. O. S. K. B. 81.

Annotation:—*Mentd. Buckeridge v. Flight* (1826), 5 L. J. O. S. K. B. 21.

148. —.]—The mere sealing does not make it a deed. It must have been delivered as a deed (LORD TENTERDEN, C.J.).—OWEN v. BOWEN (1829), 4 C. & P. 93, N. P.

149. —.]—No particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed, but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt & expressive mode of indicating such an intention is to hand it over, saying: "I deliver this as my deed," but any other words or acts that sufficiently show that it was intended to be finally executed will do as well (BLACKBURN, J.).

The efficacy of a deed depends on its being sealed & delivered by the maker of it, not on his ceasing to retain possession of it. This, as a general proposition of law, cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or till some condition has been performed, but when the time has arrived, or the condition has been performed, the delivery becomes absolute, & the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow (LORD CRANWORTH).—*XENOS v. WICKHAM* (1866), L. R. 2 H. L. 296; 36 L. J. C. P. 313; 16 L. T. 800; 16 W. R. 38; 2 Mar. L. C. 537, H. L.; *reversg.* (1863), 14 C. B. N. S. 435, Ex. Ch.

Annotations:—*Reid. Macedo v. Stroud*, [1922] 2 A. C. 330.

150 i. Effect of mere delivery—Written instrument not constituted deed thereby.]

A document under seal, whereby the maker acknowledged a debt to A., was handed, enclosed in a sealed envelope, to A. The envelope bore instructions that it was only to be opened after the maker's death, & the maker gave no indication to A. as to the contents:—*Held*: the document did not operate as a deed, there having been, in the circumstances, no delivery of it as such.—*Re CARLILE, DAKIN v. TRUSTEES EXECUTORS & AGENCY CO., LTD.*, [1920] V. L. R. 427.—**AUS.**

PART I. SECT. 5, SUB-SECT. 1.—D. (b) i.

151 i. General rule.]—A deed is pre-

sumed to have been delivered on the day it bears date.—*HAYWARD v. THACKER* (1871), 31 U. C. R. 427.—**CAN.**

151 ii. —.]—The attestation clause was simply "Witness." It was objected that there was no delivery. Deft. did not remember if the grantor delivered it to him, he thought the grantor gave it to deft.'s clerk, but in one of these two ways it came into his possession:—*Held*: not a good delivery.—*CHIVERIE v. KNIGHT* (1876), 2 P. E. I. 108.—CAN.****

151 iii. —.]—Registration of a deed does not necessarily imply delivery of the deed.—LEACOCK v. CHAMBERS (1886), 3 Man. L. R. 645.—CAN.****

Mentd. Bullen v. Sharp (1865), L. R. 1 C. P. 86; *Morocco Land Co. v. Fry* (1865), 5 New Rep. 234; *Cory v. Patton* (1872), L. R. 7 Q. B. 304; *Morrison v. Universal Marine Insce.* (1872), L. R. 8 Exch. 40; *Fisher v. Liverpool Marine Insce.* (1873), L. R. 8 Q. B. 469; *Roberts v. Security Co.* (1896), 75 L. T. 531; *Universo Insce. of Milan v. Merchants Marine Insce.*, [1897] 2 Q. B. 93.

150. Effect of mere delivery—Written instrument not constituted deed thereby.]—G. being seised of a tenement, agreed to dispose of it to S. This was done by a scrivener, in an informal manner, by indorsement under seal. The indorsement was not stamped & there was no form of delivery.

It is given in his presence, & he receives the money: it is clearly a deed between the parties; & must be so therefore, as with respect to the Stamp Act (LORD MANSFIELD, C.J.).

As to the circumstance of attestation, though the solemn form is, "sealed & delivered before us," an inaccuracy in that shall not overset every thing (ASTON, J.).

Delivery only would not make it a deed; for a memorandum may be delivered (LORD MANSFIELD, C.J.).—*GOODRIGHT v. GREGORY* (1773), Lofft, 339; 98 E. R. 682.

Delivery of scrip of limited liability company.]—See COMPANIES.

Delivery of bonds.]—See BONDS, Vol. VII., pp. 180, 181, Nos. 185–192.

(b) What amounts to—Proof of.

i. In General.

Delivery as escrow.]—See Sect. 5, sub-sect. 2, post.

151. General rule.]—The actual delivery of a writing sealed to the party, is a good delivery without any words. A sealed instrument cannot be an escrow by delivery to the intended obligee. As a writing may take effect by actual delivery without any words, so it may take effect by words without actual delivery.—THOROUGHGOOD'S CASE (1612), 9 Co. Rep. 136 b; 77 E. R. 925.

152. —.]—XENOS v. WICKHAM, No. 149, ante.

153. —Need not be by physical act.]—POWELL v. LONDON & PROVINCIAL BANK, No. 104, ante.

154. —.]—MACEDO v. STROUD, No. 172, post.

155. Mere signing, sealing & using words of delivery—Not conclusive evidence of legal delivery.]—DOE d. FENTIMAN v. VIRGO, No. 230, post.

156. No formal words necessary—Actual delivery sufficient.]—ANON. (1573), Ben. & D. 104; 123 E. R. 310.

157. —.]—HOLLINGWORTH v. ASCUE (1594), Cro. Eliz. 356; 78 E. R. 604; sub nom. ASKUE v. HOLLINGBROKE, Moore, K. B. 405; subsequent proceedings, sub nom. ASCUE v. HOLLINGWORTH (1597), Cro. Eliz. 461, 494; (1598), Cro. Eliz. 544.

Annotations:—*Mentd. Cabell v. Vaughan* (1670), 1 Wms. Saund. 288 t; *Abbot v. Smith* (1774), 2 Wm. Bl. 947; *Scott v. Godwin* (1797), 1 Bos. & P. 67.

158. Delivery may be inferred—From conduct

151 iv. —.]—A deed must be assumed to have been delivered before it is registered.—IMPERIAL BANK OF CANADA v. METCALFE (1886), 11 O. R. 467.—CAN.****

151 v. —.]—Mere registration of a deed is not delivery of it; it is but circumstantial evidence of delivery.—ANNING v. ANNING (1916), 38 O. L. R. 277.—CAN.****

158 i. Delivery may be inferred—From conduct of parties—At time of execution.]—Where a conveyance has been executed by the grantor in the presence of an attesting witness, who swears he read over the whole of the deed to the grantor before execution, & complied with all the requirements

of parties—At time of execution.]—SHELTON'S CASE (1582), Cro. Eliz. 7; 78 E. R. 274.

159. ———.]—GOODRIGHT v. GREGORY, No. 150, *ante*.

160. ———.]—A deed was executed by the grantee, but not attested, & was by him sent to the solr. of the grantors to procure their execution, & they accordingly signed, sealed, & delivered it:—*Held*: this was a complete delivery, whereby the estate passed.—KIDNER v. KEITH (1863), 15 C. B. N. S. 35; 143 E. R. 695.

Annotation:—*Reid*. Whelan v. Palmer (1888), 39 Ch. D. 648.

161. ——— After execution.]—TUPPER v. FOULKES, No. 118, *ante*.

162. ———.]—Pltf. executed a declaration of trust operating as a voluntary settlement of leasehold property upon his mother for life, with remainders in favour of her children. Subsequently a deed was indorsed upon the original assignment of the property to pltf. purporting to convey the legal term to the mother absolutely. Pltf. signed his name to this deed opposite the seal which had been affixed at the solr.'s office, but immediately upon his signing it the solr. who was present, hearing of the declaration of trust, stopped all further proceedings. The deed, however, so signed, but undated & unattested, was left in the hands of pltf.'s mother, who afterwards granted the lease to the deft. Deft. occupied the premises under this lease, & repaired them with pltf.'s knowledge, & in a deed of arrangement between pltf. & his mother's exors., which was prepared by his direction, & signed by him, though not completely executed, were contained recitals of the deed in question, & of the lease to deft.:—*Held*: sufficient evidence of the execution of the deed by pltf.—KEITH v. PRATT (1862), 10 W. R. 296.

163. ——— From handwriting of obligor.]—GRELLIER v. NEALE, No. 128, *ante*.

164. ——— From seal of obligor.]—TALBOT v. HODSON, No. 129, *ante*.

165. ——— From subsequent admission — "Signed, sealed & executed as it purported to be."—At the trial of a cause it was admitted that a document "was signed, sealed & executed as it purports to be." The document, which was produced by the party who was to take a benefit under it, concluded "as witness the hands & seals of," the parties, & the attestation was to the signing & sealing only:—*Held*: it was to be inferred that the document was delivered, & amounted in law to a deed.—HALL v. BAINBRIDGE (1848), 12 Q. B. 699; 3 New Pract. Cas. 204; 17 L. J. Q. B. 317; 11 L. T. O. S. 434; 12 Jur. 795; 116 E. R. 1032.

166. Instrument conditioned to take effect on death of grantor.]—H., who was the assignee of the lease of a dwelling-house, signed & sealed a document purporting to be an assignment of the lease by him to one B., but of which the date was not filled in, & delivered the document to his solrs.

necessary to make it an executed document, a presumption is raised in favour of the delivery of the instrument.—O'CALLAGHAN v. COADY (1912), 11 E. L. R. 63.—CAN.

161 i. ——— After execution.]—In a deed from father to son of bargain & sale the attestation clause stated it to have been signed, sealed & delivered. The grantee had voted on the land, once when his father himself was returning officer, & had resided for more than 20 years upon the lot paying nothing:—*Held*: absolutely delivered.—YOUNG v. HUBBS (1857), 15 U. C. R. 250.—CAN.

161 ii. ———.]—Land was conveyed by pltf. to his wife. Pltf. retained in his possession the duplicate of the deed to his wife. A mortgage of the land was afterwards executed by his wife, at the instance of pltf., who produced the duplicate deed for the purpose of having the mortgage prepared:—*Held*: the deed to the wife was duly delivered.—ANNING v. ANNING (1916), 38 O. L. R. 277.—CAN.

161 iii. ———.]—A man treating a deed as his own, is a delivery of it.—CAREY v. O'HARA (*circa* 1800), Rowe, 531.—IR.

upon terms set forth in a letter addressed to him by them as follows: "We acknowledge that you have to-day executed the assignment of your lease to B. as an escrow, & that we are to retain it on your behalf until you send instructions to complete the deed. In the event of your dying before the deed is completed, we understand that we are to consider the deed as having been completed before your death, & to take what steps are necessary to vest the lease in B., should she wish it. In the event of B. dying before the assignment is completed you will of course send us further instructions as to what is to be done with the premises." B. signed & sealed the document at or about the time when H. did so, but the ct. inferred from the circumstances that she did so merely by way of acquiescence in the arrangement, whatever it was, intended by H. The document was not attested so as to satisfy the requirements of the Wills Act. H. died without having given any further instructions in the matter. He occupied, & retained the title deeds of, the house, & paid the rent, rates, & taxes in respect thereof, until his death, & had, subsequently to the time when the before-mentioned document was delivered to his solrs. as aforesaid, been party to a deed, reciting that the term was vested in him, by which the lessors granted him permission to make a structural alteration in the house. B. survived him:—*Held*: the proper inference from the facts was that the above-mentioned document was never legally delivered by H. either absolutely as a deed, or as an escrow, & therefore was inoperative.

A document purporting to be a deed of conveyance by a person of his own property, which is delivered by him on a condition that it shall only become operative upon his death is a testamentary document, and therefore cannot take effect as an escrow.—FOUNDLING HOSPITAL (GOVERNORS & GUARDIANS) v. CRANE, [1911] 2 K. B. 367; 80 L. J. K. B. 853; 105 L. T. 187, C. A.

Annotations:—*Reid*. Warwick v. Warwick (1918), 34 T. L. R. 475. *Mentd.* *Re* Williams, Williams v. Ball, [1917] 1 Ch. 1.

ii. Delivery through Third Party.

Delivery as escrow.]—See Sect. 5, sub-sect. 2, *post*.

167. Delivery through third party—Effect of refusal to accept by obligee.]—A. executed a bond under seal & delivered it to B. to deliver to C. C. declined to accept it but B. left it with him:—*Held*: C. can sue on the bond & A. cannot now plead that it is not his deed.—TAW v. BURY (1558), 2 Dyer, 167 a; Ben. & D. 75; 73 E. R. 366.

Annotations:—*Consd.* Doe d. Garnons v. Knight (1826), 5 B. & C. 671. *Reid*. Alford v. Leo (1587), Cro. Eliz. 54; Hall v. Denbigh (1600), Cro. Eliz. 773; Whelpdale's Case (1605), 5 Co. Rep. 119 a; Oshey v. Hicks (1610), Cro. Jac. 263.

168. ———.]—ALFORD v. LEE (1587), Cro. Eliz. 54; 2 Leon. 110; 78 E. R. 315.

Annotation:—*Consd.* Doe d. Garnons v. Knight (1826), 5 B. & C. 671.

169. ———.]—BUTLER & BAKER'S CASE

p. *Mere possession does not imply delivery.*—M'ASLAN v. GLEN (1859), 21 Dunl. (Ct. of Sess.) 511; 31 Sc. Jur. 274.—SCOT.

PART I. SECT. 5, SUB-SECT. 1.—D. (b) ii.

g. *Delivery through third party.*—The due execution of a deed & forwarding it to a third party for the obligee, is a sufficient delivery.—MUIRHEAD v. MCDONOUGH (1838), 5 O. S. 642.—CAN.

r. ———.]—M. executed three deeds; they were placed in an envelope & sealed by a Justice at M.'s request,

Sect. 5.—Execution of deeds: Sub-sect. 1, D. (b) ii., (c) & (d) & E.]

(1591), 3 Co. Rep. 25 a; 1 And. 348; 3 Leon. 271; Moore, K. B. 254; Poph. 87; 76 E. R. 684.

Annotations.—*Consd.* Xenos v. Wickham (1867), L. R. 2 H. L. 296. *Reid.* Jennings v. Bragg (1595), Cro. Eliz. 447; Wankford v. Wankford (1698), 1 Salk. 299; Doe d. Garnons v. Knight (1826), 5 B. & C. 671; Siggers v. Evans (1855), 5 B. & C. 367; Standing v. Bowring (1885), 31 Ch. D. 282; Mallott v. Wilson, [1903] 2 Ch. 494. *Mentd.* Menvil's Case (1685), 13 Co. Rep. 19; Mountjoy's Case (1689), 5 Co. Rep. 3 b; Fitzwilliam's Case (1605), 6 Co. Rep. 82 a; Poxhall's Case (1610), 8 Co. Rep. 83 b; Lovies's Case (1614), 10 Co. Rep. 78 a; Court of Ward's Case (1626), Cro. Car. 33; Sydowne v. Holme (1635), Cro. Car. 422; R. v. Hampden (1637), 3 State Tr. 825; Norrice & Norrice's Case (1639), March. 23; Berry v. White (1682), O. Bridg. 82; Geary v. Bearcroft (1666), O. Bridg. 484; Thompson v. Leach (1690), 2 Vent. 198; Arthur v. Bokenham (1707), 11 Mod. Rep. 148; Bruncker v. Cook (1707), 11 Mod. Rep. 121; Atkin v. Barwick (1719), 1 Stra. 165; Windham v. Chetwynd (1767), 1 Burr. 414; Buckinghamshire v. Drury (1762), Wilms. 177; Brydges v. Chandos (1794), 2 Ves. 417; Goodtitle d. Holford v. Otway (1796), 1 Bos. & P. 576; Cave v. Holford (1798), 3 Ves. 650; Goodright d. Fowler v. Forrester (1807), 8 East, 652; Doe d. Tofteld v. Tofteld (1809), 11 East, 246; Balme v. Hutton (1831), 2 Tyr. 17; Lucas v. Nockells (1833), 10 Bing. 157; Bramah v. Roberts (1835), 1 Bing. N. C. 481; Mills v. Oddy (1835), 2 Cr. M. & R. 103; Garland v. Carlisle (1837), 3 Cl. & Fin. 693; Doe d. Chidgey v. Harris (1847), 16 M. & W. 517; London & County Banking Co. v. London & River Plate Bank (1888), 21 Q. B. D. 535; *Re* Arbib & Class's Contract, [1891] 1 Ch. 601.

170. — For use & benefit of obligee — Third party not agent of obligee.—Where a party to any instrument seals it, & declares, in the presence of a witness, that he delivers it as his deed, but keeps it in his own possession, & there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it is a valid & effectual deed, & delivery to the party who is to take by the deed, or to any person for his use, is not essential. Delivery to a third person for the use of the party in whose favour the deed is executed, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made.—DOE d. GARNONS v. KNIGHT (1826), 5 B. & C. 671; 8 Dow. & Ry. K. B. 348; 4 L. J. O. S. K. B. 161; 108 E. R. 250.

Annotations.—*Consd.* Hall v. Palmer (1844), 3 Hare 532; Xenos v. Wickham (1867), L. R. 2 H. L. 296. *Reid.* Grugeon v. Gerrard (1840), 4 Y. & C. Ex. 119; Fletcher v. Fletcher (1844), 4 Hare 67; Doe d. Richards v. Lewis, Richards v. Lewis (1852), 11 C. B. 1035; Jeffries v. Alexander (1860), 8 H. L. Cas. 594; Pattie v. Hornibrook, [1897] 1 Ch. 25; Macedo v. Stroud, [1922] 2 A. C. 330. *Mentd.* Roberts v. Williams (1841), 11 L. J. Ch. 65; Grant v. Hunt (1845), 1 C. B. 44.

171. — To solicitor of donor.—*Re* SEYMOUR, FIELDING v. SEYMOUR, No. 67, *ante*.

172. ——The owner of mtged. lands & houses in Trinidad, about three months before his death, executed a conveyance & a memorandum of transfer by each of which he purported to convey or transfer certain properties absolutely to his daughter in consideration of his affection for her. The properties dealt with by the memorandum, unlike those dealt with by the convey-

ance, were registered under the Real Property Ordinance No. 60 of Trinidad, & accordingly, by s. 46, no transfer of them was effectual to pass any estate or interest unless the instrument was registered under the Ordinance. The donor after having executed the two instruments delivered them to his solr., telling him to keep, & not to register, them. They remained in the solr.'s custody unregistered until the death of the donor, who during his life continued to receive the rents. There were concurrent findings that the instruments were intended to operate as immediate & unconditional gifts to the daughter:—*Held*: the deed of conveyance, though not delivered to the daughter, operated to convey to her the properties to which it referred.

No particular form of words or acts is necessary to render an instrument the deed of the party who has executed it. It is no doubt true that a deed may be delivered on a condition that it is not to be operative until some event happens or some condition is performed. In such a case it is until then an escrow only (LORD HALDANE).—MACEDO v. STROUD, [1922] 2 A. C. 330; 91 L. J. P. C. 222; 128 L. T. 45, P. C.

173. Delivery by beneficiary.—In presence of obligee.]—PARKER v. TENANT (1560), 2 Dyer, 192 b; Ben. & D. 92; 73 E. R. 424; *sub nom.* ANON., Jenk. 221.

Annotation.—*Mentd.* Dowman's Case (1586), 9 Co. Rep. 7 b.

174. Delivery to solicitor of mortgagor—Bankruptcy of mortgagor—Subsequent delivery to mortgagees.—A. being indebted to his bankers, executed a deed purporting to be a mtge. to them for securing the debt. After executing it, he delivered it to his attorney, who retained it in his possession till A.'s bkpcy., which occurred about a month afterwards. The attorney then delivered it to the mtgees.:—*Held*: this was good a delivery by A. to the mtgees.—GRUGEON v. GERRARD (1840), 4 Y. & C. Ex. 119; 160 E. R. 945.

Delivery by corporation.—*See* Sub-sect. 5, *post*.
Concealment of fact of execution—Deed retained by grantor.—*See* Sub-sect. 3, *post*.

(c) *Delivery as Escrow.*

See Sect. 5, sub-sect. 2, *post*.

(d) *Re-delivery—Acknowledgment.*

175. Re-delivery of voidable deed—Person making first delivery infant or married woman.—JENNINGS v. BRAGG (1595), Cro. Eliz. 447; cited in 3 Co. Rep. at p. 35 b; 78 E. R. 687.

176. ——A re-delivery by feme, after death of baron, of a deed delivered by her whilst covert, is a sufficient confirmation of such deed so as to bind her without it being re-executed or re-attested. Circumstances alone may be equivalent to such re-delivery though the deed be a joint deed by baron & feme affecting the wife's land & no fine levied.—GOODRIGHT v. STRAPHAN (1774), 1 Cowp. 201; Lofft, 763; 98 E. R. 1043.

Annotations.—*Appld.* Hudson v. Revett (1829), 5 Bing. 368. *Consd.* Tupper v. Foulkes (1861), 9 C. B. N. S. 797; Powell v. London & Provincial Bank, [1893] 2 Ch. 555; *Re* Seymour, Fielding v. Seymour, [1913] 1 Ch. 475. *Reid.* Lee v. Muggeridge (1813), 5 Taunt. 36.

MACECHNIE (1858), 7 Gr. 23.—CAN.

t. — Subsequent delivery to mortgagees.—Deft. executed a mtge. & left it with his solrs. with instructions not to deliver it over until he was satisfied that all was right & assented to their doing so, & without such consent they delivered it over. In an action on the covenant to pay the mtge. money:—*Held*: deft. had authorised his solrs. to deliver the mtge. whenever they should deem it advisable to do so

in deft.'s interests, & pltf. was entitled to recover.—LEYS v. HOLLINGHEAD (1878), 29 C. P. 66.—CAN.

a. Delivery to agent of both parties.—Although a deed is delivered to the agent for a husband, & he is also agent for the wife, it is not a delivered instrument as against her.—BROWNLEE v. WADDELL (1831), 10 Sh. (Ct. of Sess.) 39; 7 Fac. Coll. 36.—SCOT.

b. ——STEWART v. STEWART (1842), 1 Bell, Sc. App. 796.—SCOT.

& M. instructed the justice to keep them until his death & then deliver them to his exors.—CANADIAN CREDIT MEN'S TRUST ASSOC. v. MYERS (1922), 49 N. B. R. 83.—CAN.

a. Delivery to solicitor of mortgagor.—A mtge. was executed & left with the mtgor.'s attorney with directions not to register it until further orders. After the mtgor.'s death it was delivered to the mtgee.'s agent, who had it registered:—*Held*: a sufficient delivery.—MACECHNIE v.

177. May be inferred from circumstances—**Re-delivery of joint deed of husband & wife.**—*GOODRIGHT v. STRAPHAN*, No. 176, *ante*.

178. — **Acknowledgment of grantor.**—*TUPPER v. FOULKES*, No. 118, *ante*.

179. — **—**—*Re SEYMOUR, FIELDING v. SEYMOUR*, No. 67, *ante*.

Delivery as escrow.—*See Sub-sect. 2, post*.

180. **Re-execution by tracing over signature with dry pen—Warrant of attorney.**—A party executed a warrant of attorney to confess judgment for £1,000 in the presence of an attorney, who subscribed his name as a witness to the execution as attorney for him, pursuant to Judgments Act, 1837 (c. 110), s. 9. The warrant of attorney was afterwards altered, by consent, by changing the sum to £2,000. The attorney was present, & passed a dry pen over the attestation & over his own signature:—*Held*: the warrant was not duly subscribed.—*BAILEY v. BELLAMY* (1840), 9 Dowl. 507; *Arn. & H.* 90; 10 L. J. Q. B. 41; 5 J. P. 3. *Annotations*:—*Reid*, *Payne v. Scriven* (1849), 1 Rob. Ecol. 772. *Mentd.* *Hartley v. Manson* (1842), 11 L. J. C. P. 199.

181. **Deed executed in blank—Adoption after blanks filled in.**—*M.*, the holder of shares in a co., deposited with *S.* certificates of the shares & a blank transfer, as security for a debt. Afterwards he fraudulently executed a blank transfer in respect of the shares & deposited it with the appts., as security for a debt. On being applied to by the appts. for the share certificate he stated that it was lost or mislaid. The appts. stamped their transfer, filled up the blanks, had it executed by their manager as the transferee, & sent it to the co.'s office with a request that the co. would "certify it," & with an indemnity against any claim in respect of the missing certificates. The co. did not accept the indemnity & declined to certify. Shortly after the exors. of *S.* (who had died) gave notice to the co. of their charge upon the shares. The co. was incorporated under the Companies Act, 1862. The arts. of assoc. provided that the shares should be transferable only by deed: that lost certificates might be renewed upon satisfactory proof of the loss, or in default of proof, upon a satisfactory indemnity being given: & that the co. should not be bound by or recognise any equitable interest in shares. Each certificate stated, under the co.'s seal, that no transfer of any portion of the shares represented by the certificate would be registered until the certificate had been delivered at the co.'s office. The appts. having brought an action against the exors. for a declaration of their title to the shares & to restrain the exors. from dealing with the shares:—*Held*: the transfer to the appts. not having been re-delivered by the transferor after the blanks were filled up was not his deed & the appts. had no legal title to the shares.—*SOCIÉTÉ GÉNÉRALE DE PARIS v. WALKER* (1885), 11 App. Cas. 20; 55 L. J. Q. B. 169; 54 L. T. 389; 34 W. R. 662; 2 T. L. R. 200, H. L.; *affg.* *S. C. sub nom. SOCIÉTÉ GÉNÉRALE DE PARIS v. TRAMWAYS UNION CO.* (1884), 14 Q. B. D. 424, C. A.

Annotations:—*Consd.* *Powell v. London & Provincial Bank*, [1893] 1 Ch. 610. *Reid*, *Magnus v. Queensland National Bank* (1887), 36 Ch. D. 25; *Nanney v. Morgan* (1887), 36 Ch. D. 598; *Ireland v. Hart*, [1902] 1 Ch. 522; *Burgis v. Constantine*, [1908] 2 K. B. 484; *Re Seymour, Fielding v. Seymour*, [1913] 1 Ch. 475. *Mentd.* *Bradford Banking*

wife during coverture:—*Held*: a new delivery after his death.—*CAREY v. O'HARA* (1800), *Rowe*, 531.—*IR.*

PART I. SECT. 5, SUB-SECT. 1.—E.

183 I. **Whether necessary.**—A conveyance of land does not require a witness.—*DOE d. SHERLOCK v. POWERS*

Co. v. Briggs (1886), 12 App. Cas. 29; *Colonial Bank v. Whitney* (1886), 11 App. Cas. 426; *Colonial Bank v. Hepworth* (1887), 36 Ch. D. 36; *Roots v. Williamson* (1888), 38 Ch. D. 485; *Williams v. Colonial Bank, Williams v. London Chartered Bank of Australia* (1888), 38 Ch. D. 388; *Re Cawley* (1889), 42 Ch. D. 209; *Moore v. North Western Bank*, [1891] 2 Ch. 599; *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396; *Re Ottos Kopje Diamond Mines*, [1893] 1 Ch. 618; *Rainford v. Keith & Blackman Co.*, [1905] 1 Ch. 296; *Wells v. Smith*, [1914] 3 K. B. 722; *Mackereth v. Wigan Coal & Iron Co.*, [1916] 2 Ch. 293.

182. — **Whether action upon sufficient.**—*POWELL v. LONDON & PROVINCIAL BANK*, No. 104, *ante*.

Effect of filling up blanks after execution generally.—*See CONTRACT*, Vol. XII., Part VII., Sect. 8.

Stamps on re-execution.—*See REVENUE.*

E. Attestation.

See, generally, EVIDENCE.

In warrants of attorney to confess judgment.—*See Sect. 5, sub-sect. 6, T. (d), post*.

183. **Whether necessary.**—*GARRETT v. LISTER* (1661), 1 Lev. 25; 83 E. R. 279. *Annotation*:—*Mentd.* *Cox v. Allingham* (1822), *Jac.* 514.

184. — **At common law.**—At common law, an attesting witness is not essential to the validity of a deed.—*BUCKENIDGE v. FLIGHT* (1826), 6 B. & C. 49; 9 Dow. & Ry. K. B. 113; 5 L. J. O. S. K. B. 21; 108 E. R. 371; *affg.* *S. C. sub nom. FLIGHT v. BUCKENIDGE* (1825), 3 Bing. 215.

Annotations:—*Mentd.* *Cockburn v. Harvey* (1831), 2 B. & Ad. 797; *Richardson v. Tomkies* (1832), 9 Bing. 51; *Faircloth v. Gurney* (1833), 9 Bing. 622; *Huggins v. Coates* (1842), 6 Jur. 782.

185. — **—**—A power to demise premises with the consent of *A.*, in writing, duly attested, is not well executed by a demise which professes to be made with the consent of *A.*, "testified by his being a party to those presents." The meaning is, that the written consent shall be signed in the presence of a witness.—*FRESHFIELD v. REED* (1842), 9 M. & W. 404; 11 L. J. Ex. 193; 152 E. R. 171.

Annotations:—*Consd.* *Seal v. Claridge* (1881), 7 Q. B. D. 516. *Reid*, *Re Parrott, Ex p. Cullen*, [1891] 2 Q. B. 151.

186. — **—**—*KEITH v. PRATT*, No. 162, *ante*.

187. — **—**—A voluntary conveyance of land to charitable uses was executed by the grantor in the presence of a witness, who signed the attestation clause, & in the presence of two other persons, who executed the deed at the same time for the purpose of conveying an outstanding legal estate, but did not sign the attestation clause:—*Held*: the deed was not sealed & delivered in the presence of two witnesses within the meaning of Charitable Uses Act, 1735 (c. 36).—*WICKHAM v. BATH (MARQUIS)* (1865), L. R. 1 Eq. 17; 35 Beav. 59; 35 L. J. Ch. 5; 13 L. T. 313; 30 J. P. 36; 11 Jur. N. S. 988; 14 W. R. 21; 55 E. R. 816. *Annotation*:—*Mentd.* *Churcher v. Martin* (1889), 42 Ch. D. 312.

188. **Who may attest—Infant son of grantor.**—*KINGSTON v. MANWARING* (1664), *Nels.* 94; 21 E. R. 798; *sub nom. KINASTON v. MAYNWEARING*, 1 Cas. in Ch. 47, L. C.

189. — **Disinterested persons—Not party to deed.**—Purchase under a trust for payment of debts by the trustee, as agent for his father, both creditors in partnership, established under the

(1865), 6 All. 232.—*CAN.*

183 II. — **—**—In an action arising out of an assignment of an equity of redemption:—*Held*: the deed did not require attestation.—*ROOKER v. HOOFSTETTER* (1896), 26 S. C. R. 41.—*CAN.*

189 I. **Who may attest—Disinterested person—Not party to deed.**—Where the

PART I. SECT. 5, SUB-SECT. 1.—D. (d).

177 I. **May be inferred from circumstances—Re-delivery of joint deed of husband & wife.**—The paying of interest by a wife, after the death of her husband, upon a mtge. of the wife's lands executed by the husband &

Sect. 5.—Execution of deeds: Sub-sect. 1, E.; sub-sect. 2, A. & B.]

circumstances, particularly, that the *cestui que trust* had full information, & the sole management, making surveys, settling the particulars, fixing the prices, etc.:—*Held*: the vendor was bound by the signature of the agent's clerk.

It is true, where a party or principal, or person to be bound signs as, what he cannot be a witness, he cannot be understood to sign otherwise than as principal (LORD ELDON, C.).—*COLES v. TRE-COTHICK* (1804), 9 Ves. 234; 1 Smith, K. B. 233; 32 E. R. 592, L. C.

Annotations:—*Consd.* Seal v. Claridge (1881), 7 Q. B. D. 516. *Reid.* Gosbell v. Archer (1835), 2 Ad. & El. 500. *Mentd.* Randall v. Errington (1805), 10 Ves. 423; Blagden v. Bradbear (1806), 12 Ves. 466; Morse v. Royal (1806), 12 Ves. 355; Buckmaster v. Harrop (1807), 13 Ves. 456; Emmerson v. Heelis (1809), 2 Taunt. 38; Peacock v. Evans, Evans v. Peacock (1810), 16 Ves. 512; Kemeys v. Proctor (1813), 3 Ves. & B. 57; Copls v. Middleton (1817), 2 Madd. 410; Kenney v. Wexham (1822), 6 Madd. 365; Henderson v. Barnwell (1827), 1 Y. & J. 387; Graham v. Musson (1839), 7 Scott. 769; *Re* Robinson & Farrand, *Ex p.* Holdsworth (1841), 1 Mont. D. & G. 475; Carter v. Palmer (1842), 8 Cl. & Fin. 657; Strickland v. Turner (1852), 7 Exch. 208; Tottenham v. Green (1863), 32 L. J. Ch. 201; Coles v. Bristowe (1868), L. R. 6 Eq. 149; Plowright v. Lambert (1885), 52 L. T. 646; Luddy's Trustee v. Peard (1886), 33 Ch. D. 500; Potter v. Peters (1895), 64 L. J. Ch. 357; *Re* Boles & British Land Co.'s Contract (1901), 71 L. J. Ch. 130.

190. ———.—]—The grantee of a bill of sale, although he may be a solr., cannot be the attesting witness thereof under Bills of Sale Act, 1878 (c. 31), s. 10 (1).—*SEAL v. CLARIDGE* (1881); 7 Q. B. D. 516; 50 L. J. Q. B. 116; 44 L. T. 501; 29 W. R. 598, C. A.

Annotations:—*Apld.* *Re* Parrott, *Ex p.* Cullen, [1891] 2 Q. B. 151. *Reid.* Penwarden v. Roberts, Wilson v. Roberts, Heath v. Roberts (1882), 9 Q. B. D. 137; Peace v. Brookes, [1895] 2 Q. B. 451.

191. ———.—]—A person who is appointed by a creditor under Bankruptcy Act, 1883, Sched. I., r. 15 to act as his proxy cannot himself be the attesting witness to the instrument of proxy.—*Re* PARROTT, *Ex p.* CULLEN, [1891] 2 Q. B. 151; 60 L. J. Q. B. 507; 64 L. T. 801; 39 W. R. 543; 7 T. L. R. 564; 8 Morr. 185, D. C.

192. ———.—]—“Two credible witnesses.”—An assignment of a bail bond is invalid, if executed in the presence of & attested by pltf. in the action & another person, & Anne (c. 16), s. 20, requiring the assignment to be made to pltf. in the presence of two credible witnesses, which means disinterested persons.—*WHITE v. BARRACK* (1836), 1 M. & W. 424; 2 Gale, 57; 5 L. J. Ex. 167; 150 E. R. 500; *sub nom.* WRIGHT v. BARRACK, 1 Tyr. & Gr. 764.

193. How effected—Whether attestation should be in same place as execution.—A bond having been executed by A., & attested by one witness, was carried into an adjoining room & shown to B. who was desired to attest it also, which he accordingly did in the presence of A.:—*Held*: B. was a

good witness to prove the execution.—*PARKE v. MEARS* (1800), 2 Bos. & P. 217; 3 Esp. 171; 126 E. R. 1244.

194. ———.—]—Deeds ought to be attested in the same room in which they are executed, & not carried away for attestation. The witnesses ought to be careful that they hear the formal words of delivery used, & it is highly expedient that the party executing should state that he fully understands what he is executing. But to make the party designate the instrument in the presence of the witnesses, as by saying, “this is my power of attorney,” or the like, would be laying down a rule sometimes productive of inconvenience.

—*LOYD v. FRESHFIELD* (1826), 2 C. & P. 325, N. P.; *subsequent proceedings, sub nom.* LLOYD v. FRESHFIELD, 9 Dow. & Ry. K. B. 19.

Annotations:—*Mentd.* Alliance Bank v. Kearsley (1871), L. R. 6 C. P. 433; Okell v. Eaton & Okell (1874), 31 L. T. 330.

— **Assurances inter vivos for charitable purposes.**—*See* CHARITIES, Vol. VIII., p. 279, Nos. 506–508.

195. Sufficiency of—“Signed, sealed & delivered in presence of.”—*NEWTON v. RICKETTS*, No. 94, ante.

196. Effect of inaccuracy.—*GOODRIGHT v. GREGORY*, No. 150, ante.

Proof of attestation.—*See* EVIDENCE.

SUB-SECT. 2.—DELIVERY AS ESCROW.

A. In General.

Delivery of deeds generally, *see* Sub-sect. 1 D., ante.

197. Definition of escrow—Deed intended to take effect conditionally.—A. having received monies belonging to B. privately, without any communication with B., prepared & executed a mtge. to him for the amount. A. retained the deed in his custody for 12 years, & then died insolvent. After his death the deed was discovered in a chest containing his title deeds:—*Held*: the deed was not an escrow, there being no evidence to show that it was executed conditionally, but that it took effect from its execution, & was good against A.'s creditors.—*EXTON v. SCOTT* (1833), 6 Sim. 31; 58 E. R. 507.

Annotations:—*Mentd.* Roberts v. Williams (1841), 11 L. J. Ch. 65; Hall v. Palmer (1844), 3 Hare 532; Lloyd v. Atwood (1859), 3 De G. & J. 614; Cory v. Eyre (1863), 1 De G. J. & Sm. 149; Cracknell v. Janson (1879), 11 Ch. D. 1.

198. ———.—]—It is the ordinary & almost invariable practice for the vendor to execute the conveyance & give it to his solr., who exchanges the deed for the purchase-money when paid by the purchaser. But it would be a monstrous thing for the purchaser to be allowed to say to the seller, “You have executed the deed, & therefore

writer of a deed signed the name of the executant, & then signed his own name by way of attestation:—*Held*: the deed was not properly attested.—*SRISTEDHAR GHOSH v. RAKSHAIK DAS* (1921), 1 L. R. 49 Calc. 438.—*IND.*

193 i. How effected.—Where the signatures of witnesses to a deed were affixed for them by another person with their consent:—*Held*: properly attested.—*SASI BHUSAN PAUL v. CHANDRA PESHKAR* (1906), 1 L. R. 33 Cal. 861.—*IND.*

193 ii. ———.—]—The witnesses should be actually present at & witness the execution of the deed.—*SHAMU PATTAR v. ABDUL KADIR RAVATEAN* (1912), 28 T. L. R. 583.—*IND.*

193 iii. ———.—]—It is not a valid objec-

tion to the testing of a deed that the two witnesses were not in presence of each other.—*HOGG v. CAMPBELL* (1864), 2 Macph. (Ct. of Sess.) 848; 36 Sc. Jur. 428.—*SCOT.*

193 iv. ———.—]—The fact that the signature to a deed was not adhibited in the presence of one of the attesting witnesses is a fatal defect.—*FORRESTS v. LOW'S TRUSTEES*, [1907] S. C. 1240; 15 S. L. T. 330.—*SCOT.*

196 i. Effect of inaccuracy.—In an action on an attested instrument the obligee got another attesting signature added to it by a man who had not witnessed the execution of it by the obligor:—*Held*: the obligee could not sue upon it.—*SITARAM KRISHNA v. DAJI DEVANI* (1883), 1 L. R. 7 Bom.

418.—IND.

196 ii. ———.—]—In a suit on a hypothecation executed in favour of pltf. the name of deft. had been added as that of an attesting witness, & this was a forgery:—*Held*: pltf. was not precluded from recovering.—*RAMAYYAR v. SHANMUGAM* (1891), 1 L. R. 15 Mad. 70.—*IND.*

196 iii. ———.—]—An instrument attested by a witness whose place of abode & calling are not stated is not a deed.—*HETHERINGTON v. SAMSON*, 4 N. Z. Jur. N. S. 84.—*N.Z.*

196 iv. ———.—]—An instrument was not properly attested as a deed:—*Held*: inadmissible as evidence of a contract.—*MARTINSEN v. ALLEN* (1889), 8 N. Z. L. R. 471.—*N.Z.*

I need not pay the purchase-money; & I have got the legal estate, & you must enforce payment of the purchase-money as you can." On the contrary, I am of opinion the purchaser has no estate until he has the deed. This I take to be the ordinary case which occurs every day, where the deed of conveyance is executed as an escrow (ROMILLY, M.R.).—**WALKER v. WARE, ETC.**, Ry. Co. (1865), as reported in 35 Beav. 52; 35 L. J. Ch. 94; 55 E. R. 813.

Annotations:—Mentd. Sedgwick v. Watford & Rickmansworth Ry. (1867), 36 L. J. Ch. 379; Re Cambrian Rys. (1868), 16 W. R. 346; Pell v. Northampton & Banbury Ry. (1868), 16 W. R. 1077; Raper v. Crystal Palace & South-London Ry. (1868), 16 W. R. 413; Wing v. Tottenham & Hampstead Junction Ry. (1868), 3 Ch. App. 740; Goodford v. Stonehouse & Nailsworth Ry. (1869), 20 L. T. 137; Sutton v. Hoylake Ry. (1869), 20 L. T. 214.

199. ———.]—XENOS v. WICKHAM, No. 149, ante.

200. ———.]—FOUNDLING HOSPITAL (GOVERNORS & GUARDIANS) v. CRANE, No. 166, ante.

201. ———.]—MACEDO v. STROUD, No. 172, ante.

202. Condition cannot be imposed subsequent to delivery.]—(1) A person made a deed of gift of all his real property to his daughter. He signed & sealed it, & no one being present but the attesting witnesses, he said, "I deliver this as my last act & deed." After this he desired a third person to keep it, & not deliver it to the grantee till he was dead, it being suggested to him that she might otherwise take his property from him in his lifetime:—**Held**: the delivery of the deed was complete. *Seem*: if the direction to keep it had been given before he said, "I deliver this, etc.," the deed would not have operated as an escrow.

I doubt much whether, if the instrument had been delivered on condition that the grantee should not have it till the grantor's death, it would be an escrow (COLERIDGE, J.).

(2) If an ignorant person be induced to execute an instrument, supposing it to operate in one way & it really operates in another, such instrument is invalid.—**DOE d. LLOYD v. BENNETT** (1837), 8 C. & P. 124, N. P.

Annotation:—As to (1) Consd. Foundling Hospital v. Crane, [1911] 2 K. B. 367.

203. Condition cannot be imposed to operate after death.]—DOE d. LLOYD v. BENNETT, No. 202, ante.

204. ———.]—FOUNDLING HOSPITAL (GOVERNORS & GUARDIANS) v. CRANE, No. 166, ante.

205. Delivery of release as escrow.]—ANON. (1507), Keil. 88; 72 E. R. 251.

Release of contractual liabilities.]—See CONTRACT, Vol. XII., p. 498, Nos. 4071–4073.

206. Possession of grantee of deed delivered as escrow—Prima facie evidence of performance of condition.]—Where there is evidence to show that a deed was delivered as an escrow, the fact of the deed being found out of the possession of the party to whom it was delivered, & in the possession of the party for whose benefit it is made, is *prima facie* evidence that the condition on which it was to be delivered to him has been complied with.—

HARE v. HORTON (1833), 5 B. & Ad. 715; 2 Nev. & M. K. B. 428; 3 L. J. K. B. 41; 110 E. R. 954.

Annotations:—Mentd. Mather v. Fraser (1856), 2 K. & J. 536; Southport & West Lancashire Banking Co. v. Thompson (1887), 58 L. T. 143; Power v. Wells (1889), 6 T. L. R. 32.

By corporations.]—See CORPORATIONS, Vol. XIII., pp. 288, 289, Nos. 195–197.

B. To Whom Delivery made.

207. General rule.]—But it has been said, if it was delivered to the party it could not be delivered as an escrow, unless so delivered, in terms. Perhaps, technically speaking, this is so, because a deed delivered to a party is not an escrow. A deed delivered to a stranger is an escrow till something is done, but though it is delivered to a party, there are cases to show that it is not a perfect & complete deed (BEST, C.J.).—**HUDSON v. REVETT** (1829), 5 Bing. 308; 2 Moo. & P. 663; 130 E. R. 1103.

Annotations:—Mentd. Hibblewhite v. M'Morine (1840), 6 M. & W. 200; West v. Steward (1845), 14 M. & W. 47; Cherry v. Homming & Needham (1849), 19 L. J. Ex. 63; Fazakerly v. M'Knight (1856), 26 L. J. Q. B. 30; Tupper v. Foulkes (1861), 9 C. B. N. S. 797; Soc. Générale de Paris v. Trans. Union Co. (1884), 14 Q. B. D. 424; Powell v. London & Provincial Bank, [1893] 2 Ch. 555; Crediton, Bp. v. Exeter, Bp., [1905] 2 Ch. 455; Rudd v. Bowles, [1912] 2 Ch. 60; Re Seymour, Fielding v. Seymour, [1913] 1 Ch. 475.

208. ———.]—The delivery to the solr. of the grantee of an instrument executed by the grantor will not convert the instrument from an escrow into a deed, provided the delivery is of a character negating its being a delivery to the grantee.—**WATKINS v. NASH** (1875), L. R. 20 Eq. 262; 44 L. J. Ch. 505; 23 W. R. 647.

Annotation:—Refd. London Freehold & Leasehold Property Co. v. Suffield, [1897] 2 Ch. 608.

209. Whether escrow may be handed to grantee.]—MORICE v. LEIGH (1537), Dyer, 34 b; 73 E. R. 76.

Annotations:—Folld. Hawksland v. Gatchel (1601), Cro. Eliz. 835. **Refd.** Whyddon's Case (1596), Cro. Eliz. 520; Thoroughgood's Case (1612), 9 Co. Rep. 136 b; London Freehold & Leasehold Property Co. v. Suffield, [1897] 2 Ch. 608.

210. ———.]—WILCOCK v. HEWSON (1597), Moore, K. B. 696; 72 E. R. 847.

Annotation:—Mentd. Jones v. Bodinham (1696), 1 Salk. 173.

211. ———.]—The delivery of a deed cannot be averred to have been made to the party himself as an escrow.—**WHYDDON'S CASE** (1596), Cro. Eliz. 520; 78 E. R. 769; *sub nom.* WHYDDON'S CASE, Noy. 6.

Annotations:—Refd. Hawksland v. Gatchel (1601), Cro. Eliz. 835; Williams v. Green (1602), Cro. Eliz. 884; London Freehold & Leasehold Property Co. v. Suffield, [1897] 2 Ch. 608.

212. ———.]—A writing obligatory may be delivered as an escrow by the obligor to the obligee, to become the deed of the obligor when the obligee has performed the conditions under which the escrow was delivered, & the obligee cannot maintain an action upon it until these conditions are performed.—**HAWKSLAND v. GATCHEL** (1601), Cro. Eliz. 835; 78 E. R. 1062.

Annotation:—Refd. London Freehold & Leasehold Property Co. v. Suffield, [1897] 2 Ch. 608.

PART I. SECT. 5, SUB-SECT. 2.—A.

205 i. Delivery of release as escrow.]—Where plff. alleged that an agreement of release was delivered to a third party as an escrow, on condition that it should be void on default made by defts., & that defts. did make default:—**Held**: defts. must prove the execution of the agreement.—**LIGHT v. WOODSTOCK & LAKE ERIE RAILWAY & HARBOUR CO.** (1855), 13 U. C. R. 216.—**CAN.**

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PART I. SECT. 5, SUB-SECT. 2.—B.

209 i. Whether escrow may be handed to grantee.]—To make the delivery of a deed operate as an escrow, it must be delivered to a stranger, not to the grantee.—**HAGGARTY v. O'LEARY** (1866), 6 All. 360.—**CAN.**

209 ii. ———.]—CONFEDERATION LIFE ASSURANCE CO. v. O'DONNELL (1886), 13 S. C. R. 218.—**CAN.**

209 iii. ———.]—The ancient rule that

the delivery of a document as an escrow must be to a stranger has not survived.—**MOLSONS BANK v. CRANSTON** (1918), 44 O. L. R. 55.—**CAN.**

209 iv. ———.]—Where a deed is delivered to the party in whose favour it is executed, evidence is not admissible to show that it was intended to operate as an escrow only.—**MOHUM ALLY v. BALASOO KOER** (1863), 2 Hay. 376.—**IND.**

Sect. 5.—Execution of deeds: Sub-sect. 2, B., C. & D.]

213. —.]—A deed cannot be delivered to the party himself as an escrow.—*WILLIAMS v. GREEN* (1602), Cro. Eliz. 884; Moore, K. B. 642; 78 E. R. 1109.

Annotation:—Refd. London Freehold & Leasehold Property Co. v. Suffield (1897), 77 L. T. 445.

214. —.]—If issue be joined on a plea that a deed was delivered to the party himself as an escrow, the fault cannot be assigned for error, after verdict.—*BLUNDEN v. WOOD* (1605), Cro. Jac. 85; 79 E. R. 73.

215. —.]—*ASHFIELD v. WRENSFORD* (1616), Jenk. 327; 145 E. R. 238.

216. —.]—*THOROUGHGOOD'S CASE*, No. 151, ante.

217. —.]—*HOLFORD v. PARKER* (1618), Hob. 246; 80 E. R. 391.

218. —.]—*PORT v. MIDLETON* (1650), Sty. 251; 82 E. R. 686.

219. —.]—A deed cannot be delivered as an escrow, properly so called, to a party (LORD ELLENBOROUGH, C.J.).—*COARE v. GIBLETT* (1803), 4 East, 85; 102 E. R. 763.

Annotations:—Mentd. Phillips v. Crawford (1803), 9 Ves. 214; *Craufurd v. Phillips* (1806), 2 Bos. & P. N. R. 141; *Horwood v. Underhill* (1808), 10 East, 123; *Horwood v. Underhill* (1814), 3 M. & S. 82.

220. —.]—A deed cannot be delivered as an escrow to a party on account of the technical effect of the delivery in such a case (CROMPTON, J.).—*PYM v. CAMPBELL* (1856), 6 E. & B. 370; 25 L. J. Q. B. 277; 2 Jur. N. S. 641; 4 W. R. 528; 119 E. R. 903; *sub nom. PIM v. CAMPBELL*, 27 L. T. O. S. 122.

Annotations:—Refd. Furness v. Meek (1857), 27 L. J. Ex. 34. *Mentd. Wake v. Harrop* (1861), 6 H. & N. 768; *Wallis v. Littell* (1861), 11 C. B. N. S. 369; *Lister v. Smith* (1863), 3 Sw. & Tr. 282; *Rogers v. Hadley* (1863), 2 H. & C. 227; *Lindley v. Lacey* (1864), 17 C. B. N. S. 578; *Guardhouse v. Blackburn* (1866), L. R. 1 P. & D. 109; *Young v. Austen* (1869), 38 L. J. Q. B. 233; *Clever v. Kirkman* (1875), 33 L. T. 672; *Pattie v. Hornbrook*, [1897] 1 Ch. 25.

221. —.]—*WATKINS v. NASH*, No. 208, ante.

222. —.]—A deed may be delivered as an escrow notwithstanding that it is delivered to a person who is a party taking under it. Where there are several grantees & one of them is also solr. of the grantor & of the other grantees, & the deed is delivered to him, evidence is admissible to show the character in which & the terms upon which the deed was so delivered.—*LONDON FREEHOLD & LEASEHOLD PROPERTY CO. v. SUFFIELD* (BARON), [1897] 2 Ch. 608; 66 L. J. Ch. 790; 77 L. T. 445; 46 W. R. 102; 14 T. L. R. 8; 42 Sol. Jo. 11, C. A.

223. *Delivery to solicitor acting for all parties.]*—An indenture sealed & delivered to an attorney who is acting for all the parties to it, with directions that it is not to take effect till something else is done, operates merely as an escrow.—*MILLERSHIP v. BROOKES* (1860), 5 H. & N. 797; 29 L. J. Ex. 369; 157 E. R. 1399.

Annotations:—Folld. Watkins v. Nash (1875), L. R. 20 Eq. 262. *Refd. Kidner v. Keith* (1863), 15 C. B. N. S. 35.

224. —.]—An action was brought by the transferor of a mtge. against the transferees, seeking for payment of the money which was the consideration of transfer, or to have his mtge. & other deeds back again. Pltf. & defts. employed

in the matter of the transfer the same firm of solrs., who were then in good credit. On Oct. 20, 1888, pltf. executed the transfer, which expressed that the money was paid, & he handed the transfer & the title deeds to the solrs., they undertaking either to return them or to pay the money. Pltf. did not make any inquiry till Feb. 5, 1889, the solrs. telling him so much notice was required. On Feb. 22, the solrs. handed over the deeds & the transfer to defts. On Mar. 15, the solrs. filed their petition in bkpcy. Defts. never paid the money in cash to the solrs., but they set off in their books part of a sum owed by them to defts.:—*Held*: there had been no negligence on the part of pltf., & the deed was an escrow until defts. had paid the money to the solrs. in cash.—*COUPE v. COLLYER* (1890), 62 L. T. 927.

Annotation:—Refd. London Freehold & Leasehold Property Co. v. Suffield, [1897] 2 Ch. 608.

225. — & himself one of several grantees—*Evidence as to terms of delivery admissible.]*—*LONDON FREEHOLD & LEASEHOLD PROPERTY CO. v. SUFFIELD* (BARON), No. 222, ante.

226. *Delivery to solicitor of grantee—Escrow not converted into deed—No intention to deliver to grantee.]*—*WATKINS v. NASH*, No. 208, ante.

Retention of deed by grantor.]—See Sub-sect. 3, post.

C. What amounts to—Proof of.

Effect of delivery.]—See Sub-sect. 2, D., post.

227. *Question of fact for jury.]*—A subscribing witness to a bond stated that it was delivered by the obligor as his deed, but that before & at the time of the execution it was agreed that it should remain in his, the subscribing witness's, hands until the death of A., & until certain securities were given up, & that the bond was given up to him upon that condition:—*Held*: it was then a question of fact for the jury, upon the whole evidence, whether the bond was delivered as a deed to take effect from the moment of delivery, or whether it was delivered upon the express condition that it was not to operate as a deed until the death of A. & until the notes were delivered up.

Semble: it is not essential in order that an instrument should operate as an escrow only, that it should be expressly declared, at the time when it is executed, that it was not to operate as a deed until a given event happened.—*MURRAY v. STAIR* (EARL) (1823), 2 B. & C. 82; 3 Dow. & Ry. K. B. 278; 107 E. R. 313.

Annotations:—Folld. Davis v. Jones (1856), 17 C. B. 625; *Wallis v. Littell* (1861), 5 L. T. 489. *Refd. Bowker v. Burdakin* (1843), 11 M. & W. 128; *Gudgen v. Besset* (1856), 6 E. & B. 986; *Cumberlege v. Lawson* (1857), 1 C. B. N. S. 709; *London Freehold & Leasehold Property Co. v. Suffield*, [1897] 2 Ch. 608. *Mentd. Smith v. Bond* (1833), 10 Bing. 125; *Spicer v. Burgess* (1834), 1 Cr. M. & R. 129; *England v. Watson* (1842), 6 Jur. 763; *Gerrard v. Clowes*, [1892] 2 Q. B. 11; *Strickland v. Williams* (1898), 68 L. J. Q. B. 241.

228. —.]—*DOE d. FENTIMAN v. VIRGO*, No. 230, post.

229. *No express form of words necessary.]*—*MURRAY v. STAIR* (EARL), No. 227, ante.

230. —.]—The mere signing, sealing, & using words of delivery, is not conclusive evidence of the legal delivery of a deed, nor is any formal act necessary at the time of its execution, to indicate that it is to be an escrow. The question of deed or escrow is a question of fact, to be decided by a

2231. *Delivery to solicitor acting for all parties.]*—Before the execution of a conveyance, vendor stated that he would not sign any deed unless it was agreed that the solr., acting for all parties, should not use it until the encumbrances were paid. The solr. assured him that he would hold all

the papers until the whole thing was settled up:—*Held*: this could not support a contention that vendor executed his conveyance as an escrow.—*MCGRATH v. FREER* (1892), 10 N. Z. L. R. 688.—N.Z.

c. *Delivery to agent—No intention*

to deliver to grantee.]—The property in a policy prepared at the head office of an insurance co. & sent to their agent does not pass out of the co. & is at the most no more than an escrow in the hands of the agent.—*BUCK v. KNOWLTON* (1892), 21 S. C. R. 371.—CAN.

jury upon all the circumstances attending the transaction.—*DOE v. FENTIMAN v. VIRGO* (1826), 4 L. J. O. S. K. B. 283.

231. — May be inferred from circumstances of execution.]—It is not necessary that the delivery of a deed as an escrow should be by express words. If, from the circumstances attending the execution, it can be inferred that it was delivered not to take effect as a deed until a certain condition were performed, it will operate as a delivery as an escrow only.—*BOWKER v. BURDEKIN* (1843), 11 M. & W. 128; 12 L. J. Ex. 329; 152 E. R. 744.

Annotations:—Apld. *Gudgen v. Besset* (1856), 6 E. & B. 984; *Foundling Hospital v. Crane*, [1911] 2 K. B. 367. *Reid.* *Pattle v. Hornbrook*, [1897] 1 Ch. 25. *Mentd.* *Re Douglas, Ex p. Snowball* (1872), 7 Ch. App. 534.

232. — May operate as escrow though delivery absolute in form.]—I lay no stress upon the express use of the words "I deliver this deed as an escrow," for if in point of fact it is delivered not to take effect as a deed until some condition is performed, it will operate as an escrow, notwithstanding the delivery is in form absolute (*POLLOCK, C.B.*).—*CHRISTIE v. WINNINGTON* (1853), 8 Exch. 287; 22 L. J. Ex. 212; 155 E. R. 1355.

233. Deed of composition—Condition that all creditors should sign deed—Signature of surety.]—Before the execution of a composition deed, it was agreed, in the presence of the surety for the payment of the composition, that it should be void unless all the creditors executed it. The surety, at the same interview, afterwards executed the deed in the ordinary way, without saying anything at the time of execution. The deed was then delivered to one of the creditors, in order that he might get it executed by the rest of the creditors:—*Held*: this was to be considered a delivery of the deed as an escrow.—*JOHNSON v. BAKER* (1821), 4 B. & Ald. 440; 106 E. R. 998.

Annotations:—Reid. *Bowker v. Burdekin* (1843), 11 M. & W. 128; *London Freehold & Leasehold Property Co. v. Saffell* (1897), 66 L. J. Ch. 790. *Mentd.* *Spicer v. Burgess* (1834), 3 L. J. Ex. 285.

234. — Non-execution by some creditors—No evidence of refusal.]—The tenant of leasehold premises, by deed assigned his interest to trustees for the benefit of his creditors, with a proviso, "that if all & every the creditors should refuse to execute or otherwise consent to the deed within six months from the date thereof, it should be void." Some of the creditors did not execute the deed, but there was no evidence of their refusing

so to do:—*Held*: such non-execution was not a refusal within the meaning of the proviso, & did not make the deed void.—*HOLMES v. LOVE* (1824), 3 B. & C. 242; 5 Dow. & Ry. K. B. 56; 2 L. J. O. S. K. B. 226; 107 E. R. 724.

Annotation:—Reid. *Enderby v. Corder* (1825), 2 C. & P. 203.

235. — Deed not executed by any creditors.]—A debtor executed a deed of assignment of all his property & effects to a trustee for the benefit of all his creditors, but no creditor executed it, & the deed was not stamped:—*Held*: the deed, not having been executed by any of the creditors, was to be considered in the nature of an escrow.—*Re TRESIDDER, Ex p. SOMERVILLE* (1865), as reported in 35 L. J. Bcy. 1; 14 W. R. 113, L. C. *Annotation:—Mentd.* *Fitzpatrick v. Bourne* (1868), 9 B. & S. 157.

236. — Intended to operate under Bankruptcy Act, 1861 (c. 134), s. 192.]—*JOHNSON v. OSBENTON*, No. 397, *post*.

Deeds, compositions & schemes of arrangement.]—*See* *BANKRUPTCY & INSOLVENCY*, Vol. V., p. 1056 *et seq.*

237. Bond—Undertaking not to enforce till happening of event.]—*EVANS v. NEVILL* (1908), *Times*, Feb. 11, C. A.

238. Onus probandi—On person asserting delivery as escrow—Deed properly executed on its face & in proper custody.]—Deeds of appointment of a sum of £30,000 for younger children's portions having been properly executed, & being found in the custody of the family solr.:—*Held*: the onus was thrown upon the party disputing them to prove their invalidity as escrows.—*ROWLEY v. ROWLEY* (1854), Kay, 242; 2 Eq. Rep. 241; 23 L. J. Ch. 275; 23 L. T. O. S. 55; 18 Jur. 306; 69 E. R. 103.

Annotations:—Mentd. *Bulteel v. Plummer* (1869), L. R. 8 Eq. 585; *Whelan v. Palmer* (1888), 39 Ch. D. 648; *Saunders v. Shafto*, [1905] 1 Ch. 126; *Re Wright, Hegon v. Bloom*, [1920] 1 Ch. 108.

Effect of delivery of deed—Conditioned to take effect from death of grantor.]—*See* Nos. 166, 202, *ante*. **Retention of deed by grantor.]**—*See* Sub-sect. 3, *post*.

D. Effect of.

239. Inoperative till condition performed—Consent of grantee condition precedent—Death of grantee before consent.]—*DUGOZE v. ROWE* (1591), Moore, K. R. 300; 1 Leon. 152; 72 E. R. 592. *Annotation:—Consd.* *Johnson v. Baker* (1821), 4 B. & Ald. 440.

PART I. SECT. 5, SUB-SECT. 2.—C.

231 i. No express form of words necessary—May be inferred from circumstances of execution.]—It is not necessary that the delivery of a deed as an escrow should be by express words; though it is in form an absolute delivery, yet, if from the circumstances attending the execution, it can reasonably be inferred that the delivery was only conditional, it will operate as an escrow.—*KEATOR v. SCOVIL* (1848), 3 Kerr. 647.—*CAN.*

231 ii. —.]—No form of words is necessary to constitute the delivery of a deed as an escrow, but the facts & surrounding circumstances may be looked at to see whether such was the intention of the parties.—*O'CONNOR v. BEATY* (1876), 27 C. P. 203; *re-ad.* *on another point*, 2 A. R. 497.—*CAN.*

231 iii. —.]—To an action for breach of covenant for title in a mtge. to ptfs., executed by T., defts., grantee, R., one of defts., pleaded that T. did not, after the making of that deed, convey the lands to ptfs. The deed from defts. to T. was dated June, 1856, & the mtge. from T. to ptfs. was dated April, 1856. There were two mtges. from T. to ptfs. on another lot,

when this mtge. was made, & instead of which it was given. After executing this mtge. T. found that a deed from defts. to him was necessary to give the legal title, & he got the deed in question. The two mtges. were not discharged until some months afterwards:—*Held*: the whole transactions shewed that the mtge. was not intended to take effect until the perfecting of T.'s title & the discharge of the other mtges. for which it was given.—*TRUST & LOAN CO. v. RUTAN* (1877), 18 C. R. 564.—*CAN.*

231 iv. —.]—In order to make a sealed instrument operate as a mere escrow it is not necessary that express words be used; what would otherwise be an absolute delivery may be restricted by the surrounding circumstances showing that only a conditional delivery could have been intended.—*MOIRSONS BANK v. CRANSTON* (1918), 44 O. L. R. 58.—*CAN.*

231 v. —.]—It is not necessary in delivering an instrument as an escrow, to say that it is delivered as an escrow, if it be delivered upon a condition that constitutes it an escrow.—*NASH v. FLYN* (1844), 1 Jo. & Lat. 162.—*IR.*

231 vi. —.]—No form of

words is necessary to constitute the delivery of an instrument as an escrow. If the real intention of the parties be that it shall not operate at all, except & until a specified condition be performed, it is as an escrow.—*WOOD v. KNOX* (1852), 3 L. Ch. R. 109; 4 Ir. Jur. 309.—*IR.*

238 i. Onus probandi—On person asserting delivery as escrow—Deed properly executed on its face & in proper custody.]—A mtge. to ptfs., was placed by deft. together with a bond for the amount, in the hands of deft.'s solr. to be delivered to ptfs. so soon as another mtge. was released, & a new mtge. by deft. was signed by his wife. Dft.'s wife refused to sign the new mtge. The documents afterwards came into possession of ptfs., but deft.'s solr. stated that he had never been authorised to deliver them on any other terms than those mentioned, & he could not recollect when, how or where ptfs.' solr. had got them:—*Held*: the fact of the documents being in the possession of ptfs. was presumptive proof of their delivery as deeds, & the burden was upon deft. to show they had never been delivered as such.—*COGSWELL v. O'CONNOR* (1880), 1 R. & G. 613.—*CAN.*

Sect. 5.—Execution of deeds: Sub-sect. 2, D.; sub-sect. 3.]

240. —[—]—A lease of premises from pltf. to P., containing the usual words "signed, sealed & delivered," was executed by both parties, pursuant to a previous agreement to let, in which the annual rent was stated to be £55, & by which it was agreed that P. should pay £100 for pltf.'s goodwill & fixtures, & that the lease should not be delivered, but remain in pltf.'s possession until the whole of the £100 was paid. P. paid £50 of that sum & entered into possession & carried on the business of a baker, pltf. keeping possession of the lease. P. became bkpt. without paying the remaining £50, the lease still remaining with pltf. Deft. became assignee in bkpcy. In an action for use & occupation, it appearing that deft. had accepted the tenancy:—*Held*: the evidence warranted the jury in finding that there had been no delivery of the deed so as to operate as a lease, & that until the payment of the remaining £55 only a tenancy from year to year existed, & therefore, deft. was liable for rent in an action for use & occupation.—**GUDGEN v. BESSER** (1856), 6 E. & B. 986; 26 L. J. Q. B. 36; 21 J. P. 196; 3 Jur. N. S. 212; 5 W. R. 47; 119 E. R. 1131.

Annotations:—*Refd.* **Rogers v. Hadley** (1863), 9 Jur. N. S. 898; **Pattle v. Hornibrook**, [1897] 1 Ch. 25. *Mentd.* **Furness v. Meek** (1857), 27 L. J. Ex. 34; **Brown v. Briscoe** (1859), 2 E. & E. 116.

241. —[—]—Upon the sale of some leaseholds, it was stipulated, "that if, from any cause or circumstance whatever, the purchase should not be completed" on a day named, the vendor should be at liberty to annul the contract. The purchaser refused to pay the purchase-money on the day named, the only remaining requisitions then being as to the registration of a deed, & the sufficiency of a stamp, which the vendor undertook to supply. The purchaser, on the same day, annulled the contract:—*Held*: he was justified in so doing.—**HUDSON v. TEMPLE** (1860), 29 Beav. 536; 30 L. J. Ch. 251; 3 L. T. 495; 7 Jur. N. S. 248; 9 W. R. 243; 54 E. R. 735.

242. —[—]—A settlement contained a power for the trustee to lease at the request in writing of a married woman. She & the trustee, in pursuance of a parol agreement, executed a lease, & delivered it to their solr. to exchange for the counterpart, but before the exchange was made or the counterpart executed, she directed the solr. not to part with the deed:—*Held*: the execution of the deed was not a part performance of the parol agreement, & the deed was executed as an escrow, & the ct. would not compel the lessors to deliver it to the lessee.—**PHILLIPS v. EDWARDS** (1864), 33 Beav. 440; 3 New Rep. 658; 55 E. R. 438.

243. Where grantor incapable of executing deed.]—**JENNINGS v. BRAGG** (1595), Cro. Eliz. 447, as cited in 3 Co. Rep. 35 b; 78 E. R. 687.

244. —[—]—A lease delivered upon the land, by attorney, before the lessor is in possession is void.—**STEPHENS v. ELIOT** (1596), Cro. Eliz. 484; 78 E. R. 735.

245. Deed relates back to date of delivery.—**Death of party before performance of condition.**—If a writing be delivered as an escrow to be the

party's deed on certain conditions to be performed, afterwards the obligor or obligee dies, & then the condition is performed, the deed is good.—**PERRYMAN'S CASE** (1599), 5 Co. Rep. 84 a; 77 E. R. 181.

Annotations:—*Consd.* **Graham v. Graham** (1791), 1 Ves. 272; **Coare v. Giblett** (1803), 4 East, 85. *Refd.* **Bushell v. Pasmore** (1704), 6 Mod. Rep. 217; **Foundling Hospital v. Crane**, [1911] 2 K. B. 367. *Mentd.* **Foorde v. Hoskins** (1615), 2 Bulst. 336; **R. v. Bosworth** (1739), 2 Stra. 1112; **Hawkins v. Kemp** (1803), 3 East, 410; **Lockwood v. Wood** (1844), 6 Q. B. 50; **Mercer v. Denne**, [1904] 2 Ch. 534.

246. —[—]—**FROSETT v. WALSH** (1616), J. Bridg. 49; Cro. Jac. 403; Godb. 268; 1 Roll. Rep. 415; 123 E. R. 1192; *sub nom.* **ROSWELL v. WELSH**, 3 Bulst. 214.

Annotations:—*Refd.* **Payne v. Barker** (1662), O. Bridg. 18; **Graham v. Graham** (1791), 1 Ves. 272. *Mentd.* **Brown v. Dyer** (1705), 11 Mod. Rep. 70; Eccl. Comrs. for England v. Parr, [1894] 2 Q. B. 420.

247. —[—]—At law these bonds must be considered as escrows, to be delivered to the obligee upon performance of the condition, & then they take effect from their original sealing & delivery, & the rule of law is, that though the obligor & obligee are both dead before the condition performed, yet upon performance of it the bond is good to charge assets (EYRE, C.B.).—**GRAHAM v. GRAHAM** (1791), 1 Ves. 272; 30 E. R. 339.

Annotation:—*Refd.* **Foundling Hospital v. Crane**, [1911] 2 K. B. 367.

248. —[—]—**Revokes authority of agent to receive purchase-money.**—A railway co. after serving the usual notice to take land, agree in writing with the owner, accept the title, & the conveyance is executed by him & delivered to his solrs. as an escrow with a written authority to the co. to pay the money to them. The owner dies, having made a will & appointed exors., & the co. requiring the land, but the exors. not having proved, pay the money into the bank under the Lands Clauses Consolidation Act, 1845 (c. 18), & take possession. The exors. & beneficiaries then file a bill to restrain such taking possession, & move for an injunction:—*Held*: the escrow could have been made effectual upon the condition upon which it was authorised to be delivered, but the authority died with him by whom it was given.—**NEWTON v. METROPOLITAN Rty. Co.** (1861), 1 Drew. & Sm. 583; 5 L. T. 542; 8 Jur. N. S. 738; 10 W. R. 102; 62 E. R. 501.

249. To vest title deeds in property of grantee.]—If the vendor of a leasehold estate delivers the conveyance as an escrow to take effect on payment of the residue of the purchase-money, the property in the title deeds of the estate is so vested in the vendee that the vendor obtaining possession of them, & pawning them confers on the pawnee no right to detain them after tender of the residue of the purchase-money.—**HOOPER v. RAMSBOTTOM** (1815), 6 Taunt. 12; 1 Marsh. 414; 128 E. R. 936.

Annotations:—*Consd.* **Foundling Hospital v. Crane**, [1911] 2 K. B. 367. *Mentd.* **Robertson v. Showler** (1845), 13 M. & W. 609.

From what time deed effective.—See Sect 7, *post*.

250. Deed conditioned to take effect from death of grantor.]—**DOE d. LLOYD v. BENNETT**, No. 202. *ante*.

PART I. SECT. 5, SUB-SECT. 2.—D.

240 i. Inoperative till condition performed.]—Where an indenture was delivered by A. to deft. to be delivered to pltf. after A.'s death on condition that pltf. should keep A. until his death, & should pay his debts; & the pltf. had not maintained A., but after his death was ready to pay his debts:—*Held*: the writing being delivered to

deft. merely as an escrow was not in fact a deed.—**REYNOLDS v. WADDELL** (1854), 12 L. C. R. 9.—**CAN.**

240 ii. —[—]—Where a deed is lodged with a trustee, as an escrow, until the consideration be paid, the ct. will not give validity to such deed, when the purpose for which it has been executed has not been attained.—**HATCHELL v. CREMORNE** (1833), 3 Ir. L. Rec. N. S. 279.—**IR.**

d. —[—]—*Consent of party condition precedent.*—Where a deed would be void on account of the absence of the consent of a person, & by a subsequent deed that person consents, the prior deed will be good if the execution was inchoate, so that the deed was in reality an escrow until the execution of the subsequent deed.—**ANI WAATA v. GRICE** (1883), 2 N. Z. L. R. C. A. 95.—**N.Z.**

251. —.]—**FOUNDLING HOSPITAL (GOVERNORS & GUARDIANS) v. CRANE**, No. 166, *ante*.

SUB-SECT. 3.—RETENTION OF DEED BY GRANTOR—CONCEALMENT OF FACT OF EXECUTION.

Incomplete or imperfect gifts.—*See* GIFTS.

Voluntary assignments & conveyances.—*See* CHOSES IN ACTION, Vol. VIII., p. 496, Nos. 613 *et seq.*; **EQUITY**; **GIFTS**; **SETTLEMENTS**; **TRUSTS & TRUSTEES**.

Compositions & schemes of arrangement—Right of debtor to revoke—Deed not communicated.—*See* **BANKRUPTCY & INSOLVENCY**, Vol. V., pp. 1180–1181, Nos. 9540–9517.

Deed communicated.—*See* **BANKRUPTCY & INSOLVENCY**, Vol. V., pp. 1181–1182, Nos. 9548, 9549.

Seizure in execution after communication to some creditors.—*See* **BANKRUPTCY & INSOLVENCY**, Vol. V., p. 1093, No. 8933.

252. Deed valid if properly executed—Operation as from date of execution.—**THOMPSON v. LEACH** (1692), Holt, K. B. 357, 623; 3 Lev. 284; 3 Mod. Rep. 296; 2 Vent. 198; 2 Salk. 618, n.; 90 E. R. 1097, 1244; *sub nom.* **LEACH v. THOMPSON**, 1 Show. 296; *sub nom.* **LEECH v. THOMPSON**, Carth. 211; *sub nom.* **LEECH'S CASE**, Carth. 250, II. L.; *subsequent proceedings*, *sub nom.* **THOMPSON v. LEACH** (1698), 2 Salk. 618.

Annotations.—**Consd.** **Townson v. Tickell** (1819), 3 B. & Ald. 31; **Siggers v. Evans** (1855), 5 E. & B. 367. **Refd.** **Xenos v. Wickham** (1862), 13 C. B. N. S. 381; **Muller's Margarine v. I. R. Comrs.** (1899), 69 L. J. Q. B. 291; **Mallott v. Wilson**, [1903] 2 Ch. 494. **Mentd.** **Thompson v. Leach** (1698), 2 Salk. 618; **Atkin v. Berwick** (1719), 10 Mod. Rep. 431; **R. v. Shrewsbury Corp.** (1733), 2 Barn. K. B. 394; **Yates v. Boen** (1738), 2 Stra. 1104; **Taylor d. Atkyns v. Horde** (1757), 1 Burr. 60; **Baine v. Hutton** (1831), 2 Tyr. 17; **Garland v. Carlisle** (1837), 4 Scott, 587; **Doe d. Chidgey v. Harris** (1847), 16 M. & W. 517; **Peacock v. Eastland** (1870), L. R. 10 Eq. 17; **Standing v. Bowring** (1885), 31 Ch. D. 282.

253. ——— **Not an escrow.**—**EXTON v. SCOTT**, No. 197, *ante*.

Delivery as escrow, *see* Sub-sect. 2, *ante*.

254. ——— **Though no delivery to grantee or to his use.**—**DOE d. GARNONS v. KNIGHT**, No. 170, *ante*.

255. —.]—A father makes a voluntary settlement to trustees & their heirs, in trust, to receive the profits, & to put them out for the increase of the fortunes of his daughters A. & B., & also executes a bond to the same trustees to pay them £1,000 at a certain day, in trust for the daughters, but kept both deed & bond by him until his death, & received the profits, & then by will taking notice of the bond, gives legacies to A. & B. in satisfaction thereof, & the surplus of his personal estate to his said two daughters, & his four younger children. Yet A. & B. elected to have the benefit of the settlement & bond decreed for

them, & an account of the profits from the date of the settlement, & the £1,000 with interest, from the time it was payable by the bond.—**BARLOW v. HENEAGE** (1702), Prec. Ch. 210; 2 Eq. Cas. Abr. 283, pl. 2; 24 E. R. 103.

Annotations.—**Consd.** **Cecil v. Butcher** (1821), 2 Jac. & W. 565; **Doe d. Garnons v. Knight** (1836), 5 B. & C. 671.

256. —.]—**CLAVERING v. CLAVERING** (1704), 2 Vern. 473; Prec. Ch. 235; 1 Eq. Cas. Abr. 24, pl. 6; 23 E. R. 904; *affd.* (1705), 7 Bro. Parl. Cas. 410, II. 1.

Annotations.—**Consd.** **Worrall v. Jacob** (1817), 3 Mer. 256; **Cecil v. Butcher** (1821), 2 Jac. & W. 565; **Doe d. Garnons v. Knight** (1826), 5 B. & C. 671. **Refd.** **Chadwick v. Doleman** (1705), 2 Vern. 528; **Clavell v. Littleton** (1710), Prec. Ch. 305; **Roberts v. Williams** (1841), 11 L. J. Ch. 65. **Mentd.** **Birch v. Blagrove** (1755), Amb. 264; **Doe d. Richards v. Lewis**, **Richards v. Lewis** (1852), 11 C. B. 1035; **Re Jones, Farrington v. Forrester**, [1893] 2 Ch. 461.

257. ——— **Operating from death of grantor.**—**JOHNSON v. SMITH** (1749), 1 Ves. Sen. 314; 27 E. R. 1053, I. C.

Annotation.—**Mentd.** **Alleyne v. Alleyne** (1750), 2 Ves. Sen. 37.

258. —.]—**GRUGEON v. GERRARD**, No. 174, *ante*.

259. —.]—Testator, by a voluntary deed, covenanted with trustees that in case A. & B., his two natural sons, or either of them, should survive him, his exors. & administrators should within twelve months after his death pay to trustees named in the deed £60,000, upon trust for such of A. & B., as should attain twenty-one & be living at the time of his death, & if neither of them, having survived him, should attain twenty-one, then upon trust for him, the testator, his exors. & administrators. Testator retained the deed in his own possession until his death, & did not communicate it either to the trustees or to A. & B. Testator, by his will, dated some years later than the deed, bequeathed all his property upon trust for the benefit of his wife, his said sons A. & B., & his legitimate children. After the death of the testator, the deed of covenant was found amongst his papers. A. survived the testator, & attained twenty-one:—**Held**: although the deed of covenant was voluntary, it nevertheless created a trust for A., & the refusal of the trustee to sue at law upon the covenant did not prejudice the right of A. to recover the payment of the debt out of the assets of the testator. The retention of the deed in the possession of the covenantor, & the absence of communication respecting it to the trustees & the *cestuis que trust*, did not affect its validity.—**FLETCHER v. FLETCHER** (1844), 4 Hare, 67; 14 L. J. Ch. 66; 8 Jur. 1040; 67 E. R. 564.

Annotations.—**Consd.** **Bonfield v. Hassell** (1863), 32 Beav. 217. **Refd.** **Alexander v. Brame** (1854), 19 Beav. 436; **Phillips v. Edwards** (1864), 33 Beav. 440; *Re* **Plumpton's Marriage Settlement**, Underhill v. Plumpton, [1910] 1 Ch. 609. **Mentd.** **Bridge v. Bridge** (1852), 16 Beav. 315; **Heech v. Keep** (1854), 23 L. J. Ch. 539; **Scales v. Maude** (1855), 6 De G. M. & G. 43; **Woodford v. Charnley** (1860), 28 Beav. 96; **Patch v. Shore** (1862), 2 Drew. & Sm. 589; **Re Baker, Collins v. Rhodes, Re Seaman, Rhodes v. Wish**

PART I. SECT. 5, SUB-SECT. 3.

a. General rule.—The fact that a deed, after it has been signed & sealed by the grantor, is retained in his possession is not sufficient evidence that it was never so delivered as to take effect as a duly executed instrument.—**ZWICKER v. ZWICKER** (1899), 29 S. C. R. 527.—**CAN.**

f. —.]—Where a party executes a deed, he is not concluded by the legal ceremonies of formal execution. If he retains it in his custody, he shows a plain intent not to divest himself of power over it, but to hold it as revocable; & whatever words he uses that intent must determine its character.—**UNIAKE v. GILES** (1828), 2 Mol. 257.—**IR.**

252 i. Deed valid if properly executed—Operation as from date of execution.

—A deed, the possession of which is not delivered, is complete, not merely an escrow, when complete on its face, & it is treated as executed at the time of its date.—**BLENNERHASSETT v. DAY**, [1813] Beat. 468.—**IR.**

252 ii. ———.]—An unstamped deed conveying grantor's house upon trust to apply the profit-rent to the payment of two life annuities remained in his possession until his death. It was signed & sealed by him; & the attestation clause stated that it was signed, sealed, & delivered by him in the presence of two witnesses. The grantor after signing put it into his pocket, not delivering it to any one. Subsequently the grantor conveyed

the same house by a deed duly executed & stamped upon trusts inconsistent with the former deed:—**Held**: delivery of the first deed, & it prevailed over the second.—**EVANS v. GREY** (1882), 9 L. R. Ir. 539.—**IR.**

252 iii. ———.]—In answer to a sum claimed as due by deceased, it was averred that deceased had paid it in consideration of which pursuer had granted a deed in favour of his own wife & children, & such deed was in the possession of pursuer, who averred that he had retained it, the transaction never being completed by payment:—**Held**: the deed was delivered though in grantor's custody.—**FORREST v. WILSON** (1858), 20 Dunl. (Ct. of Sess.) 1201; 30 Sc. Jur. 714.—**SCOT.**

Sect. 5.—Execution of deeds: Sub-sects. 3, 4, 5 & 6, A., B., C., D., E., F., G. & H.]

(1883), 44 L. T. 414; *Re Patrick, Bills v. Tatham*, [1891] 1 Ch. 82; *Re Cavendish Browne's Settmt. Trusts*, *Horner v. Rawle* (1916), 61 Sol. Jo. 27.

260. — Formal delivery with apt & proper words.]—Where a deed has been formally delivered with apt & proper words, its retention by the grantor after such delivery will not render it inoperative.—*HALL v. PALMER* (1844), 3 Hare, 532; 13 L. J. Ch. 352; 3 L. T. O. S. 200; 8 Jur. 459; 67 E. R. 491.

Annotations:—Mentd. *Reade v. Adams* (1857), 28 L. T. O. S. 8; *Hunter v. Young* (1879), 4 Ex. D. 256; *Re Wootton Isaacson, Sanders v. Smiles* (1904), 21 T. L. R. 89.

261. ——*HOPE v. HARMAN*, No. 107, *ante*.

262. — Subsequent destruction by grantor.]—

A deed, which is irrevocable & duly executed by the party bound, does not lose its force by being retained in that party's custody. If he destroys the deed, he is a wrongdoer, & the fact of keeping it in his own custody merely renders it more difficult for the other parties to prove its existence (*LORD CRANWORTH*).—*JEFFRIES v. ALEXANDER* (1860), 8 H. L. Cas. 594; 31 L. J. Ch. 9; 2 L. T. 748; 24 J. P. 643; 7 Jur. N. S. 221; 11 E. R. 502, H. L.; *revsg.* S. C. *sub nom.* *ALEXANDER v. BRAME* (1855), 7 De G. M. & G. 525, L. J.J.

Annotations:—Consd. *Re Robson, Emley v. Davidson* (1881), 19 Ch. D. 156. *Reid.* *Patch v. Shore* (1862), 2 Drew. & Sm. 589. *Mentd.* *Marsh v. A.-G.* (1860), 3 L. T. 615; *Richards v. Davies* (1862), 13 C. B. N. S. 69; *Brook v. Badley* (1867), L. R. 4 Eq. 106; *Coleman v. Llanelly Rty. & Dock Co.* (1867), 17 L. T. 86; *Fox v. Lownds* (1875), L. R. 10 Eq. 453; *Cotton v. Imperial & Foreign Agency & Investment Corp.*, [1892] 3 Ch. 454.

263. ——*]*—A person entitled to an equitable reversionary interest in a sum of stock made a voluntary assignment of it by deed to trustees. No notice was given of this deed either to the trustees named in it, or to any person interested under it, or to the original trustees of the stock; the assignor retained the deed & subsequently destroyed it, & made a different disposition by will of the fund, which was still standing in the names of the original trustees:—*Held*: unless the deed could be successfully impeached on the ground of fraud, mistake or surprise, it operated as an effectual disposition of the fund, notwithstanding the absence of notice & the retention & destruction of the deed by the assignor.—*RE WAY'S TRUSTS* (1864), 2 De G. J. & Sm. 365; 5 New Rep. 67; 34 L. J. Ch. 49; 11 L. T. 405; 10 Jur. N. S. 1166; 13 W. R. 149; 40 E. R. 416, L. J.J.

Annotations:—Consd. *Re Patrick, Bills v. Tatham* (1890), 63 L. T. 752. *Reid.* *Re Lucan, Hardinge v. Cobden* (1890), 45 Ch. D. 470. *Mentd.* *Hall v. Hall*, *Hall v. Hall* (1872), L. R. 14 Eq. 365; *Garnham v. Skipper* (1885), 2 T. L. R. 64; *It. v. Paulson*, [1921] 1 A. C. 271.

264. ——*]*—A voluntary deed, though retained by the grantor until his death, held valid.—*BONFIELD v. HASSELL* (1803), 32 Beav. 217; 1 New Rep. 251; 32 L. J. Ch. 475; 7 L. T. 776; 9 Jur. N. S. 453; 11 W. R. 297; 55 E. R. 85.

265. — Disclaimer by trustee.]—*JONES v. JONES* (1874), 31 L. T. 535; 23 W. R. 1.

Annotation:—Consd. *Mallott v. Wilson*, [1903] 2 Ch. 494.

PART I. SECT. 5, SUB-SECT. 4.

270. 1. Whether deed void if executed in blank—Obligation "as per schedule annexed"—Schedule not annexed at time of execution.]—A co. by deed assigned all their property "which will be more particularly mentioned & described in the schedule to these presents hereafter to be annexed, marked A." The schedule was not filled up at the time of executing the assignment, but was afterwards filled up by a third person without reference

to the assignors:—*Held*: the schedule to the assignment, filled up as it was, could have no effect.—*CRAWFORD v. BROWN* (1858), 17 U. C. R. 126.—*CAN.*

2. Effect of filling up blanks after execution—Whether instrument rendered valid thereby.]—When a deed was executed there were blanks, but attached to the deed was a letter, signed by the grantor, & addressed to M., in which he mentioned these blanks, & told M. to fill them up

according to the facts; The words were inserted after M. received the deed:—*Held*: the insertion of the words mentioned were not fatal.—*STUART v. PRENTISS* (1861), 20 U. C. R. 513.—*CAN.*

3. ——*]*—A person executed a mtge. with blanks therein, & instructed his agent to fill up the blanks as he should find necessary, which was accordingly done, & handed over to the mtgee. —*Held*: sufficient, & mtge. was valid.—*BANK OF MONTREAL*

266. ——*]*—*MALLOTT v. WILSON*, No. 479, *post*.

267. ——*]*—Although a donee may dissent from & render null a gift to him, yet a gift by deed of real or personal property vests the property in the donee subject to his dissent. Pltf. caused, unknown to deft., certain Consols to be transferred into the joint names of herself & deft., who was her godson, & in whose welfare she took great interest. Pltf., subsequently married, & applied to deft. to re-transfer the Consols into her name alone:—*Held*: the assent of deft. was not necessary to complete the gift, & formal acceptance by the transferee of the transfer to him was not necessary to complete his legal title.

You certainly cannot make a man accept as a gift that which he does not desire to possess. It rests only subject to repudiation. That is a matter which is settled by authorities (*LORD HALSBURY, C.*)—*STANDING v. BOWRING* (1885), 31 Ch. D. 282; 55 L. J. Ch. 218; 54 L. T. 191; 34 W. R. 204; 2 T. L. R. 202, C. A.

Annotations:—Reid. *London & County Banking Co. v. London & River Plate Bank* (1888), 21 Q. B. D. 535; *Mallott v. Wilson*, [1903] 2 Ch. 494. *Mentd.* *Re Blake, Blake v. Power* (1889), 60 L. T. 663; *Re Arabis & Class's Contract*, [1891] 1 Ch. 601; *Re Weston, Davies v. Tagart*, [1900] 2 Ch. 164; *Re Howes, Howes v. Platt* (1905), 21 T. L. R. 501.

As to disclaimer, *see* Sect. 8, sub-sect. 7, *post*.

268. Deed executed for purpose—Purpose never completed.]—*CECIL v. BUTCHER* (1821), 2 Jac. & W. 565; 37 E. R. 744.

Annotations:—Consd. *Roberts v. Williams* (1841), 11 L. J. Ch. 65; *Fletcher v. Fletcher* (1844), 4 Hare, 67; *Childers v. Childers* (1857), 3 K. & J. 310. *Reid.* *Re Way's Trusts* (1864), 2 De G. J. & Sm. 365. *Mentd.* *Groves v. Groves* (1829), 3 Y. & J. 163; *Crichton v. Crichton* (1895), 65 L. J. Ch. 13.

SUB-SECT. 4.—EXECUTION IN BLANK.

Estoppel by execution of instruments in blank.]—

See ESTOPPEL.

269. General rule.]—A deed signed in blank is not executed.—*CONSOLS INSURANCE ASSOCN. v. NEWALL* (1862), 3 F. & F. 130.

270. Whether deed void if executed in blank—Obligation "as per schedule annexed"—Schedule not annexed at time of execution.]—Where by articles under seal deft. bound himself under a penalty to deliver to pltf., by a certain day, "the whole of his mechanical pieces, as per schedule annexed," the schedule forms part of the deed, which, without it, would be insensible. Therefore, in covenant for the breach of the contract in not delivering the pieces, in which pltf., after setting out the articles executed by deft., averred that to the articles there was then & there annexed & subscribed a certain schedule of the several pieces of mechanism agreed to be delivered, etc., & upon *non est factum* pleaded:—*Held*: it was competent to deft. to show in his defence, that at the time of the execution of the articles the schedule was not annexed, but that in fact it was afterwards

subscribed & annexed by the witness to the articles, who was the agent of both parties, immediately after the execution of the articles, & after one of the parties had left the room, though the pieces mentioned in the schedule so annexed were such as had been agreed upon by the parties before the execution of the articles.—**WEEKS v. MAILLARDET** (1811), 14 East, 568; 104 E. R. 719.

Annotations:—**Distd. Daines v. Heath** (1847), 3 C. B. 938. **Refd. England v. Downs** (1840), 2 Beav. 522; **Hibblewhite v. M'Morine** (1840), 6 M. & W. 200; **West v. Steward** (1845), 14 M. & W. 47; **Vint v. Vint** (1888), 4 T. L. R. 630; **Re Queensland Land & Coal Co., Davis v. Martin**, [1894] 3 Ch. 181. **Mentd. Dyer v. Green** (1847), 1 Exch. 71; **Re Deprez, Henriques v. Deprez**, [1917] 1 Ch. 24.

271. ———.]—Deft., by deed reciting that he owed pltf. £100, assigned certain articles, generally described in the deed, to pltf., to have & to hold the same assigned as per schedule to pltf., etc. The deed contained a covenant on behalf of deft. to pay pltf. £100 on a certain day. The money not being paid, pltf. brought an action on the covenant. At the trial, deft. objected that the deed could not be read for pltf. as evidence, unless the schedule were produced & read by him also:—**Held:** the schedule formed no part of the deed, though referred to therein.—**DAINES v. HEATH** (1847), 3 C. B. 938; 16 L. J. C. P. 117; 11 Jur. 185; 136 E. R. 376; *sub nom.* **DAVIES v. HEATH**, 8 L. T. O. S. 390.

272. ———.]—Execution of bail bond—Before condition filled up.]—If a party executes a bail bond before the condition is filled up it is void.—**POWELL v. DUFF** (1812), 3 Camp. 181, N. P.

Annotation:—**Refd. Hibblewhite v. M'Morine** (1840), 6 M. & W. 200.

273. Effect of filling up blanks after execution—Instrument not rendered valid thereby.]—**HIBBLEWHITE v. M'MORINE**, No. 25, *ante*.

——.]—See **CONTRACT**, Vol. XII., pp. 361, 362, Nos. 3000–3012.

Transfer in blank of shares transferable only by deed.—See **COMPANIES**.

Execution in blank of Bills of Exchange, etc.—See **BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS**, Vol. VI., pp. 68–76, Nos. 550–592.

Proof of filling up blanks in bonds.—See **BONDS**, Vol. VII., p. 180, No. 183.

SUB-SECT. 5.—EXECUTION BY CORPORATIONS.

Seal—Necessity for.—See **CORPORATIONS**, Vol. XIII., pp. 284–285, 380–390, Nos. 164–173, 1104–1160.

Affixing of.—See **CORPORATIONS**, Vol. XIII., pp. 286–288, Nos. 174–188.

Delivery—How far sealing amounts to.—See **CORPORATIONS**, Vol. XIII., pp. 288, 289, Nos. 195–197.

SUB-SECT. 6.—EXECUTION IN VARIOUS SPECIAL CASES.

A. Appointment of Guardian by Parent.

See **INFANTS & CHILDREN**; 12 Car. 2, c. 24, s. 8.

B. Appointments of New Trustees.

See **TRUSTS & TRUSTEES**; **Trustee Appointment Acts**, 1850 (c. 28), s. 3, 1869 (c. 26); 1890 (c. 19).

C. Assurances to Charitable Uses.

See **CHARITIES**, Vol. VIII., p. 279, Nos. 505–514; **Mortmain & Charitable Uses Act**, 1888 (c. 42), s. 4 (2), (6).

D. Bills of Sale.

See **BILLS OF SALE**, Vol. VII., pp. 81–83, Nos. 458–477; **Bills of Sale Act**, 1878 (c. 31), s. 10; **Bills of Sale Act** (1878) Amendment Act, 1882 (c. 43), ss. 8, 10.

E. Blind and Illiterate Persons.

274. General rule.—**ANDROSE v. EDEN** (1583), Moore, K. B. 143; 72 E. R. 494.

275. ———.]—**MAUNKEL'S CASE** (1583), Moore, K. B. 182; 72 E. R. 519.

276. ———.]—(1) Deed executed by an illiterate person does not bind him, if read falsely either by the grantee or a stranger. (2) An illiterate man need not execute a deed before it be read to him in a language which he understands; but if the party executes without desiring it to be read, the deed is binding. (3) If an illiterate man execute a deed which is falsely read, or the sense declared differently from the truth, it does not bind him.—**THOROUGHGOOD'S CASE**, **THOROUGHGOOD v. COLE** (1584), 2 Co. Rep. 9 a; 1 And. 129; 76 E. R. 408; *sub nom.* **THOROUGHGOOD v. TURNOR**, Moore, K. B. 148.

Annotations:—As to (1) **Consd. Bright v. Eynon** (1757), 1 Burr. 390; **Foster v. Mackinnon** (1869), L. R. 4 C. P. 704. **Refd. Shinnons v. G. W. Ry.** (1857), 2 C. B. N. S. 620; **Favell v. Wright** (1891), 64 L. T. 85; **Bagot v. Chapman**, [1907] 2 Ch. 222; **Carlisle & Cumberland Banking Co. v. Bragg** (1910), 104 L. T. 121. **Generally, Refd. R. v. Longnor** (1833), 4 B. & Ad. 647; **Hunter v. Walters, Curling v. Walters, Darnell v. Hunter** (1871), 7 Ch. App. 75; **National Provincial Bank of England v. Jackson** (1886), 33 Ch. D. 1; **Howatson v. Webb**, [1907] 1 Ch. 537.

277. ———.]—**SHULTER'S CASE** (1611), 12 Co. Rep. 90; 77 E. R. 1366.

Annotation:—**Refd. Pigot's Case** (1614), 11 Co. Rep. 26 b.

278. Deed not read over—Execution presumed from subsequent conduct.—**R. v. LONGNOR** (INHABITANTS), No. 117, *ante*.

Avoidance of deeds—On ground of misrepresentation or fraud.—See **FRAUDULENT & VOIDABLE CONVEYANCES; MISREPRESENTATION & FRAUD**.

—Executed without being read or understood—By parties not illiterate.]—See Sect. 8, sub-sect. 5, *post*.

F. Bonds of Officers of Friendly Societies.

See **FRIENDLY SOCIETIES**; **Friendly Societies Act**, 1896 (c. 25), ss. 54, 98 (4).

G. Compositions and Schemes and Deeds of Arrangement.

See **BANKRUPTCY & INSOLVENCY**, Vol. V., pp. 1056 *et seq.*

H. Deeds executed in one Country to be performed in Another.

Conveyance of real property.—See **CONFLICT OF LAWS**, Vol. XI., p. 376, No. 544.

Conveyance of chattels personal.—See **CONFLICT**

v. BAKER (1862), 9 Gr. 97, 298.—**CAN.**

k. ———.]—C. executed & delivered to P. a transfer, leaving a blank which P. filled in. P. registered the transfer:—**Held:** there was no reason why the transfer should not be executed in blank, & authority given to fill in same.—**ARNOT & SMITH v.**

PETERSON (1912), 21 W. L. R. 153; 2 W. W. R. 1.—**CAN.**

l. ———.]—Blanks were left in a marriage settlement. After its execution, the blanks were filled:—**Held:** the deed was not invalidated by the filling in of the blanks.—**DELA COUR v. FREEMAN** (1853), 2

1 Ch. R. 633.—**IR.**

PART I. SECT. 5, SUB-SECT. 6.—E.

274 l. General rule.—Blindness is not *per se* a legal incapacity from signing a deed.—**DUFF v. FIFE'S (EARL) TRUSTEES** (1823), 1 Sh. Sc. App. 498.—**SCOT.**

Sect. 5.—Execution of deeds: Sub-sect. 6, H., I., J., K., L., M., N., O., P., Q., R., S. & T. (a).]

OF LAWS, Vol. XI., pp. 359–361, Nos. 415–417, 423, 425.

Law governing formalities of contracts generally.]—See CONFLICT OF LAWS, Vol. XI., p. 393, Nos. 668 *et seq.*

Marriage contracts or settlements.]—See CONFLICT OF LAWS, Vol. XI., p. 436, Nos. 975 *et seq.*

I. Deeds exercising Powers.

See POWERS.

J. Deeds registered in Middlesex Registry.

See REAL PROPERTY & CHATTELS REAL.

K. Deeds under Glebe Exchange Act, 1815 (c. 147).

See ECCLESIASTICAL LAW; Glebe Exchange Act, 1815 (c. 147), s. 10.

L. Execution under Power of Attorney.

Exercise of authority by agent generally.]—See AGENCY, Vol. I., p. 384, Nos. 886 *et seq.*

279. Agent appointed by power of attorney—Must sign in principal's name.]—When any has authority as attorney to do any act, he ought to do it in his name who gives the authority; for he appoints the attorney to be in his place, & to represent his person; & therefore the attorney cannot do it in his own name nor as his proper act, but in the name & as the act of him who gives the authority.—COMBES'S CASE (1613), 9 C. Rep. 75 a; 77 E. R. 843.

*Annotations:—***Refd.** Parker v. Kett (1701), Holt, K. B. 221; Hunter v. Parker (1840), 7 M. & W. 322. **Mentd.** Compton v. Collinson (1790), 1 Hy. Bl. 334.

280. ———.]—A person empowered by warrant of attorney to execute a deed for another must execute it in the name of the principal.—FRONTIN v. SMALL (1726), 2 Ld. Raym. 1418; 2 Stra. 705; 92 E. R. 423.

*Annotations:—***Mentd.** Berkeley v. Hardy (1826), 5 B. & C. 355; Cornish v. Scarell (1828), 8 B. & C. 471; Cooch v. Goodman (1842), 2 Q. B. 580; Pittman v. Woodbury (1848), 3 Exch. 4.

281. ———.]—A person executing a deed for his principal under a power of attorney should sign in the name of the principal.—WHITE v. CUYLER (1795), 6 Term Rep. 176; 101 E. R. 497, N. P.

*Annotations:—***Mentd.** Clifford v. Burton (1823), 8 Moore, C. P. 16; Weston v. Foster (1836), 3 Scott, 164; Hunter v. Parker (1840), 7 M. & W. 322; Fishmongers' Co. v. Robertson (1843), 5 Man. & G. 131; Hogan v. Hand (1861), 14 Moo. P. C. C. 310.

282. ———.]—One who executes a deed for another under a power of attorney must execute it in the name of his principal.—WILKS v. BACK (1802), 2 East, 142; 102 E. R. 323.

*Annotations:—***Refd.** Berkeley v. Hardy (1826), 5 B. & C. 355. **Mentd.** Hogan v. Hand (1861), 14 Moo. P. C. C. 310; *Re* Bumsel & Wootton, *Ex p.* Assignees (1867), 16 L. T. 538.

283. ———.]—A person, acting by power

of attorney to execute a deed for another, should not be a party to the deed, even though he describe himself as acting under the power of attorney. The deed should run in language as if the principal himself intended to execute the deed.—BERKELEY v. HARDY (1826), 5 B. & C. 355; 8 Dow. & Ry. K. B. 102; 4 L. J. O. S. K. B. 184; 108 E. R. 132.

*Annotations:—***Refd.** *Re* Milsted, *Ex p.* Jorey (1868), 18 L. T. 156; Forster v. Elvert Colliery Co., Quin v. Same, Seed v. Same, Morgan v. Same, [1908] 1 K. B. 629. **Mentd.** Hall v. Bainbridge (1840), 1 Scott, N. R. 151; Hunter v. Parker (1840), 7 M. & W. 322; Cooch v. Goodman (1842), 2 Q. B. 580; *Re* Smith & Laxton, *Ex p.* Cockburn (1863), 3 New Rep. 227; Chesterfield & Midland Silkstone Colliery Co. v. Hawkins (1865), 3 H. & C. 677.

284. ———.]—The execution of a deed by attorney must be in the principal's name. If a deed be executed under power of attorney, the power of attorney should be produced; no subsequent acknowledgment is sufficient.—*Re* MILSTED, *Ex p.* JOREY (1868), 18 L. T. 156; 10 W. R. 582.

285. Production of authority.]—When a party executes a deed under a power of attorney, the power of attorney ought to be produced.—JOHNSON v. MASON (1794), 1 Esp. 89, N. P.

*Annotation:—***Mentd.** Whyman v. Garth (1853), 8 Exch. 803.

286. ———.]—*Re* MILSTED, *Ex p.* JOREY, No. 284, ante.

287. ——— No presumption from lapse of time.]—Although the presumption will be made that a deed more than thirty years old, coming from an unsuspected repository, has been validly executed, yet, in the case of the execution by an attorney of a deed purporting to be an appointment under a discretionary power, the ct. will not assume that the attorney was authorised to & could lawfully make the appointment in the absence of any evidence to that effect.—*Re* AIREY, AIREY v. STAPLETON, [1897] 1 Ch. 164; 66 L. J. Ch. 152; 76 L. T. 151; 45 W. R. 286; 41 Sol. Jo. 128.

Execution by agent of Crown.]—See CONSTITUTIONAL LAW, Vol. XI., p. 557, No. 576.

To transfer bank stock.]—See BANKERS & BANKING, Vol. III., p. 121.

M. Execution by Lunatics.

See LUNATICS & PERSONS OF UNSOUND MIND.

N. Execution by Order of Court.

See, *now*, Jud. Act, 1884 (c. 61), s. 14.

288. Jurisdiction to compel execution—By married woman.]—The ct. has no jurisdiction to compel a married woman to execute a deed.—JORDAN v. JONES (1846), 2 Ph. 170; 16 L. J. Ch. 93; 8 L. T. O. S. 249; 10 Jur. 1067; 41 E. R. 906, L. C.

*Annotations:—***Refd.** Field v. Moore, Field v. Brown (1855), 7 De G. M. & G. 691. **Mentd.** Hope v. Carnegie (No. 1) (1868), L. R. 7 Eq. 254.

289. ——— & order deed to be ante-dated—To secure right of party obtaining decree.]—Where the party cannot obtain the rights to which the

4 Ch. Ch. 99; 8 U. C. L. J. N. S. 197.—CAN.

PART I. SECT. 5, SUB-SECT. 6.—N.

288 1. Jurisdiction to compel execution—By married woman.]—In a reference to the master "to settle the conveyance & all proper parties are to join therein as the master shall direct," the master did not direct an infant to be made a party, & subsequently, after such infant had married, directed that she & her husband should join in a new conveyance, which was done:—**Held:** this was as if the ct. had directed the execution of the conveyance.—*RAE v. GEDDES* (1871), 3 Ch. Ch. 404.—CAN.

PART I. SECT. 5, SUB-SECT. 6.—L.

279 1. Agent appointed by power of attorney—Must sign in principal's name.]—A person executing under a power of attorney ought to do so in the name of his principal.—*ION v. BROWN* (1874), 2 C. A. 378.—N.Z.

m. ——— Power procured by fraud—Deed not valid.]—Plff., sought to set aside a mtge. executed by deft. under a power of attorney from plff., on the ground that the execution of the power of attorney was procured by fraud & false representation.—**Held:** the mtge. was null & void.—*PRINCE v. TRACEY* (1913), 25 W. L. R. 412.—CAN.

n. Production of authority —

Whether presumption from lapse of time.]—A deed 73 years old purporting to be signed by the grantor by his attorney was tendered in evidence.—**Held:** it was not necessary to prove the existence or contents of the power of attorney under which the deed purported to have been signed.—*HOBSON v. THOMPSON* (1906), 6 S. R. N. S. W. 436; 23 N. S. W. W. N. 128, 156.—AUS.

c. ———.]—The production of a deed thirty years old, purporting to be executed, under a power of attorney, does not prove the power.—*JONES v. McMULLEN* (1866), 25 U. C. R. 542.—CAN.

p. ———.]—*Re* STREET (1872),

ct. has declared him entitled, without ante-dating a deed which the ct. orders to be executed, the ct. will order such deed to be dated at the time at which it ought to have been executed.—*MUNDY v. JOLLIFFE* (1839), 9 L. J. Ch. 95; 4 Jur. 621, L. C.

290. By person appointed to execute deed on refusal or neglect of party ordered.—Under Trustee Act, 1850 (c. 60)—Refusal by peer.]—By a decree a peer was ordered to execute a certain deed to secure to his wife a rentcharge. Upon his refusal, the ct., on a petn. under the above Act, appointed a person to execute the deed for him.—*MORNINGTON v. MORNINGTON* (1853), 1 Eq. Rep. 369, L. J.

291. — Under Jud. Act, 1884 (c. 61), s. 14—Execution by chief clerk.]—Where debt. refused to obey an order directing her to execute a mtge., the judge appointed his chief clerk to execute it under sect. 14 of the above Act.—*Re EDWARDS, OWEN v. EDWARDS* (1885), 33 W. R. 578.
*Annotation:—**Reid. Re Cathcart* (1892), 68 L. T. 358.

292. — Jurisdiction of Probate Division.]—The Probate Div. has jurisdiction under sect. 14 of the above Act in the event of any person neglecting or refusing to obey its order to execute a deed, to direct its execution by any other person whom it may nominate for the purpose.

Semble: as a general rule the ct. should not make an order under sect. 14 of the above Act, upon an *ex p.* appln.—*HOWARTH v. HOWARTH* (1886), 11 P. D. 95; 55 L. J. P. 49; 55 L. T. 303; 50 J. P. 376; 34 W. R. 633; 2 T. L. R. 705, C. A.
*Annotation:—**Mentd. Re Evans, Evans v. Noton*, [1893] 1 Ch. 252.

293. — To secure payment of costs in lunacy.]—An inquiry instituted on the petn. of a husband as to the state of his wife's mind resulted in a finding that she was of sound mind & capable of managing herself & her affairs. The Lords Justices sitting as judges in lunacy made, on the appln. of petitioner, an order that two-thirds of his costs of the inquiry & also his costs of the appln. should be paid by the wife. Subsequently an order was made by a judge charging the costs on certain Consols belonging to the wife & standing in her name, & directing the transfer by her of a sufficient amount to meet such costs; & as she neglected to make the transfer, a further order was made by the judge that the official solr. should execute the necessary transfer. On appeal against these orders:—*Held*: (1) an appeal would lie in such a case to the Ct. of Appeal, & no leave to appeal was necessary; (2) the charging order was rightly & properly made, & so, also, under sect. 14 of the above Act, was the order directing the official solr. to execute the transfer.—*Re CATHCART*, [1893] 1 Ch. 466; 62 L. J. Ch. 320; 68 L. T. 358; 41 W. R. 277; 9 T. L. R. 134; 37 Sol. Jo. 114; 2 R. 268, C. A.

*Annotation:—**Folld. Re Lumley*, [1893] W. N. 13.

294. — — — — —.]—*Re LUMLEY*, [1893] W. N. 13.

See, generally, LUNATICS & PERSONS OF UNSOUND MIND.

295. — — — — — Transfer of government stock by court broker—Indemnity to bank.]—Where an order has been made under sect. 14 of the above Act, directing some person to execute an instrument on the neglect or refusal of the person originally directed to execute it, it is not necessary or con-

venient for it to be intitled in the matter of the Act, at all events where the proceedings in which the order is made are not originating proceedings. Such an order ought not to be made in an anticipatory form, unless the person in the first instance ordered to execute the instrument has by his conduct already shown that he does & will refuse to do what is ordered to be done.

Where, in pursuance of such an order, the ct. broker transfers Bank of England stock, the transfer is in effect the act of the stockholder, & the Bank of England is impliedly indemnified for acting on the order, even if the order is subsequently shown to have been invalidly made.

The ct. will not order any one to give an indemnity to the bank in case the order should prove to have been wrongly made.—*SAVAGE v. NORTON*, [1908] 1 Ch. 290; 77 L. J. Ch. 198; 98 L. T. 382.

296. — — — — — Whether order granted on ex parte application.]—*HOWARTH v. HOWARTH*, No. 292, *ante*.

297. — — — — — Form of order.]—*SAVAGE v. NORTON*, No. 295, *ante*.

298. — — — — — Whether anticipatory order made.]—*SAVAGE v. NORTON*, No. 295, *ante*.

299. Appeal from order nominating person to execute—To Court of Appeal—Leave to appeal not necessary.]—*Re CATHCART*, No. 293, *ante*.

O. Execution by Partners.

See PARTNERSHIP.

P. Instruments of Transfer under Land Transfer Acts.

See REAL PROPERTY & CHATTELS REAL; Land Transfer Acts, 1875 (c. 87), 1897 (c. 65).

Q. Relinquishment of Holy Orders.

See ECCLESIASTICAL LAW; Clerical Disabilities Act, 1870 (c. 91), s. 3 (i).

R. Transfers, Mortgages, and Transfers of Mortgages of British Ships.

See SHIPPING & NAVIGATION; M. S. Act, 1894 (c. 60), ss. 24, 31, 37, Sched. I., Part I., Forms B. & C.

S. Transfers of Stock and Shares under Companies Acts.

See COMPANIES.

T. Warrants of Attorney to confess Judgment.

(a) *Execution in Presence of Attorney.*

See, now, Debtors Act, 1869 (c. 62), s. 24; Jud. Act, 1873 (c. 66), s. 87; Jud. Act, 1875 (c. 77), s. 14.

300. Whether necessary.]—*ANON.* (1663), 3 Salk. 212; 91 E. R. 783.

301. — — — — — When under arrest in same suit.]—In what cases the presence of an attorney is necessary to render a warrant of attorney, given by prisoner, valid.

If a man be arrested at the suit of A., & while he is under confinement of the bailiff, he gives a warrant of attorney to confess a judgment, if there be no attorney by, it is always taken to be by duress. But when one is in gaol a good while, &

296 I. By person appointed to execute deed on refusal or neglect of party ordered—Whether order granted on ex parte application.]—An application for an order to compel a party to execute a deed directed to be executed, should be on notice, & will not be granted *ex parte*.—*WESTMACOT v. COCKERLINE*

(1869), 2 Ch. Ch. 442.—*CAN.*

PART I. SECT. 5, SUB-SECT. 6.—T. (a).

300 I. Whether necessary.]—A warrant of attorney must be executed in the presence of an attorney on behalf of the obligor.—*FARREL v. MASTERSON*

(1850), 2 Ir. Jur. 191.—*IR.*

300 II. — — — — —.]—The ct. will set aside a warrant of attorney, & all proceedings thereunder, when it has been executed by a person in custody, without any attorney on his behalf present.—*HORNSEY v. WILSON* (1856), 8 Ir. Jur. 204.—*IR.*

Sect. 5.—Execution of deeds: Sub-sect. 6, T. (a), (b) i. & ii. & (c).]

then another that is his creditor, or supposed to be so, comes to him, & he voluntarily without any compulsion confesses a judgment to him, that judgment shall stand, though there be no attorney (HOLT, C.J.).—ANON. (1702), 7 Mod. Rep. 115; 87 E. R. 1132.

302. — When under arrest at suit of another.]—ANON., No. 301, *ante*.

303. — — —.]—A man in custody of the sheriff at the suit of one person, may give a warrant of attorney to confess a judgment to another, without having an attorney on his part present.—FINN v. HUTCHINSON (1702), 2 Ld. Raym. 797; 92 E. R. 32.

304. — — —.]—If A., under arrest at the suit of B., gives to C., the sheriff's officer, in whose custody he is, a warrant of attorney for a debt due to C., such warrant will be void, if no attorney be present at the execution on the part of A.—FAULKNER v. EMMETT (1818), 8 Taunt. 233; 2 Moore, C. P. 176; 129 E. R. 372.

305. — Defendant in custody under execution.]—Warrant of attorney to confess a judgment by one in custody under an execution is good, though no attorney be present on his behalf at the time of its being executed.—FELL v. RILEY (1775), 1 Cowp. 281; 98 E. R. 1086.

306. — Cognovit.]—If a debt. in custody gives a *cognovit*, it is necessary that an attorney for debt. should be present. An attorney's clerk is not sufficient.—PAUL v. CLEAVER. (1810), 2 Taunt. 360; 127 E. R. 1117.

Annotation:—Reid. Bayley v. Taylor (1826), 8 Dow. & Ry. K. B. 56.

307. — — —.]—ARNOLD v. LOWE (1817), 7 Taunt. 703; 129 E. R. 280.

308. — — —.]—A *cognovit* is not within the rule of ct. requiring an attorney to be present on the part of debt. in custody, executing a warrant to acknowledge a judgment. Therefore, where a debt. in custody signed a *cognovit* without the presence of his attorney, the ct. refused to set aside the judgment & execution thereon.—BAYLEY v. TAYLOR (1826), 8 Dow. & Ry. K. B. 56.

309. — — —.]—If an attorney who is acting for both parties attests a warrant of attorney on the part of debt., it is not a sufficient attestation to satisfy Judgments Act, 1838 (c. 110), s. 9; nor is the attestation of such an attorney's clerk, being himself an attorney, sufficient.—DURRANT v. BLURTON (1841), 9 Dowl. 1015; Woll. 190; 5 J. P. 532; 5 Jur. 825.

310. — Action for ejectment.]—The provisions of Judgments Act, 1838 (c. 110), s. 9, rendering necessary the presence of an attorney on behalf of any person executing a warrant of attorney do not apply to a warrant of attorney given in an action of ejectment.—DOE d. KINGSTON v. KINGSTON (1841), 1 Dowl. N. S. 263; 11 L. J. Q. B. 73; 6 Jur. 105.

(b) Who may act as Attorney.

i. In General.

See, now, Debtors Act, 1869 (c. 62), s. 24; Jud. Act, 1873 (c. 66), s. 87; Jud. Act, 1875 (c. 77), s. 14.

311. Not clerk to attorney.]—PAUL v. CLEAVER, No. 306, *ante*.

312. — — —.]—DURRANT v. BLURTON, No. 309, *ante*.

305 i. — Defendant in custody under execution—Attorney not originally named by defendant.]—A debt. being in custody under execution, gave

a bond & warrant to confess judgment:—*Held*: the fact of the attorney not having been originally named by debt., did not vitiate the execution of the

313. Uncertified attorney.]—A warrant of attorney is sufficiently attested under Judgments Act, 1838 (c. 110), s. 9, by an uncertified attorney.—HOLGATE v. SLIGHT (1851), 2 L. M. & P. 662; *sub nom.* HOLDGATE v. SLIGHT, 21 L. J. Q. B. 74.

Annotation:—Mentd. Sparling v. Brereton (1866), L. R. 2 Eq. 64.

ii. Attorney acting for both Parties.

See, now, Debtors Act, 1869 (c. 62), s. 24; Jud. Act, 1873 (c. 66), s. 87; Jud. Act, 1875 (c. 77), s. 14.

314. Plaintiff's attorney alone present.]—ANDREWS v. RICHARDS (1729), 1 Barn. K. B. 242; 94 E. R. 165.

315. Same attorney may not act for both parties.]—In order to make a *cognovit* valid, its execution must be attested by an attorney attending on behalf of debt., other than the attorney act for pltf.—MASON v. KIDDLE (1839), 5 M. & W. 513; 9 L. J. Ex. 37; 4 Jur. 89; 151 E. R. 217.

Annotations:—Folld. Rising v. Dolphin (1840), 4 Jur. 193. *Reid.* Cocks v. Edwards (1842), 2 Dowl. N. S. 55. *Mentd.* Dixon v. Sleddon (1846), 15 M. & W. 427.

316. — Attorney for plaintiff attesting as defendant's attorney.]—Where a warrant of attorney, executed by a debt. in custody, was addressed to pltf.'s attorney, & the execution was also attested by him though describing himself as the attorney for debt., the ct. set it aside, together with all the proceedings thereon.—TODD v. GOMPERTZ (1838), 6 Dowl. 296; 1 Will. Woll. & H. 69; 2 Jur. 96.

Annotations:—Reid. Rice v. Linstead (1838), 6 Scott, 895. *Mentd.* Bate v. Lawrence (1844), 8 Scott, W. R. 122.

317. — — — Though defendant fully aware of nature of instrument.]—The attorney who subscribed the execution of a warrant of attorney for debts. was the attorney of pltf.:—*Held*: though debts. were fully aware of the nature of the instrument, yet, as the attorney was not wholly uninterested, this was not a sufficient attestation within Judgments Act, 1838 (c. 110), s. 9.—DEVERELL v. THRING (1839), 3 Jur. 1193.

318. — — —.]—In order to render a warrant of attorney valid its execution must be attested by an attorney on the part of the debt. other than the attorney acting for the pltf.—RISING v. DOLPHIN (1840), 8 Dowl. 309; 4 Jur. 193.

Annotation:—Folld. Durrant v. Blurton (1841), 9 Dowl. 1015.

319. — Defendant's attorney formerly acting for plaintiff & paid by plaintiff.]—Where, on the execution of a warrant of attorney, one attorney only was present who had acted on previous occasions for pltf., & attested it on behalf of debt., & made out his bill for the obtaining & preparation of the warrant of attorney to pltf.:—*Held*: he was not such an attorney attending on behalf of debt. as to satisfy Judgments Act, 1838 (c. 110), s. 9, & the warrant of attorney would be set aside.—SANDERSON v. WESTLEY (1840), 6 M. & W. 98; 8 Dowl. 412; 9 L. J. Ex. 204; 151 E. R. 337; *sub nom.* SAUNDERSON v. WESTLEY & WATERS, 4 Jur. 942.

Annotations:—Folld. Cocks v. Edwards (1842), 2 Dowl. N. S. 55. *Distd.* Levinson v. Syer (1851), 18 L. T. O. S. 80. *Reid.* Hirst v. Hannah (1851), 17 Q. B. 383.

320. — — —.]—On the execution of a warrant of attorney, if one attorney alone is present, & acts for both parties, it is not a sufficient compliance with Judgments Act, 1838 (c. 110), s. 9.—MORLEY v. DAVIS (1841), 5 Jur. 246.

321. — — — Though named by defendant.]—

instrument.—NOLAN v. GUMLEY (1863), 14 I. C. L. R. 301 15 Ir. Jur. 253.—*IR.*

Attorney acting on behalf of pltf. cannot validly attest the execution of a warrant of attorney under Judgments Act, 1838 (c. 110), s. 9, although named by deft. himself who knows him to be pltf.'s attorney.—*COOKS v. EDWARDS* (1842), 2 Dowl. N. S. 55.

322. — London agent of plaintiff's attorney — Acting for defendant.]—Where the attorney who attested the execution of a warrant of attorney was London agent to pltf.'s attorney, & acted as such in filing the instrument:—*Held*: the attorney so attesting was in substance pltf.'s attorney, & he could not, therefore, stand in that independent situation which Judgments Act, 1838 (c. 110), requires.—*PRYOR v. SWAINE* (1844), 2 Dow. & L. 37; 13 L. J. Q. B. 214; 3 L. T. O. S. 79; 8 Jur. 423.

Annotations:—*Distd.* *Levinson v. Syer* (1851), 18 L. T. O. S. 80. *Mentd.* *R. v. Keen* (1847), 11 J. P. Jo. 37.

323. —]—Attorneys who act for both parties cannot attest warrants of attorney.—*LLOYDS v. ROBINSON* (1845), 5 L. T. O. S. 125.

324. —]—*MOON v. HUNTSMAN* (1848), 11 L. T. O. S. 247, 274.

325. —]—A warrant of attorney, to confess judgment, was attested in due form by an attorney, acting for deft., but who also acted, in the transaction, for pltf.:—*Held*: by Judgments Act, 1838 (c. 110), s. 9, the attorney acting for pltf. could not act as attorney for deft.—*HIRST v. HANNAH* (1851), 17 Q. B. 383; 117 E. R. 1326.

326. Attorney subsequently acting for plaintiff — Not plaintiff's attorney at time of execution.]—A warrant of attorney, prepared by deft., was addressed to H., an attorney, by name. Pltf. introduced H. to deft., who adopted him as his attorney to attest the execution of the warrant of attorney, & H. accordingly attested it. H. afterwards at the request of pltf., signed judgment & issued execution on the warrant as attorney for pltf. The ct. refused to set aside the warrant.—*LEVINSON v. SYER* (1851), 2 L. M. & P. 557; 21 L. J. Q. B. 16; 18 L. T. O. S. 80; 15 Jur. 1011.

(c) *Attorney must attend at Request of Defendant.*

See, now, Debtors Act, 1869 (c. 62), s. 24; Jud. Act, 1873 (c. 66), s. 87; Jud. Act, 1875 (c. 77), s. 14.

327. Mere consent of defendant not sufficient.]—Where an attorney was requested by deft.'s attorney's clerk to attend & to act for deft., with the latter's assent:—*Held*: this was not a sufficient compliance with r. 72, H. T., 2 Will. 4, but it would be necessary that the attorney should attend at deft.'s request.

Semble: the attorney subscribing his name as a witness to the execution of the *cognovit*, must in writing declare himself to be attorney for deft., & that he subscribes as such attorney according to the terms of the rule.—*FISHER v. PAPANICHOLOS* (1833), 2 Cr. & M. 215; 2 Dowl. 251; 4 Tyr. 44; 3 L. J. Ex. 13; 149 E. R. 738.

Annotations:—*Consd.* *Bligh v. Brewer* (1834), 1 Cr. M. & R. 651; *White v. Cameron* (1838), 1 Will. Woll. & H. 169. *Refd.* *Lees v. Fry* (1835), Tyr. & Gr. 1084; *Wallace v. Brookley* (1837), Will. Woll. & Dav. 382; *Todd v. Gompertz* (1838), 1 Will. Woll. & H. 69.

328. Must be at free request of defendant.]—In an action upon a *cognovit actionem* it must appear that the attorney who attests does so at the free request of deft.—*BARNES v. PENLEY* (1839), 3 J. P. 369; 3 Jur. 506.

Annotations:—*Consd.* *Gripper v. Bristow* (1840), 6 M. & W.

807; *Pease, Liddell & Liddell v. Wells* (1840), 4 Jur. 679. *Refd.* *Haig v. Frost* (1839), 3 Jur. 1125.

329. Nomination cannot be implied.]—To give validity to a warrant of attorney, under Judgments Act, 1838 (c. 110), s. 9, it is necessary that there should be something different from an implied naming of the attorney on behalf of the party. It is necessary that the party naming the attorney or adopting him should be sensible of his having the right to exercise an option on the subject.—*GRIPPER v. BRISTOW* (1840), 6 M. & W. 807; 8 Dowl. 797; 9 L. J. Ex. 324; 151 E. R. 636. *Annotation*:—*Mentd.* *Kemp v. Findon* (1844), 12 M. & W. 421.

330. Where suggested by plaintiff's attorney — & expressly assented to by defendant.]—Where a deft. in custody was about to execute a *cognovit*, & deft.'s attorney being absent from home, pltf.'s attorney suggested another attorney to act for him, to whom deft. made no objection, & on being asked by that attorney, if he wished him to attest the execution as his attorney, answered in the affirmative:—*Held*: this was an express naming of the attorney, within the meaning of r. 72, H. T., 2 Will. 4.—*BLIGH v. BREWER* (1834), 1 Cr. M. & R. 651; 3 Dowl. 206; 5 Tyr. 222; 4 L. J. Ex. 49; 149 E. R. 1242.

Annotations:—*Distd.* *Barnes v. Pendry* (1839), 3 Jur. 506. *Fold.* *Oliver v. Woodroffe* (1839), 4 M. & W. 650. *Distd.* *Gripper v. Bristow* (1840), 6 M. & W. 807. *Fold.* *Taylor v. Nicholls* (1840), 6 M. & W. 91. *Mentd.* *Wade v. Simeon* (1845), 2 Dow. & L. 658; *Cannan v. Reynolds* (1855), 1 Jur. N. S. 873.

331. —]—Where a *cognovit* was attested by a solr. on the part of deft., who was recommended by pltf.'s attorney, & then requested to attend, or sent for by deft.:—*Held*: the *cognovit* was good.—*OLIVER v. WOODROFFE* (1839), 4 M. & W. 650; 7 Dowl. 106; 1 Horn & H. 474; 3 J. P. 85; 3 Jur. 59; 150 E. R. 1581; *sub nom.* *OLLIVER v. WOODROFFE*, 8 L. J. Ex. 105. *Annotations*:—*Distd.* *Barnes v. Pendry* (1839), 3 Jur. 506. *Refd.* *Poole v. Hobbs* (1839), 3 Jur. 1151.

332. —]—A warrant of attorney is not vitiated by the fact that the name of the attorney who attests it on behalf of deft. was first suggested by pltf.'s attorney, if he was expressly adopted by deft. as his attorney for that purpose.—*TAYLOR v. NICHOLLS* (1840), 6 M. & W. 91; 8 Dowl. 242; 9 L. J. Ex. 78; 4 Jur. 271; 151 E. R. 334.

Annotations:—*Distd.* *Gripper v. Bristow* (1840), 6 M. & W. 807. *Refd.* *Pease, Liddell & Liddell v. Wells* (1840), 4 Jur. 679; *Joel v. Dicker* (1847), 5 Dow. & L. 1. *Mentd.* *Bell v. Tidd* (1842), 6 Jur. 59.

333. —]—A deft. went to pltf.'s attorney's office, when it was agreed he should give a *cognovit* for a debt due by him. Pltf.'s attorney informed deft. that an attorney must be present on his behalf. Deft. asked some person to be named. M. was named, who came to deft., & asked him if he wished him to act as his attorney. Deft. replied in the affirmative, & requested M. to attest the *cognovit*:—*Held*: M. was sufficiently named by deft., & attending at his request, as required by Judgments Act, 1838 (c. 110), s. 9.—*PEASE v. WELLS* (1840), 8 Dowl. 626; 4 Jur. 679. *Annotation*:—*Refd.* *Joel v. Dicker* (1847), 5 Dow. & L. 1.

334. —]—Where a deft., who is about to execute a warrant of attorney, declines the attendance of his own usual attorney, but adopts freely an attorney suggested by pltf.'s attorney, that is a sufficient nomination of an attorney by

PART I. SECT. 5, SUB-SECT. 6.—
T. (c).

q. *Whether mere consent of defendant sufficient.*—Dft. applied that a judgment might be set aside upon the

ground that there was not an attorney present on his behalf when he signed the warrant of attorney, alleging that the party who obtained the warrant from him dictated to him a letter to an attorney named by him, & whom he,

def., had never seen, requiring him to attend the next day, which he did, & witnessed deft.'s signature:—*Held*: the attestation was sufficient.—*NOLAN v. GUMLEY* (1863), 9 L. T. 272.—*IR.*

Sect. 5.—Execution of deeds: Sub-sect. 6, T. (c) & (d); sub-sect. 7, A.]

deft. pursuant to Judgments Act, 1838 (c. 110), s. 9.—**HALE v. DALE** (1840), 8 Dowl. 599; 4 Jur. 988.

Annotation:—*Fold.* Joel v. Dicker (1847), 5 Dow. & L. 1.

335. —[—]—A warrant of attorney was attested by A. an attorney, introduced to deft. by pltf.'s attorney, the deft. thereupon naming A. & requesting him to attend on his behalf:—**Held:** the attestation was good.—**WALTON v. CHANDLER** (1845), 1 C. B. 300; 2 Dow. & L. 802; 14 L. J. C. P. 149; 4 L. T. O. S. 374; 9 Jur. 257; 135 E. R. 557.

Annotation:—*Distd.* Hirst v. Hannah (1851), 17 Q. B. 383.

336. —[—]—Where deft. requested pltf.'s attorney to name an attorney to act for him in witnessing the execution of a warrant of attorney which he accordingly did, & deft. adopted the person so named:—**Held:** this was a sufficient nomination under Judgments Acts, 1838 (c. 110), deft. having expressly named the attorney.—**JOEL v. DICKER** (1847), 5 Dow. & L. 1; 16 L. J. Q. B. 359; 11 Jur. 589.

337. —[—]—The ct. set aside a warrant of attorney, on the ground that deft.'s execution was attested by an attorney introduced by pltf.'s attorney.—**RICE v. LINSTAD** (1838), 7 Dowl. 153; 6 Scott, 895.

Annotation:—*Refd.* Poole v. Hobbs (1839), 8 Dowl. 113.

338. —[—]—**RICKARDS v. KAY** (1843), 1 L. T. O. S. 201.

339. —[—]—**MORLEY v. WHITE** (1843), 1 L. T. O. S. 170, 204.

(d) Attestation by Attorney.

See, now, Debtors Act, 1869 (c. 62), s. 24; Jud. Act, 1873 (c. 60), s. 87; Jud. Act, 1875 (c. 77), s. 14.

340. General rule.]—**LEWIS v. KENSINGTON** (LORD) (1846), 2 C. B. 463; 3 Dow. & L. 637; 15 L. J. C. P. 100; 6 L. T. O. S. 321; 135 E. R. 1026.

Annotations:—*Apld.* Phillips v. Gibbs (1846), 16 M. & W. 208. *Refd.* Holt v. Kershaw (1848), 10 L. T. O. S. 309; Pocock v. Pickering (1852), 18 Q. B. 789.

341. Necessity for—Warrant executed abroad.]—**DAVIS v. TREVANION** (1845), 2 Dow. & L. 743; 14 L. J. Q. B. 138; 4 L. T. O. S. 341; 9 Jur. 492.

Annotations:—*Mentd.* *Re* Mander (1845), 6 Q. B. 867; *Re* Ford (1846), 7 L. T. O. S. 142.

342. Must state that witness is attorney for defendant.]—**FISHER v. PAPANICHOLAS**, No. 327, ante.

343. —[—]—**BROMLEY v. FEATHERSTONHAUGH** (1846), 8 L. T. O. S. 117.

344. Must state subscription "as such attorney."—**FISHER v. PAPANICHOLAS**, No. 327, ante.

345. —[—]—**"Witness to the signing by the said R. F. C. B. P. attorney for the said defendant"**—**Sufficient.]—****LEES v. FRY** (1835), Tyr. & Gr. 1084.

346. —[—]—**"Witness G. E., defendant's attorney, named by him & attending at his request"**—**Insufficient.]—****POOLE v. HOBBS** (1839), 8 Dowl. 113; 3 Jur. 1151.

Annotations:—*Fold.* Potter v. Nicholson (1841), 8 M. & W. 294. *Consd.* Knight v. Hasty (1843), 12 L. J. Q. B. 293. *Distd.* Lewis v. Kensington (1846), 2 C. B. 463. *Refd.* Everard v. Poppleton (1843), 5 Q. B. 181.

347. —[—]—**"J. B. attending for the said W. N. at his request"**—**Insufficient.]—****POTTER v.**

NICHOLSON (1841), 8 M. & W. 294; 9 Dowl. 808; 10 L. J. Ex. 311; 5 Jur. 511; 151 E. R. 1050.

Annotations:—*Distd.* Lewis v. Kensington (1846), 2 C. B. 463. *Refd.* Knight v. Hasty (1843), 12 L. J. Q. B. 293.

348. —[—]—**"I subscribe myself as attorney for him expressly named by him to attest as attorney"**—**Insufficient.]—****ELKINGTON v. HOLLAND** (1842), 9 M. & W. 659; 1 Dowl. N. S. 643; 11 L. J. Ex. 273; 6 Jur. 374; 152 E. R. 278.

Annotations:—*Distd.* Lewis v. Kensington (1846), 2 C. B. 463. *Refd.* Everard v. Poppleton (1843), 5 Q. B. 181; Knight v. Hasty (1843), 12 L. J. Q. B. 293; *Mentd.* Hunter v. Caldwell (1847), 9 L. T. O. S. 73; Stokes v. Trumper (1855), 25 L. T. O. S. 140.

349. —[—]—**"As attorney of the said W. B. attending at the execution hereof at his request & expressly named by him"**—**Insufficient.]—****HIBBERT v. BARTON** (1842), 10 M. & W. 678; 2 Dowl. N. S. 434; 12 L. J. Ex. 70; 6 Jur. 1019; 152 E. R. 644.

Annotations:—*Distd.* Lewis v. Kensington (1846), 2 C. B. 463. *Consd.* Pocock v. Pickering (1852), 18 Q. B. 789. *Refd.* Knight v. Hasty (1843), 12 L. J. Q. B. 293; Bromley v. Featherstonhaugh (1846), 8 L. T. O. S. 117; Phillips v. Gibbs (1846), 16 M. & W. 208; Noland v. Gumley (1863), 9 L. T. 272.

350. —[—]—**"Signed by the above named P. in the presence of us of whom the said J. H. S. is the attorney expressly named by him & acting at his request"**—**Insufficient.]—****EVERARD v. POPPLETON** (1843), 5 Q. B. 181; 1 Dav. & Mer. 322; 13 L. J. Q. B. 1; 2 L. T. O. S. 95; 114 E. R. 1217; *sub nom.* EDWARDS v. POPPLETON, 7 Jur. 991.

Annotation:—*Distd.* Lewis v. Kensington (1846), 2 C. B. 463.

351. —[—]—**"Subscribe myself accordingly"**—**Sufficient.]—****LINDLEY v. GIRDLER** (1843), 13 L. J. Q. B. 53; 8 Jur. 61.

352. —[—]—**"I hereby subscribe myself to be attorney for him"**—**Sufficient.]—****LEWIS v. KENSINGTON (LORD)** (1846), 2 C. B. 463; 3 Dow. & L. 637; 15 L. J. C. P. 100; 6 L. T. O. S. 321; 135 E. R. 1026.

Annotations:—*Apld.* Phillips v. Gibbs (1846), 16 M. & W. 208. *Refd.* Holt v. Kershaw (1848), 10 L. T. O. S. 309; Pocock v. Pickering (1852), 18 Q. B. 789.

353. —[—]—**"I subscribe my name as witness to the due execution hereof by the said R. G. & as his attorney"**—**Sufficient.]—****PHILLIPS v. GIBBS** (1846), 16 M. & W. 208; 16 L. J. Ex. 48; 8 L. T. O. S. 170; 10 Jur. 971; 153 E. R. 1163.

354. —[—]—**"I declare myself to be the attorney for the same J. K."**—**Sufficient.]—****HOLT v. KERSHAW** (1848), 10 L. T. O. S. 309.

355. —[—]—**"Set & subscribed my name as the attorney on their behalf attesting the execution thereof"**—**Insufficient.]—****POCOCK v. PICKERING** (1852), 18 Q. B. 789; 21 L. J. Q. B. 365; 19 L. T. O. S. 363; 16 Jur. 760; 118 E. R. 298.

356. Need not state attorney of superior court.]—**KNIGHT v. HASTY** (1843), 12 L. J. Q. B. 293; *sub nom.* KNIGHT v. EASTESE, 1 L. T. O. S. 150; 7 Jur. 852.

Annotations:—*Apld.* Lewis v. Kensington (1846), 2 C. B. 463. *Refd.* Everard v. Poppleton (1843), 5 Q. B. 181.

357. Need not state attestation.]—**STANLEY v. PARROTT** (1846), 8 L. T. O. S. 188.

358. Need not state attendance at request of defendant.]—**GAY v. HALL** (1848), 5 Dow. & L. 422; 18 L. J. Q. B. 12; 12 L. T. O. S. 179; 13 Jur. 124.

Annotation:—*Mentd.* Crouch v. Waller (1859), 4 De G. & J. 302.

359. Second attestation—First attestation insufficient.]—**LEDGARD v. THOMPSON** (1843), 11 M. & W. 40; 2 Dowl. N. S. 706; 12 L. J. Ex. 229; 7 Jur. 239; 152 E. R. 707.

PART I. SECT. 5, SUB-SECT. 6.—
T. (d).

r. Omission of date of attestation

*by attorney—Whether renders judgment void.]—*The omission by an attorney, who signs a confession under a warrant of attorney, to add the date of signing

does not render void a judgment signed on such confession.—**LEVI v. MUZEROLL** (1857), 3 All. 598.—**CAN.**

SUB-SECT. 7.—EFFECT OF NON-EXECUTION BY SOME PARTIES.

A. In General.

360. Binding on party executing—Indenture.]—

If one party executes an indenture, it shall be his deed, though the other party does not execute it.—*FOSTER & WILSON v. MAPES* (1590), Cro. Eliz. 212; 1 Leon. 324; Owen, 100; 78 E. R. 468.

Annotations.—*Mentd.* *Tisdale v. Essex* (1613), Hob. 34; *Hayes v. Bickerstaff* (1669), Vaugh. 118; *Nash v. Palmer* (1816), 5 M. & S. 374; *Fowler v. Welch* (1822), 2 Dow. & Ry. K. B. 133.

361. — Assignment to trustees for creditors—

Execution by some creditors.—A covenant in a deed between the debtor of the first part, a trustee of the second part, & several other persons whose names & seals are in the schedule thereto affixed of the third part, & all other the creditors of the debtor of the fourth part, whereby the creditors covenanted not to sue, etc., is binding only upon those who execute & will not therefore invalidate the deed. *Qu.*: whether creditors of a debtor merely assenting to, but not executing, the deed must be considered as parties to the covenants contained in the deed.—*Re A TRUST DEED, Ex p. HUTCHINSON* (1864), 10 L. T. 728.

362. — Charterparty.]—One of the owners

alone having executed a charterparty, without the others being made parties to it:—*Held*: the legal operation of the deed was that it was the agreement of him alone who executed it; consequently, the charterparty was correctly set forth as the agreement of that owner alone, though made on behalf of himself & the other joint owners of the vessel. *BUSHELL v. BEAVAN* (1834), 1 Bing. N. C. 103; 4 Moo. & S. 622; 3 L. J. C. P. 279; 131 E. R. 1056.

Annotation.—*Mentd.* *Caballero v. Slater* (1854), 23 L. J. C. P. 67.

363. — Appointment of Public Trustee.]—

Three ladies, executrices of a will, executed a deed on Nov. 29, 1912, appointing the Public Trustee to be sole trustee of the will in their place. The Public Trustee delayed giving his formal consent to act until the administration of the estate had been completed, & gave his consent under his hand & official seal in accordance with the rules made under Public Trustee Act, 1906 (c. 55), on Feb. 28, 1913, & executed the deed of appointment on

Mar. 3, 1913. One of the ladies desired to withdraw the appointment, contending that, inasmuch as it was made before the consent of the Public Trustee had been formally given, it was invalid:—*Held*: the appointment of the Public Trustee dated as from Mar. 3, 1913, when the Public Trustee had executed the deed of appointment, which was after his consent had been formally given in accordance with the rules, so that the appointment so made was valid.—*Re SHAW, PUBLIC TRUSTEE v. LITTLE* (1914), 110 L. T. 924; 30 T. L. R. 418; 58 Sol. Jo. 414, C. A.

364. Executed by some parties on faith of execution by all.]—

The eight children of A., being entitled to a fund, equally, in the event of their surviving B., seven of them, in pursuance of an arrangement made amongst themselves whilst the eighth, whose name was James, was in India, executed a deed, by which they & he were made to covenant with each other, reciprocally, that, in case any of them should die in B.'s lifetime leaving a child or children, such child or children should be entitled to the share or shares of his, her, or their parent or parents, in such & the same manner as if such parent or parents had survived B. James never executed the deed; but he & six of those who did execute it, survived B. The other left children, & those children claimed to be entitled, under the deed, to their parent's share:—*Held*: the deed was made upon the assumption that all the persons named as parties, would execute it, & as one of them had not executed it, it was not binding upon the others, though they had executed it.—*PETO v. PETO* (1849), 16 Sim. 590; 13 L. T. O. S. 134; 13 Jur. 646; 60 E. R. 1003.

Annotation.—*Mentd.* *Boltho v. Hillyar* (1865), 34 Beav. 180.

365. —.]—A mortgaged property to three trustees, B., C. & D. Some time after, B., who was a solr., having in his hands a sum belonging to a client, E., proposed to lay it out on a transfer of the mtge. He prepared a transfer, which was executed by A., B., & C. but not by D., & a receipt for the money was signed by B. & C. alone. No money was ever paid, & it was lost by B.'s insolvency:—*Held*: in equity, the deed was inoperative, both as against the mtgor. & the

PART I. SECT. 5, SUB-SECT. 7.—A.

a. *Whether binding on party executing.*—Where an indenture of apprenticeship was executed by only one of the employers:—*Held*: sufficiently executed & binding.—*R. v. McNANEY* (1871), 5 P. R. 438.—*CAN.*

t. —.]—Where a conveyance has been executed by some of the parties, but not by all, & there has been no delivery, it is not a deed, & is not evidence against the parties who have executed it.—*POPE v. PRINCE EDWARD ISLAND CROWN LANDS COMR.* (1872), 1 P. E. I. 414.—*CAN.*

a. —.]—In a conveyance the grant was to the party of the third part, whereas there were only two parties, & the party of the second part did not execute it:—*Held*: a valid objection.—*Re CLARKE & CHAMBERLAIN* (1889), 18 O. R. 270.—*CAN.*

b. —.]—A deed contained in the *habendum* a reservation to the grantee of a right of way. The deed was not executed by the grantee, but had been accepted by him. It was contended that not having been executed by the grantee, there was no grant of the right of way:—*Held*: plts. were bound by the reservation.—*LOYAL PRINCE OF WALES LODGE v. SINFELD* (1891), 40 N. S. R. 30.—*CAN.*

c. —.]—A document is operative as a release though not signed by the executant.—*GANGARAM AGARWALA v. LACHIRAM KISHEN DYAL* (1914), 19 C. W. N. 611.—*IND.*

d. —.]—If a document is drawn up in the names of several persons, & it is the intention of the parties that all should execute it, it will be inoperative till all have done so.—*NETHUR MENON v. GOPALAN NAIR* (1916), 1 L. L. 39 Mad. 597.—*IND.*

e. —.]—A party who subscribed a deed as cautioner, after hearing a co-obligant refuse to sign it, pleaded the deed was not binding, because all the parties proposed had not signed it:—*Held*: the plea was repelled.—*MONTGOMERIE, ETC. v. ALEXANDER (PATON'S TRUSTEE)* (1865), 38 Sc. Jur. 85.—*SCOT.*

364 i. *Executed by one party on faith of execution by others.*—In an action on a covenant by debt, as surety, debt, contended that he executed on the understanding that Y. K. & E. should also execute, & that he should be responsible with them, & not solely:—*Held*: the defence was admissible, as debt, executed the deed conditionally only.—*HURON COUNTY CORPN. v. ARMSTRONG* (1868), 27 U. C. R. 533.—*CAN.*

364 ii. —.]—To an action against V. on his covenant as surety V. pleaded that the agreement was drawn up to be signed by C. as his co-surety, & C. afterwards refused to sign:—*Held*: V. was bound.—*HENDERSON v. VERMILYEA* (1868), 27 U. C. R. 544.—*CAN.*

364 iii. —.]—A co. applied to pltf. bank for a loan; the application was accepted upon the terms that all the directors should guarantee the repayment of the loan. All the directors agreed to execute & all but one, F., did execute a bond, some of them saying when they executed it that they did so upon the condition that all should execute. The bond was delivered to the local manager, who knew of the condition, & undertook to get F.'s signature. Subsequently F. refused to sign, & this action was brought against those who did sign to recover the amount advanced. One of the clauses in the instrument was: "This guarantee shall be binding upon every person signing the same, notwithstanding the non-execution thereof by any other proposed guarantor:—"*Held*: the guarantee never became effective as against any of the parties.—*MOLSONS BANK v. CRANSTON* (1918), 41 O. L. R. 58.—*CAN.*

Sect. 5.—Execution of deeds: Sub-sect. 7, A. & B.
(a), (b) & (c).]

three trustees.—**Griffin v. Clowes** (1855), 20 Beav. 61; 3 W. R. 309; 52 E. R. 525.

Annotation:—Mentd. Perry v. Holl (1860), 2 Giff. 138.

366. —J.—One of two intended co-sureties executed a deed of covenant for the repayment of money advanced to the principal debtor, on the understanding that the money would not be advanced until the deed was executed by the other surety. The deed was never executed by the other surety, & no notice of his failure to execute it was given by the creditor to the executing surety until after the principal debtor had made default & become insolvent:—**Held:** the executing surety was entitled to be discharged in equity from every part of the debt & to have the deed delivered up to be cancelled.—**Evans v. Bremridge** (1856), 8 De G. M. & G. 100; 25 L. J. Ch. 331; 27 L. T. O. S. 8; 2 Jur. N. S. 311; 4 W. R. 350; 44 E. R. 327, L. J.J.

Annotations:—Consd. Spaight v. Cowne, Edwards v. Spaight (1863), 1 Hem. & M. 359. **Distd. Cooper v. Evans** (1867), L. R. 4 Eq. 45. **Refd. Cumberlege v. Lawson** (1857), 26 L. J. C. P. 120; **Luke v. South Kensington Hotel Co.** (1879), 27 W. R. 514; **Beckett v. Addyman** (1882), 9 Q. B. D. 783; **Royal Albert Hall Corpn. v. Winchelsea** (1891), 7 T. L. R. 362; **National Provincial Bank of England v. Brackenbury** (1906), 22 T. L. R. 797. **Mentd. Waterlow v. Bacon** (1866), 35 L. J. Ch. 643; **Ellesmere Brewery Co. v. Cooper**, [1896] 1 Q. B. 75.

367. —J.—The covenant of indemnity was intended to be entered into by all parties, & it was entered into by the subscribers on the faith of its being entered into by the managing directors also. But as no managing director executed it, the parties who intended to be bound jointly with others were left bound alone, & I consider that in such a case they have a right in equity to insist that they are not bound at all (**TURNER, L.J.**).—**Re Dover, Hastings & Brighton Junction Ry. Co., Carew's Case** (No. 2) (1855), 7 De G. M. & G. 43; 24 L. J. Ch. 769; 24 L. T. O. S. 329; 3 W. R. 289; 44 E. R. 17, L. J.J.

Annotation:—Refd. Luke v. South Kensington Hotel Co. (1879), 27 W. R. 514.

368. —J.—Defts., by deed, covenanted, jointly & severally, that they would make advances so as to enable a trustee to wind up the business of plffs. In an action by plffs. against defts. for a breach of covenant, to which they pleaded, that after the execution by the other plffs., one pltf. had refused, & still refused, to execute the deed:—**Held:** this was a good answer to the action, for the deed was inoperative unless executed by each of the parties to it.—**Lascaridi v. Gurney** (1862), 9 Jur. N. S. 302.

369. —J.—A surety who has executed a bond on the faith of its being executed by the principal debtor also cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him & become a specialty creditor of his.—**Cooper v. Evans** (1867), L. R. 4 Eq. 45; 36 L. J. Ch. 431; 15 W. R. 609.

370. —J.—It is well settled that if two persons execute a deed on the faith that a third party will do so, & that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute (**JESSEL, M.R.**).—**LUKE v.**

SOUTH KENSINGTON HOTEL Co. (1879), 11 Ch. D. 121; 48 L. J. Ch. 361; 40 L. T. 638; 27 W. R. 514, C. A.

Annotations:—Refd. Palmer v. Mallet (1887), 36 Ch. D. 411. **Mentd. Webb v. Jonas** (1888), 39 Ch. D. 660; **Re Continental Oxygen Co., Elias v. Continental Oxygen Co.**, [1897] 1 Ch. 511.

See, further, BONDS, Vol. VII., p. 181, Nos. 193, 195–198; GUARANTEE.

Delivery as escrow.]—See Sub-sect. 2, ante.

Disentailing assurance—Consent of protector given after death of tenant for life.]—See REAL PROPERTY & CHATTELS REAL.

Compositions & schemes & deeds of arrangement.]—See BANKRUPTCY & INSOLVENCY, Vol. V., pp. 1056 et seq.

B. Rights and Liabilities of Non-Executing Parties.

(a) Disclaimer.

See Sect. 8, sub-sect. 7, post.

(b) Where Benefit accepted under Deed.

See, generally, ESTOPPEL.

371. Deed operative against non-executing party—Acceptance of grant from Crown.]—An action of covenant will lie for a breach by patentee of the Crown, although he did not sign or seal any counterpart, for his acceptance of the deed shall bind him as strongly as if it had been an indenture.—**Brett v. Cumberland** (1619), Cro. Jac. 521; 3 Bulst. 163; Godb. 270; 1 Roll. Rep. 359; 2 Roll. Rep. 63; 79 E. R. 446.

Annotations:—Consd. Lyme Regis Corpn. v. Henley (1834), 1 Bing. N. C. 222. **Refd. Norton v. Acklane** (1640), Cro. Car. 579; **Nicholl v. Allon** (1862), 1 B. & S. 935. **Mentd. Hellier v. Caseborough** (1665), 1 Keb. 839; **Thursby v. Plant** (1670), 1 Wms. Saund. 237; **Jenkins v. Hermitage** (1674), Freem. K. B. 377; **Glover v. Cope** (1691), 1 Show. 284; **London City v. Vanacre** (1699), 12 Mod. Rep. 269; **Bally v. Wells** (1769), 3 Wils. 25; **Rumsey v. George** (1813), 1 M. & S. 176; **McNeillage v. Holloway** (1818), 1 B. & Ald. 218.

372. —Contract of hiring—Acceptance of service.]—To make a valid contract of hiring & service it is not absolutely necessary that the contract when by deed should be executed by the master; it is sufficient that he accepted the services on the terms of the deed.—**R. v. Houghton-le-Spring** (1819), 2 B. & Ald. 375; 106 E. R. 403.

Annotations:—Distd. R. v. Arnesby (1820), 3 B. & Ald. 584. **Consd. Whitford v. Tutin** (1834), 10 Bing. 395.

373. —Covenants in lease—Liability of non-executing assignee.]—Case, not covenant, lies by the assignor, against the assignee of a lease, assigned by deed poll, upon his implied duty to perform the covenants in the original lease, although the assignor has by the assignment parted with all his interest.—**Burnett v. Lynch** (1826), 5 B. & C. 589; 8 Dow. & Ry. K. B. 368; 4 L. J. O. S. K. B. 274; 108 E. R. 220.

Annotations:—Consd. Dutton v. Powles (1861), 2 B. & S. 174. **Refd. Edwards v. Bates** (1844), 7 Man. & G. 590; **Rudge v. Bowman** (1868), L. R. 3 Q. B. 689; **Bowring v. Shepherd** (1871), 24 L. T. 721. **Mentd. Walker v. Moore** (1829), 8 L. J. O. S. K. B. 159; **Marzetti v. Williams** (1830), 1 B. & Ad. 415; **Hancock v. Caffyn** (1832), 6 Bing. 358; **Wolveridge v. Steward** (1833), 1 Cr. & M. 644; **Wright v. Doe d. Tatham** (1834), 1 Ad. & El. 3; **Humble v. Langston** (1841), 7 M. & W. 517; **Yates v. Aston** (1843), 4 Q. B. 182; **Magnay v. Edwards** (1853), 17 Jur. 839; **Smith v. Peat** (1853), 9 Exch. 161; **Rolin v. Steward** (1854), 14 C. B. 595; **Walker v. Bartlett** (1856), 18 C. B. 845; **Mathew v. Blackmore** (1857), 1 H. & N. 762; **Nokes v. Fish** (1857), 3 Drew. 736; **Maughan v. Sharpe** (1864),

PART I. SECT. 5, SUB-SECT. 7.—
B. (b).

1. Deed operative in favour of non-executing party.]—A declaration in covenant stated that, by indenture made between plffs. & defts., plffs. demised to defts. turnpike tolls, that

defts. covenanted to pay a rent therefor; & by virtue of said demise defts. entered & were possessed for the term. Breach, non-payment of the rent:—**Held:** the non-execution by the lessors was no defence.—**FRONTENAC, LENNOX, & ADDINGTON MUNICIPAL COUNCIL v. CHESTNUT** (1851), 9

U. C. R. 365.—**CAN.**

g. Whether deed operative against non-executing party.]—Where an agreement under seal was executed by one of two partners in the name of the firm, & the partner not executing afterwards received the benefit of it,

17 C. B. N. S. 443; *Grissell v. Bristowe* (1868), L. R. 3 C. P. 112; *Moule v. Garrett* (1872), L. R. 7 Exch. 101; *Kellock v. Einthoven* (1874), L. R. 9 Q. B. 241; *Whitaker v. Forbes* (1875), 45 L. J. Q. B. 140; *Woodhouse v. Walker* (1880), 5 Q. B. D. 404; *Baynes v. Lloyd*, [1895] 2 Q. B. 610.

374. ———. ———.]—Where an assignee of leaseholds accepted the benefit of an assignment:—*Held*: in equity he was liable to the covenants on his part contained in the assignment, though he did not execute it.—*WILLSON v. LEONARD* (1840), 3 Beav. 373; 49 E. R. 146.

Annotations:—*Mentd. Nokes v. Fish* (1837), 3 Drew. 735; *Coope v. Crosswell* (1866), 14 L. T. 262.

375. ———.]—A made his promissory note payable on demand, with interest, in favour of B. & C., the exors. of D. A. was, with several other relatives, to be entitled to certain benefits, under D.'s will, upon the coming of age of the youngest legatee named in the will. By an agreement made between the legatees, the exors. were authorised to lend the funds in their hands on personal security, & a part of these funds having been lent to A. (as well as to the other legatees), he gave the exors. the note in question. By the agreement it was settled that the notes given to the exors. should not be sued on till the youngest legatee had arrived at the age mentioned in the will. The exors. did not sign this agreement; but when it had been signed by the other parties, took it into their possession. The exors. brought the action while the legatee in question was alive, & before he had attained the specified age. A. pleaded the agreement as an answer to the action, averring that plffs. accepted & received the note on the terms & conditions of the agreement, & that the youngest legatee was still under age. At the trial the agreement was proved:—*Held*: the pleas were bad in substance, for that the agreement was collateral, & was therefore not between the same parties as the note.—*SALMON v. WEBB* (1852), 3 H. L. Cas. 510; 10 E. R. 201, H. L.; *affg. S. C. sub nom. WEBB v. SPICER*, *WEBB v. SALMON* (1849), 13 Q. B. 894, Ex. Ch.

Annotations:—*Consd. Hudspeth v. Yarnold* (1850), 9 C. B. 626. *Refd. Stroughill v. Buck* (1850), 14 Jur. 741; *Weldon v. Woodbridge* (1850), 13 Q. B. 470; *Manley v. Boycott* (1853), 2 E. & B. 46. *Mentd. Pollok v. Bradbury* (1853), 8 Moo. P. C. C. 227; *Canham v. Barry* (1855), 15 C. B. 597.

376. ———. *Policy of insurance incorporating declaration.*—Pltf. effected a policy of insurance with debts, but was not made a party to it. In it was a proviso that if the declaration under the hand of pltf. delivered at debts' office as the basis of the insurance was not in every respect true, then the insurance should be void:—*Held*: the proviso in the policy avoided the insurance if the particulars in the declaration were untrue in fact, on a material matter.—*MACDONALD v. LAW UNION INSURANCE CO.* (1874), L. R. 9 Q. B. 328; 43 L. J. Q. B. 131; 30 L. T. 545; 38 J. P. 485; 22 W. R. 530.

Annotations:—*Refd. Re Universal Non-Tarif Fire Insce.. Forbes' Claim* (1875), L. R. 19 Eq. 485; *Howarth v. Pioneer Life Assoe.* (1912), 107 L. T. 155.

377. ———.]—*EXCHANGE BANK OF YARMOUTH v. BLETHEN*, No. 395, *post*.

378. ———. *Grantee of land subject to reserva-*

tion of easement.—*MAY v. BELLEVILLE*, [1905] 2 Ch. 605; 74 L. J. Ch. 678; 93 L. T. 241; 54 W. R. 12; 49 Sol. Jo. 651.

379. *Whether recitals binding on non-executing party.*—In 1792 husband & wife, in consideration of a sum of money, executed a conveyance, with a fine, of the wife's estates of M. & F. to O. in fee. In Aug. 1798, they conveyed the M. estate alone to O. in fee, with a declaration, that the fine already levied should enure to the uses of that deed. In Nov. 1798, by a deed reciting that the original transaction was only a mtge., & that it had been lately discovered that the wife had only a life interest in the F. estate, the husband & wife, in consideration of a further advance of money from O., conveyed to him the wife's life interest in that estate. O. never executed the last-mentioned deed, but he entered into possession of both estates at the time of its execution. Upon a bill filed in 1836, by the heir of the wife, to redeem the E. estate:—*Held*: although O. entered into possession under that deed, yet not having signed it he was not bound by its recitals.—*TULL v. OWEN* (1840), 4 Y. & C. Ex. 192; 9 L. J. Ex. Eq. 33; 4 Jur. 503; 160 E. R. 975.

380. *Application of rule to trusts—Imposing obligations.*—Assuming it to be the law that a party is presumed to assent to that which is for his personal benefit, the rule does not necessarily apply to trusts, which impose an onerous obligation (*PAIKE, B.*)—*LINWOOD v. SQUIRE* (1850), 5 Exch. 234; 10 L. J. Ex. 237; 155 E. R. 100.

(c) *Right to Sue.*

Rights under deed poll.—*See* Sect. 6, sub-sect. 2, *post*.

381. *May sue on covenant.*—*CLEMENT v. HENLEY* (1643), 2 Roll. Abr. 22 (f. 2).

382. ———.]—In an action of covenant, by surviving covenantees of a joint & several covenant, against the exors. of a surviving covenantor, with a plea that one of the covenantees did not execute the deed; on demurrer:—*Held*: the plea was bad.—*ROSE v. POULTON* (1831), 2 B. & Ad. 822; 1 L. J. K. B. 5; 109 E. R. 1348.

Annotations:—*Distd. Cooch v. Goodman* (1842), 2 Q. B. 580. *Refd. Cardwell v. Lucas* (1836), 2 M. & W. 111; *Dewhurst v. Jones* (1864), 3 H. & C. 60. *Mentd. Hume v. Bolland* (1832), 2 Tyr. 575; *Boyce v. Edbrooke*, [1903] 1 Ch. 836; *Ellis v. Kerr*, [1910] 1 Ch. 529.

383. ———.]—*AVELINE v. WHISSON*, No. 115, *ante*.

384. ———. *Although cross-covenants by covenantee.*—A covenantee in an ordinary indenture, who is a party to it, may sue the covenantor who executed it, although he himself has not executed it; notwithstanding there may be cross-covenants on the part of the covenantee, which are stated in the deed to be the consideration for the covenants on the part of the covenantor.—*MORGAN v. PIKE* (1854), 14 C. B. 473; 23 L. J. C. P. 64; 22 L. T. O. S. 242; 2 W. R. 193; 2 C. L. R. 696; 139 E. R. 195.

Annotation:—*Refd. Northampton Gas-Light Co. v. Parnell* (1855), 15 C. B. 630.

385. ———.]—By a deed made between P., plffs., & debts., P. covenanted with plffs. that he would, on the execution of the deed, commence,

such agreement was sustained as his deed.—*BLOOMLEY v. GRINTON* (1852), 9 U. C. R. 455.—*CAN.*

h. ———.]—An action of covenant cannot be maintained on a deed executed by the grantor, but which has not been executed by the grantees, although he has accepted the benefit of the deed.—*CREDIT FONCIER FRANCO-CANADIAN v. LAWRIE* (1896), 27 O. R. 498.—*CAN.*

k. ———.]—A party to a deed who had not executed it is not liable to an action of covenant by the other party to the deed unless he has taken a benefit under it, & it is established that the benefit was offered on condition that the covenants would be performed & that he assented to the condition.—*HART v. GREAT WEST SECURITIES & TRUST CO., LTD.*, [1918] 2 W. W. R. 1061; 11 Sask. L. R. 336.—*CAN.*

PART I. SECT. 5, SUB-SECT. 7.—B. (c).

1. *May sue on covenant—On observing all his own covenants.*—A party to a deed who has not executed it cannot enforce its provisions by action without observing all the covenants which the deed requires him to observe.—*HART v. GREAT WEST SECURITIES & TRUST CO., LTD.*, [1918] 2 W. W. R. 1061; 11 Sask. L. R. 336.—*CAN.*

Sect. 5.—Execution of deeds: Sub-sect. 7, B. (c); sub-sects. 8 & 9.]

& forthwith build & finish, a certain gas-holder tank, the same to be finished within three months from the date of the deed; & in the event of P. neglecting to finish the work within the time specified, plffs. were empowered to determine the contract; & plffs. covenanted with P. as to the mode of payment for the work. By the deed it was further agreed that the whole of the work should be fully completed on or before June 30, 1853, & defts. covenanted with plffs. that P. should perform the covenants & agreements on his part which should be subsisting, & not annulled or avoided; & in default thereof, that defts. would pay to plffs. such sum as E., or other the engineer for the time being of plffs., should adjudge to be proper to be paid for such default. In an action for not finishing the work on June 30, 1853, & for not paying the sum of £300, which E. had adjudged proper to be paid to plffs. for the default of P. in performing the covenants:—*Held*: the non-execution of the deed by plffs. until after June 30, 1853, was no defence.—**NORTHAMPTON GAS-LIGHT CO. v. PARNEILL** (1855), 15 C. B. 630; 24 L. J. C. P. 60; 24 L. T. O. S. 239; 1 Jur. N. S. 211; 3 W. R. 179; 3 C. L. R. 409; 139 E. R. 572.

386. Where execution condition precedent—To legal obligation of covenantor—Non-execution of lease by lessor.]—SOPRANI & BARNARDI v. SKURRO (1602), Yelv. 19; 80 E. R. 14.

Annotations:—**Consd.** Cooch v. Goodman (1842), 2 Q. B. 580. **Refd.** Antram v. Chace (1812), 15 East, 209; Cardwell v. Lucas (1836), 2 M. & W. 111; Pitman v. Woodbury (1848), 3 Exch. 4; British Empire Assce. Co. v. Browne (1852), 12 C. B. 723; Morgan v. Pike (1854), 14 C. B. 473; Wood v. Copper Miners' Co. (1854), 14 C. B. 428. **Mentd.** Reuss v. Pickles (1866), L. R. 1 Exch. 342; Clifford v. Watts (1870), 40 L. J. C. P. 36.

387. ———.]—BLAND v. INMAN (1632), Cro. Car. 288; 79 E. R. 853.

Annotation:—**Mentd.** Sachoverell v. Walker (1671), Freem. K. B. 16.

388. ———.]—Declaration in covenant on an indenture bearing date Mar. 25, 1838, made between plff. & defts., whereby plff. then demised to deft. a certain messuage, with the appurtenances, for the term of seven years, & deft. did thereby covenant with plff. that he would yearly, & every year during the term, keep the premises in good repair, & give them up in good repair at the end of the term; by virtue of which demise deft. entered upon & enjoyed the demised premises. The breach laid was for not keeping the premises in repair during the term. Deft. pleaded that his part of the indenture was executed by him after the alleged day of the execution thereof; & that plff.'s part was never executed by him, or by any agent of his thereunto lawfully authorised; nor was there ever any demise of the premises to deft., nor was there ever any lease of any part of the premises put in writing & signed, or made, signed, sealed, or delivered by plff., or by any agent of his thereunto lawfully authorised by writing or otherwise; & that, although before the making of the indenture, to wit, on Mar. 25, 1838, plff. demised the premises for the term of one year, and so on from year to year, by virtue of which demise deft. entered & occupied the premises for a term, to wit, for nine years, which term had ended before the commencement of the suit, deft. never did occupy the premises under any demise from plff. other than that last mentioned, or for any term granted by the indenture, & that there never was any consideration for the execution

by deft., on his part, of the indenture, & that his covenant therein was void:—*Held*: a good answer to the action.—**PITMAN v. WOODBURY** (1848), 3 Exch. 4; 154 E. R. 732.

Annotations:—**Apld.** Swatman v. Ambler (1852), 8 Exch. 72. **Distd.** Morgan v. Pike (1854), 14 C. B. 473. **Refd.** British Empire Assce. Co. v. Browne (1852), 12 C. B. 723; Wood v. Copper Miners' Co. (1854), 14 C. B. 428. **Mentd.** Cottee v. Richardson (1851), 7 Exch. 143; Wheatley v. Boyd (1851), 7 Exch. 20; Shepherd v. Hodsmen (1852), 16 Jur. 948; Toler v. Slater (1867), L. R. 3 Q. B. 42.

389. ———.]—Debt upon an indenture, dated Dec. 27, 1849, alleged to have been made between five comrs. of an inland navigation, under the authority of several Acts of Parliament on the one part, & deft. on the other part, whereby the comrs., as was alleged in the declaration, in consideration of the rent therein mentioned, demised the tolls of the navigation to deft. for one year, from Jan. 1, 1850, at the rent of £3,470, payable monthly, together with certain other payments, & deft. covenanted with the comrs., parties to the indenture, & also with the whole body of the comrs. of the navigation, as a separate covenant, for the due payment of the rent. The declaration then averred an entry by virtue of the demise, & the occupying & receiving the tolls during the entire year. Breach, the non-payment of the rent. Plea, that the comrs., the lessors named in the indenture, never executed the lease, & that the entry & occupation was at the will of the comrs. only, & not under the demise. Replication, that deft. had entered & had received & enjoyed the tolls, by the permission of the comrs., under the terms of the indenture:—*Held*: as the lessors had not executed the lease, the lessee had never received the consideration for which he had stipulated, namely a permanent estate during the demise, & under its terms; & he was not liable to be sued upon his covenant in that instrument.—SWATMAN v. AMBLER** (1852), 8 Exch. 72; 22 L. J. Ex. 81; 19 L. T. O. S. 312; 155 E. R. 1264.**

Annotations:—**Distd.** Morgan v. Pike (1854), 14 C. B. 473; How v. Greek (1864), 3 H. & C. 391; Toler v. Slater (1867), L. R. 3 Q. B. 42. **Refd.** Wood v. Copper Miners' Co. (1854), 14 C. B. 428; Morton v. Woods (1869), 38 L. J. Q. B. 81; Dawes v. Dowling (1874), 22 W. R. 770. **Mentd.** Merrill v. Eccle. Comrs. of England (1869), 17 W. R. 676.

390. ———.]—Lease not acknowledged by married woman.]—Husband & wife, seised in fee in right of the wife, in Apr. 1860 by indenture demised land to C. for seven years, & the lessee & defts. as his sureties covenanted to pay the rent during the term. The deed was executed by all the parties, but the wife did not acknowledge it under 3 & 4 Will. 4, c. 74, s. 79, nor was the deed in conformity with 19 & 20 Vict. c. 120, s. 32. The lessee entered immediately & occupied till Aug. 1866, when he left England. The husband died in Jan. 1866, & the wife died in Jan. 1867, having interfered in no way with the property. The exors. of the wife brought an action on the covenant against defts. to recover rent which accrued due in June, 1866:—*Held*: the covenant bound defts., inasmuch as the lessors had executed the deed, so as to pass the term for which the lessee & defts. must be taken to have contracted & to which the covenant was annexed, viz. a term for seven years, terminable at the option of the wife on the husband dying during the term, & as the wife had done nothing to avoid the lease, but allowed the lessee to retain possession, the lease was subsisting up to her death, & plffs. could therefore recover.—TOLER v. SLATER** (1867), L. R. 3 Q. B. 42; 37 L. J. Q. B. 33; 32 J. P. 406; 16 W. R. 124.**

SUB-SECT. 8.—CONTEMPORANEOUS EXECUTION.

391. Priority determined by intention of parties.]

—If it was necessary we ought to presume the lesser deed first executed to support the clear intent of the parties in a family settlement made for valuable consideration (LORD MANSFIELD, C.J.).—TAYLOR d. ATKYNS v. HORDE (1757), 1 Burr. 60; 97 E. R. 190; *affd.* (1758), 6 Bro. Parl. Cas. 633.

Annotations:—**Mentd.** Fairclaid d. Empson v. Shackleton (1770), 5 Burr. 2604; Doe d. Atkyns v. Horde (1777), 2 Cowp. 689; Peaceable d. Hornblower v. Read (1801), 1 East, 568; Doe d. Cook v. Danvers (1806), 3 Smith R. 11. 291; Jerritt v. Wear (1817), 3 Price, 575; Cholmondeley v. Clinton (1820), 2 Jac. & W. 1; Doe d. Maddock v. Lynes (1824), 3 B. & C. 388; Cooke v. Yates (1827), 4 Bing. 90; Doe d. Teynham v. Tyler (1830), 4 Moo. & P. 29; Doe d. Douglas v. Look (1835), 2 Ad. & El. 705; Doe d. Blight v. Pett (1840), 11 Ad. & El. 842; Doe d. Hartridge v. Gilbert (1843), 5 Q. B. 423; Cannon v. Rimington (1852), 12 C. B. 1; Bevan v. Habgood (1860), 30 L. J. Ch. 107; Simpson v. Fogo (1860), 8 W. R. 407; Howlett v. Tarte (1861), 31 L. J. C. P. 146; Shrowsbury v. Keightley (1865), 19 C. B. N. S. 606; Simpson v. Bathurst, Shepherd v. Bathurst (1869), 5 Ch. App. 193; Des Barres v. Shey (1873), 29 L. T. 592; Lows v. Telford & Westray (1876), 45 L. J. Q. B. 613; Weller v. Stone (1885), 54 L. J. Ch. 497; Boyce v. Edbrooke, [1903] 1 Ch. 836.

392. —.]—Where two deeds are executed on the same day, the ct. must inquire which was, in fact, executed first, but where there is anything in the deeds themselves to show an intention either that they shall take effect *pari passu*, or even that the later deed shall take effect in priority to the former, then the ct. assumes the execution of the deeds to have been in such order as to give effect to the manifest intention of the parties.—GARTSIDE v. SILKSTONE & DODSWORTH COAL & IRON CO. (1882), 21 Ch. D. 762; 47 L. T. 76; 31 W. R. 36; *sub nom.* GARTSIDE v. SILKSTONE & DODSWORTH COLLIERIES CO., HOLDEN v. SILKSTONE & DODSWORTH COLLIERIES CO., 51 L. J. Ch. 828.

Annotation:—**Consd.** James v. Boythorpe Colliery Co. (1890), 2 Meg. 55.

393. Two independent mortgage deeds — Priority of holder of title deeds.]—HORGOD v. ERNEST, No. 433, *post*.

See, further, MORTGAGES.

SUB-SECT. 9.—PARTIAL OR QUALIFIED EXECUTION.

394. General rule.]—(1) A declaration alleged that debts. were a completely registered co. formed under a deed of settlement, & that pltf. became a subscriber for shares to be received by him as soon as debts. were completely registered, & had paid the deposit upon such shares, & that after the complete registration of debts., pltf. duly executed the deed of settlement except as to a certain provision, & that by virtue of the premises & of 7 & 8 Vict. c. 110, pltf. was entitled to have made out by debts. a certificate of the proprietorship of the shares so subscribed for by pltf. & alleged as a breach that debts. refused to deliver to him such certificate. The plea alleged that pltf. had not executed the deed of settlement:—**Held**: the declaration showed no cause of action, as it must be taken to omit any allegation that pltf. had executed the deed of settlement.

(2) There can be no such thing as a partial execution of a deed.—WILKINSON v. ANGLO

CALIFORNIAN GOLD MINING CO. (1852), 18 Q. B. 728; 7 Ry. & Can. Cas. 511; 21 L. J. Q. B. 327; 19 L. T. O. S. 181; 17 Jur. 230; 118 E. R. 275.

Annotations:—**Consd.** Exchange Bank of Yarmouth v. Blethen (1885), 10 App. Cas. 293. **Refd.** Stewart v. Anglo Californian Gold Mining Co. (1852), 18 Q. B. 736; Murray v. Bush (1873), L. R. 6 H. L. 37.

395. —.]—Not every attempt by a form of execution to restrain the full operation of a deed can be treated as a non-execution of it.

Where a deed of assignment by debtors to a trustee for the benefit of all creditors who should execute the deed was executed by pltf., who appended a note that they executed only in respect of certain claims, scheduled to the deed, & it appeared that subsequently thereto they received a sum of money from the trustee by virtue of their execution of the deed:—**Held**: pltf. were bound. The note did not amount to a refusal to execute, & pltf., having received payment under the deed, could not be heard to repudiate it, & deny their execution.—EXCHANGE BANK OF YARMOUTH v. BLETHEN (1885), 10 App. Cas. 293; 54 L. J. P. 27; 53 L. T. 537; 33 W. R. 801; 1 T. L. R. 269, P. C.

396. Execution excluding one clause.]—WILKINSON v. ANGLO CALIFORNIAN GOLD MINING CO., No. 394, *ante*.

397. Execution "without prejudice" to right under former deed.]—A deed by which a debtor assigned all his property to a trustee for the benefit of his creditors, was expressed to be intended to operate under 21 & 25 Vict. c. 134. By reason of some of the written assents necessary to make up the required majority being invalid, the deed could not operate under the Act:—**Held**: it was nevertheless good at common law to pass the property of the debtor to the trustee, it was not invalid for want of registration under 17 & 18 Vict. c. 55, & it could not be regarded as a mere escrow.

A written assent to a deed intended to operate under 21 & 25 Vict. c. 134, appearing on its face to be given "without prejudice to the assenting creditors' rights under a former deed" is invalid, because qualified, & therefore tending to produce inequality.—JOHNSON v. OSENTON (1869), L. R. 4 Exch. 107; 38 L. J. Ex. 76; 19 L. T. 793; 17 W. R. 675.

Annotations:—**Refd.** Exchange Bank of Yarmouth v. Blethen (1885), 10 App. Cas. 293. **Mentd.** *Re Prior, Ex p. Osenton* (1869), 4 Ch. App. 690.

398. Execution excluding certain items.]—EXCHANGE BANK OF YARMOUTH v. BLETHEN, No. 395, *ante*.

399. Joint surety bond—Execution by one surety limiting amount of liability.]—C. & four others as sureties for him joined in a bond whereby they were jointly & severally bound to pltf. in £150 in case C., who was employed by pltf. as their agent, should fail to account for all moneys received by him for pltf. By the terms of the bond the liability of E. & N. was limited to £50. N., who was the last to sign the bond, added after his signature the words £25 only. C. having failed to account to pltf. for moneys, pltf. sued all debts. on the bond:—**Held**: the words added by N. were a material alteration, rendering the bond void against all debts. except C., including N. himself.—ELLESMERE BREWERY CO. v. COOPER, [1896] 1 Q. B. 75; 65 L. J. Q. B. 173; 73 L. T. 567; 44

PART I. SECT. 5, SUB-SECT. 8.
m. Rule in equity.]—Courts of Equity so regard documents given contemporaneously & in one trans-

action that if one of them fixes a date & thereby gives a right to a time for payment which the others do not give the ct. will give to the whole that

meaning as to time which is given by the one document only.—MURPHY v. MARTIN (1864), 1 W. W. & A. B. 26.—AUS.

Sect. 5.—Execution of deeds: Sub-sects. 9 & 10.
Sect. 6: Sub-sects. 1, 2 & 3.]

W. R. 254; 12 T. L. R. 86; 40 Sol. Jo. 147; 1 Com. Cas. 210.

Annotations:—*Consd.* National Provincial Bank of England v. Brackenbury (1906), 22 T. L. R. 797. *Reid.* *Re* Denton's Estate, *Licenses Insee. Corpn. & Guarantee Fund v. Denton*, [1903] 2 Ch. 670; *Stirling v. Burdett*, [1911] 2 Ch. 418.

SUB-SECT. 10.—ADDITIONS AND ALTERATIONS BEFORE AND AFTER EXECUTION.

400. General rule.]—All that is written on an instrument under seal, according to the intention of the parties before execution, constitutes the deed. When therefore an allowance at the foot of an indenture of parish apprenticeship, purported to be signed by the signing justices before it was executed by any of the parties, & referred by the date & the names of the justices to the order of binding, & the indenture itself recited the approbation & consent of two justices, whose names were subscribed:—*Held*: such reference was a sufficient compliance with 56 Geo. 3, c. 139.—*R. v. ALDBROUGH (INHABITANTS)* (1849), 13 Q. B. 190; 3 New Sess. Cas. 486; 18 L. J. M. C. 81; 13 J. P. 331; 13 Jur. 322; 110 E. R. 1236.

Annotation:—*Reid.* *R. v. St. George's, Bloomsbury* (1855), 4 E. & B. 520.

401. Presumption as to time of making.]—As a deed cannot be altered after execution without fraud or wrong the presumption if an alteration appears is that it was made before execution.—*DOE d. TATUM v. CATOMORE* (1851), 16 Q. B. 745; 20 L. J. Q. B. 364; 17 L. T. O. S. 74; 15 J. P. 673; 15 Jur. 728; 117 E. R. 1066.

402. Whether part of deed—Addition after testimony—Before sealing.]—*ANON.* (1534), Benl. 1; Moore, K. B. 3; 73 E. R. 931.

403. — Interlineation.]—There is no proof when these words were interlined or that they were inserted by the direction of F.; therefore I must look upon them as if they had been originally incorporated in the body of the deed (*REYNOLDS, C.B.*)—*FITZGERALD v. FAUCONBERGE (LORD)* (1729), Fitz-G. 207; 94 E. R. 722; *affd. sub nom. FAUCONBERGE (LORD) v. FITZGERALD* (1730), 6 Bro. Parl. Cas. 295, H. L.

Annotations:—*Mentd.* *Warrick v. Warrick* (1745), 3 Atk. 291; *Hart v. Middlehurst* (1746), 3 Atk. 371; *Moody v. Matthews* (1802), 7 Ves. 174; *Barnett v. Wilson* (1843), 2 Y. & C. Ch. Cas. 407; *Hipkin v. Wilson* (1850), 15 L. T. O. S. 559; *Heather v. O'Neill* (1858), 2 De G. & J. 399; *Dresser v. Norwood* (1863), 14 C. B. N. S. 574.

404. — Indorsement — Before sealing & delivery of deed—Indorsement attested but not sealed or signed.]—*HALLED v. MASON* (1738), *West temp.* Hard. 557; 25 E. R. 1084, L. C.

405. — Made after signing of deed—Contemporaneous with sealing & delivery.]—*LYBURN v. WARRINGTON* (1816), 1 Stark. 162, N. P. **Annotation:—***Reid.* *Potter v. I. R. Comrs.* (1854), 10 Exch. 147.

Indorsements on bonds.]—*See* BONDS, Vol. VII., p. 186, Nos. 261–263.

Avoidance of deeds by alteration.]—*See* CONTRACT, Vol. XII., p. 359 *et seq.*

PART I. SECT. 5, SUB-SECT. 10.

n. Whether part of deed—Indorsement.]—A memorandum indorsed upon a deed, but not proved or admitted to have been so indorsed at the time of the execution of the deed cannot, even if consistent therewith, be read as if incorporated with it.—*McDONALD v. BLOIS* (1873), 9 N. S. R. 298.—*CAN.*

408 i. — Interlineation.]—Interlineations in a lease, coming out of the custody of the lessee:—*Held*: part of the instrument.—*STUDDART v. NEYLAN* (1841), 1 Leg. Rep. 142.—*IR.*

403 ii. — —.]—Pltf. produced & proved a lease in which words were interlined, & it appeared they had been introduced with the consent of the grantee of the reversion:—*Held*: the interlineation formed part of the lease.—*STUDDART v. NEYLAN* (1842), 5 I. L. R. 116.—*IR.*

PART I. SECT. 6, SUB-SECT. 1.

406 i. General rule.]—A third party cannot call for execution of a provision which is a mere contract between the parties to a deed.—*BURRIS v. RHIND* (1899), 29 S. C. R. 498.—*CAN.*

Effect of filling up blanks after execution.]—*See* CONTRACT, Vol. XII., pp. 361, 362, Nos. 3000–3012.

SECT. 6.—POSITION OF PARTIES AND NON-PARTIES.

SUB-SECT. 1.—IN GENERAL.

406. General rule.]—*SCUDAMORE v. VANDERSTENE* (1587), 2 Co. Inst. 673.

Annotations:—*Consd.* *Storer v. Gordon* (1814), 3 M. & S. 308; *Barford v. Stuckey* (1820), 2 Brod. & Bing. 333. *Reid.* *Vernon v. Jefferies* (1740), 7 Mod. Rep. 358. *Mentd.* *Zouch d. Abbot v. Parsons* (1765), 3 Burr. 1794.

407. —.]—One party to a deed cannot covenant with another who is no party, but a mere stranger to it; but one who is no party to a deed may covenant with another who is a party, & thereby oblige himself by sealing the deed (*HOLT, C.J.*)—*SALTER v. KIDGLY* (1688), Carth. 76; *Holt K. B.* 210; 90 E. R. 648.

Annotations:—*Mentd.* *Bensley v. Burdon* (1830), 8 L. J. O. S. Ch. 85; *Right d. Jefferys v. Bucknell* (1831), 2 B. & Ad. 278.

408. —.]—A deed *inter partes* cannot operate as a release to strangers.—*STORER v. GORDON* (1814), 3 M. & S. 308; 105 E. R. 627.

Annotations:—*Reid.* *Barford v. Stuckey* (1820), 2 Brod. & Bing. 333. *Mentd.* *Fothergill v. Walton* (1818), 8 Taunt. 576.

409. Beneficiary dead on deed becoming operative—No estate or interest passes.]—A deed cannot operate in favour of one who is dead at the time of its execution.—*Re TILT, LAMPET v. KENNEDY* (1896), 74 L. T. 163; 12 T. L. R. 162; 40 Sol. Jo. 224.

Annotation:—*Mentd.* *Re Ellenborough, Towry Law v. Burne*, [1903] 1 Ch. 697.

410. Party joined for specific purpose — Joinder for other purposes not inferred — Unless clear intention shown.]—A party who joins in a deed for a specific purpose cannot be treated as having joined for a totally different purpose, or as having thereby dealt with any property, unless a clear intention to do so appears.—*Re HORSEFALL, HUDLESTON v. CROFTON*, [1911] 2 Ch. 63; 80 L. J. Ch. 480; 104 L. T. 590.

Annotation:—*Consd.* *Re Sugden*, *Sugden v. Walker* (1917), 86 L. J. Ch. 447.

411. Each party must take one part of indenture.]—Where there are several parties to a deed of the 1st, 2nd, & 3rd parts respectively, it is supposed in point of law that each takes a part (*per Cur.*)—*HODGSON v. WARDEN* (1844), 13 M. & W. 22; 13 L. J. Ex. 257; 153 E. R. 9; *sub nom. HODGSON v. WALKER*, 3 L. T. O. S. 164.

Non-execution by party.]—*See* Sect. 5, sub-sect. 7, *ante*.

Under deeds of arrangement.]—*See* BANKRUPTCY, Vol. V., pp. 1098–1190.

SUB-SECT. 2.—UNDER DEED POLL.

Effect of non-execution by some parties, see Sect. 5, sub-sect. 7, *ante*.

412. Right of action against person executing.]—*LOWTHER v. KELLY*, No. 85, *ante*.

406 ii. —.]—No action can lie against a person on an agreement under seal not signed by him even if it was for his benefit.—*PORTER v. PELTON* (1903), 33 S. C. R. 449.—*CAN.*

406 iii. —.]—No person can be sued upon an instrument under seal, made *inter partes*, who is not a party to the deed.—*M'ARDLE v. IRISH IODINE CO.* (1864), 15 I. C. L. R. 146, 153.—*IR.*

PART I. SECT. 6, SUB-SECT. 2.

a. Whether right of action by person executing.]—*A.*, by deed poll,

413. —.]—A deed poll may be so constructed as to give a right of action against the person who executed it.—*GARDNER v. LACHLAN* (1836), 8 Sim. 123; *Donnelly*, 119; 59 E. R. 49; *on appeal* (1838), 4 My. & Cr. 129, L. C.
Annotation:—*Mentd.* *Cooke v. Hemming* (1868), L. R. 3 C. P. 334.

414. Who may take benefit — Covenantee — Not named — Deed indented but not inter partes.]—*COOKER v. CHILD* (1873), 2 Lev. 74; 83 E. R. 456; *sub nom.* *COGER v. CHILDE*, 3 Keb. 94; *sub nom.* *COKER v. CHILD*, 3 Keb. 115.

Annotations:—*Refd.* *Gilby v. Copley* (1683), 3 Lev. 139; *Vernon v. Jeffries* (1740), 7 Mod. Rep. 358; *Barford v. Stuckey* (1820), 5 Moore, C. P. 23. *Mentd.* *Joddrell v. Heathcot* (1709), 11 Mod. Rep. 258; *Smith v. Scott* (1859), 6 C. B. N. S. 771.

415. —.]—Though covenant may be brought on a deed poll, yet the party must be named in the deed (*per CUR.*).—*GREEN v. HORNE* (1694), 1 Salk. 197; *Comb.* 219; 91 E. R. 177.
Annotation:—*Consd.* *Sunderland Marine Insce. v. Kearney* (1851), 16 Q. B. 925.

416. —.]—Otherwise sufficiently described.]—It is not absolutely necessary in order that a person may be joined as a co-pltf. in an action on a deed poll that he should be specifically named by name in the deed, as a person interested in it, if he be so designated that it cannot be mistaken that it was he who was interested.—*SUNDERLAND MARINE INSURANCE CO. v. KEARNEY* (1851), 16 Q. B. 925; 20 L. J. Q. B. 417; 18 L. T. O. S. 33; 15 Jur. 1006; 117 E. R. 1136.

Annotations:—*Mentd.* *Metcalf v. Hetherington* (1855), 11 Exch. 257; *Gresty v. Gibson* (1866), 13 L. T. 676.

417. —.]—Described under trading name.]—An action may be maintained upon a bond expressed to be payable to a mercantile firm, by the persons who actually constituted the firm when the bond was executed.—*MOLLER v. LAMBERT* (1810), 2 Camp. 548, N. P.

SUB-SECT. 3.—UNDER INDENTURES.

418. Assurance of land — Position at common law — Immediate interest to parties only—Stranger might take remainder interest.]—*WINDSMORE v. HOBART* (1585), Hob. 313; 80 E. R. 456; *sub nom.* *WINSMORE v. HOBART*, Hut. 87.
Annotations:—*Refd.* *Gainsford v. Griffith* (1667), 1 Saund. 58; *Ungly v. Peale* (1711), 2 Eq. Cas. Abr. 358.

419. —.]—*ROE d. WILKINSON v. TRANMARR*, No. 988, *post*.

agreed to make & haul all the timber he could find on B.'s permit, for which B. was to allow him whatever the timber sold for, & that all the timber got should be the property of B.:—*Held*: there was no mutuality, & B. acquired no property in the timber without a delivery.—*COOMBS v. HATHEWAY* (1847), 3 Kerr. 592.—*CAN.*

PART I. SECT. 6, SUB-SECT. 3.

420 i. Rights under covenants—Position at common law—Attached only to parties.]—An heir cannot sue on a covenant entered into with the ancestor, to convey land to him, his heirs & assigns, the heir not being mentioned in the covenant, & the breach having taken place in the ancestor's lifetime.—*GOODALL v. ELMSELEY* (1841), 1 U. C. R. 457.—*CAN.*

420 ii. —.]—*Pltf.* declared against the heir of W. upon W.'s covenant to teach & board & lodge *pltf.* a specified period, & that in case of W.'s death her heirs, exors., & administrators should perform the covenant:—*Held*: by the form of the

covenant the heir was not bound.—*FRAZER v. WRIGHT* (1858), 16 U. C. R. 514.—*CAN.*

420 iii. —.]—A deed in favour of a third person not a party to it cannot be sustained.—*DAWSON v. DAWSON* (1866), 12 Gr. 278.—*CAN.*

420 iv. —.]—*Re* *McMILLAN* (1889), 17 O. R. 344.—*CAN.*

420 v. —.]—A covenant in a bishop's lease, that if the lessee should grind grain growing on the premises at any mill save the mill belonging to the bishop, then the lessee should pay the bishop, & his successors, five shillings for each barrel of grain so ground, as if the same had been due for rent, is not personal to the lessor, but the right to sue thereon passes to his successor.—*RAPHOE (Br.) v. HAWKESWORTH* (1828), 1 Hud. & B. 606.—*IR.*

420 vi. —.]—A covenant against the acts of heirs & assigns does not regard the tenant in tail.—*LAMBERT v. LAMBERT* (1853), 6 Ir. Jur. 37.—*IR.*

420. Rights under covenants—Position at common law—Attached only to parties.]—Covenant lies on a deed of composition with creditors, by one of two partners who signs the deed in the name of his firm & sets his seal thereto, for non-payment of an instalment due on a partnership debt; for the other partner, not being a party to the deed, cannot join in covenant.—*METCALFE v. RYCROFT* (1817), 6 M. & S. 75; 105 E. R. 1171.

Annotations:—*Refd.* *Re Smith & Laxton, Ex p. Cockburn* (1863), 3 New Rep. 227; *Dewhurst v. Jones* (1864), 3 H. & C. 60.

421. —.]—Where, by indenture between A. & B. of the first part, C. of the second part, & D. of the third part, A. & B. did, with the assent of C., demise to D. for years, yielding & paying a certain rent to E. & the heirs of his body, & D. covenanted with A. & B. & E. to pay the rent, & to repair, etc.:—*Held*: E. could not join with A. & B. in an action of covenant against D. for non-payment of rent & not repairing.—*SOUTHAMPTON (LORD) v. BROWN* (1827), 6 B. & C. 718; 5 L. J. O. S. K. B. 253; 108 E. R. 615.

422. —.]—Position in equity—Attached only to parties.]—*COLYEAR v. MULGRAVE* (COUNTS), *COLYEAR v. BRUNDRETT & WALLER* (1836), 2 Keen. 81; 5 L. J. Ch. 335; 48 E. R. 559.

Annotations:—*Consd.* *Page v. Cox* (1852), 10 Hare 163. *Refd.* *Davenport v. Bishopp* (1843), 2 Y. & C. Ch. Cas. 451; *Fletcher v. Fletcher* (1844), 4 Hare 67; *Kekewich v. Manning* (1851), 1 De G. M. & G. 176; *Re D'Angibau, Andrews v. Andrews* (1880), 15 Ch. D. 228; *Re Baker, Collins v. Rhodes, Re Seaman, Rhodes v. Wish* (1881), 44 L. T. 414; *Re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89; *Pullan v. Koe*, [1913] 1 Ch. 9.

Sec. now, Real Property Act, 1845 (c. 100), s. 5.

423. —.]—Party signing deed but not entering into covenant.]—Beneficial interest in a lease of premises, accompanied by occupation & payment of rent by a widow, party to the lease, but whose husband, also a party, had alone entered into covenants to repair & had died before the expiration of the term, creates no contract between the widow & the lessor legally binding her to perform the covenants in the lease, nor does it create any like equitable liability, notwithstanding a declaration in the lease by the husband that he held the premises as trustee for his wife as part of her separate estate.—*RAMAGE v. WOMACK*, [1900] 1 Q. B. 116; 69 L. J. Q. B. 40; 81 L. T. 526; 16 T. L. R. 63.

Annotation:—*Mentd.* *Hand v. Blow*, [1901] 2 Ch. 721.

—.]—Running with the land.]—*See* LANDLORD & TENANT; SALE OF LAND.

424. Grant of easement—Enjoyment by licensees

420 vii. —.]—*BUTLER v. ARCHER* (1850), 12 I. C. L. R. 104.—*IR.*

420 viii. —.]—In a lease the tenant covenanted in a certain event to pay the landlord a sum of money. The tenant assigned, the assignee agreeing to indemnify him against the covenants in the agreement:—*Held*: the lessor could not enforce the covenant directly against the assignee.—*GRAY v. PARKER* (1887), 6 N. Z. L. R. 226.—*N.Z.*

422 i. —.]—Position in equity.]—Where the effect of a contract is to give a stranger to it a beneficial right thereunder, he may enforce such right by action.—*MOOT v. GIBSON* (1891), 21 O. R. 248.—*CAN.*

422 ii. —.]—A person not named as a party to a covenant is nevertheless entitled to maintain an action upon it if he takes a beneficial right under it in the character of *cestui que trust*, the covenantee standing to him in the relation of trustee.—*KELLY v. LARKIN & CARTER*, [1910] 2 I. R. 550.—*IR.*

Sect. 6.—Position of parties and non-parties: Sub-sect. 3. Sects. 6, 7 & 8: Sub-sects. 1, 2, 3, 4 & 5.]

of grantee—Although not named in grant.]—A grant of a right of way extends to all licensees of the grantee, even though licensees are not expressly mentioned in the grant.—BAXENDALE v. NORTH LAMBETH LIBERAL & RADICAL CLUB, LTD., [1902] 2 Ch. 427; 71 L. J. Ch. 806; 87 L. T. 161; 50 W. R. 650; 18 T. L. R. 700; 46 Sol. Jo. 616.
Annotation:—Mentd. Hammond v. Prentice, [1920] 1 Ch. 201.

SECT. 7.—FROM WHAT TIME DEED EFFECTIVE.

From time of execution—Deed retained by grantor.]—See Sect. 5, sub-sect. 3, ante.

Contemporaneous execution—Priority determined by intention of parties.]—See Sect. 5, sub-sect. 8, ante.

Whether date essential to validity of deed.]—See Sect. 4, sub-sect. 4, ante.

Interpretation of date.]—See Part III., Sect. 6, post.

Delivery as essential formality in execution of deeds.]—See Sect. 5, sub-sect. 1, D., ante.

Delivery as escrow.]—See Sect. 5, sub-sect. 2, ante.

425. From time of delivery—Not from date mentioned in deed.]—HEDLEY v. JOANS (1572), 3 Dyer, 307 a; 73 E. R. 693.

Annotations:—Refd. Stone v. Bale (1633), 3 Lev. 348; Bottrell v. Summers (1828), 2 Y. & J. 47.

426. ———.]—Indentures of demise were ingrossed bearing date May 26, of land in L. to have & to hold for three years from henceforth, & the indentures were delivered on June 20 following:—Held: from henceforth should be accounted from the day of the delivery of the indentures, & not by any computation of date.—CLAYTON'S CASE (1585), 5 Co. Rep. 1 a; 77 E. R. 48.

Annotations:—Consd. Steele v. Mart (1825), 4 D. & C. 272. **Refd.** Oshey v. Hicks (1610), Cro. Jac. 263; Bellasis v. Hester (1697), 1 Ld. Raym. 280; Pugh v. Leeds (1777), 2 Cowp. 714; Browne v. Burton (1848), 2 Saund. & C. 220; Sidebotham v. Holland, [1895] 1 Q. B. 378. **Mentd.** Hemming v. Brabson (1660), O. Bridg. 1; Liefv. v. Saltinestone (1674), 1 Mod. Rep. 189; R. v. Bethel (1695), 5 Mod. Rep. 19; Reynolds v. Thorpe (1728), 2 Stra. 796; Cooke v. Hemming (1868), 18 L. T. 772; Galula v. Pintus (1911), 104 L. T. 574.

427. ———.]—A prebendary made a lease for life to hold from the date of the lease:—Held: from the date meant from delivery.—HATTER v. ASHE (1696), 3 Lev. 438; 1 Ld. Raym. 84; 83 E. R. 770; sub nom. HATHS v. ASH, 2 Salk. 413.

Annotations:—Refd. Pugh v. Leeds (1777), 2 Cowp. 714; Ackland v. Lutley (1839), 9 Ad. & El. 879.

428. ———.]—Time of delivery is the important time when it takes its effect as a deed

(LORD ELLENBOROUGH, C.J.).—**HALL v. CAZENOVE** (1804), 4 East, 477; 1 Smith, K. B. 272; 102 E. R. 913.

Annotations:—Refd. Re Slater, Ex p. Slater (1897), 76 L. T. 529. **Mentd.** Tarrabochia v. Hickie (1856), 1 H. & N. 183; Reffell v. Reffell (1866), L. R. 1 P. & D. 139.

429. ———.]—A lease purported on the face of it to have been made on Mar. 25, 1783, habendum to the lessee from Mar. 25 last past for 35 years. There was evidence to show that the lease was not executed until after Mar. 25, 1783:—Held: it took effect from the time of delivery, & not from the day of the date.—STEELE v. MART (1825), 4 B. & C. 272; 6 Dow. & Ry. K. B. 392; 107 E. R. 1060.

Annotations:—Appld. Browne v. Burton (1847), 5 Dow. & L. 289. **Refd.** Re Slater, Ex p. Slater (1897), 76 L. T. 529.

430. ———.]—A deed or other writing must be taken to speak from the time of the execution, & not from the date apparent on the face of it (PATESON, J.).—BROWNE v. BURTON (1817), 5 Dow. & L. 289; 2 Saund. & C. 220; 17 L. J. Q. B. 19; 12 Jur. 97.

431. ———.]—The deed must be taken to speak from the time of its execution (POLLOCK, C.B.).—JAYNE v. HUGHES (1854), 10 Exch. 430; 24 L. J. Ex. 115; 24 L. T. O. S. 116; 3 W. R. 65; 3 C. L. R. 188; 156 E. R. 504.

Annotation:—Mentd. Reffell v. Reffell (1866), L. R. 1 P. & D. 139.

432. ———.]—The deed speaks from the time not of its date but of its delivery (per CUR.).—TAYLOR v. MCCALMONT (1855), 26 L. T. O. S. 93; 4 W. R. 59.

433. ———.]—Where, by reason of the contemporaneous delivery of their mtgcs. deeds, two independent mtgcs. are jointly seised of the legal estate, but one of them has received the title deeds without notice of the other's title while the other has neither claimed the deeds nor made any inquiry for them, the party holding the deeds is entitled in equity to priority over the other, whose gross negligence disentitles him from deriving any benefit in equity from his legal title; & this, though the negligence is not that of the mtgce. himself, but of his solr.

A deed takes effect from its delivery only (WOOD, V.-C.).—HOPGOOD v. ERNEST (1865), 3 De G. J. & Sm. 116; 13 W. R. 1004; 46 E. R. 581, L. J.

Annotations:—Mentd. Hopgood v. Parkin (1870), L. R. 11 Eq. 74; Berwick v. Price, [1905] 1 Ch. 632.

434. Presumption of delivery on date mentioned in deed—In absence of evidence to contrary.]—OSHEY v. HICKS (1610), Cro. Jac. 263; 79 E. R. 227.

Annotations:—Refd. Lewis v. Hellar (1667), 2 Keb. 377; Pullen v. Benson (1698), 2 Salk. 628; Steele v. Mart (1825), 4 B. & C. 272; Re Slater, Ex p. Slater (1897), 76 L. T. 529.

PART I. SECT. 7.

425 i. From time of delivery—Not from date mentioned in deed.]—DOE d. BRIDGES v. QUINT (1828), (1825-1897), N. B. Dig. 683.—CAN.

425 ii. ———.]—Pltf., by lease, consisting of seven sheets, & bearing date Mar. 15, 1862, demised premises to W. On July 21 following, this lease was cancelled by an instrument under seal; the second & fourth sheets were taken out & re-placed by others, & it was re-executed & re-delivered without any other alteration. As it then stood, it was dated as before, to hold "from the 1st day of April now next," for nine years, "from thence next ensuing," at a yearly rent, payable "in advance, that is to say, on the 1st of April, 1862, & on the 1st April in each year during the term"; the conclusion being that the parties

had thereunto set their hands & seals, "the day & year first above written":—**Held: the lease took effect from the delivery, on July 21, 1862, not from the date; that the term began on Apr. 1, 1863.—BELL v. MCKINDSEY (1865), 3 E. & A. 9.—CAN.**

425 iii. ———.]—The erasure of the date is not to be presumed to have been made after execution; but even if it were, the deed takes effect from its delivery.—FRASER v. FRASER (1864), 14 C. P. 70.—CAN.

425 iv. ———.]—R. v. GRAND FALLS, Ex p. GRAND FALLS CO., LTD. (1913), 13 E. L. R. 240; 42 N. B. R. 122.—CAN.

434 i. Presumption of delivery on date mentioned in deed—In absence of evidence to contrary.]—MEAGHER v. COLEMAN (1880), 1 R. & G. 271.—CAN.

434 ii. ———.]—A deed purported to have been signed, sealed & delivered is complete & binding as from the date of execution, unless there remains some act to be done by the other party to declare his adoption of it.—ELSON v. NORTH AMERICAN LIFE ASSURANCE CO. (1902), 40 B. C. R. 474; affd. 33 S. C. R. 383.—CAN.

434 iii. ———.]—It is open to the parties to a lease to agree that the period of tenancy should be reckoned from a date different from that on which the lease is executed.—ARUNACHELLA CHETTIAR v. RAMIAH NAIDU (1906), 1 L. R. 30 Mad. 109.—IND.

p. From time of registry—Not from date mentioned in deed.]—The registration of a mtgce. does not cause it to relate back to its date. Such mtgce. takes effect only from its registry.

435. ———.]—STONE *v.* BALE (1693), 3 Lev. 348; 83 E. R. 724.

Annotation:—*Refd.* Hall *v.* Cazenove (1804), 4 East, 477.

436. ———.]—STONE *v.* GRUBBAM (1614), 1 Roll. Rep. 3; 2 Bulst. 225; 81 E. R. 285.

Annotations:—*Mentd.* Ryall *v.* Rolle (1749), 1 Atk. 165; Edwards *v.* Harben (1788), 2 Term Rep. 587; Reed *v.* Wilmott (1831), 5 Moo. & P. 553.

SECT. 8.—AVOIDANCE OF AND DEFENCES TO ACTIONS ON DEEDS.

SUB-SECT. 1.—IN GENERAL.

437. Grantor without interest at time of grant.]—WIVEL'S CASE (1615), 1 Hob. 45; 80 E. R. 105.

Annotations:—*Refd.* Poole *v.* Haskey (1663), O. Bridg. 364; Right d. Jefferys *v.* Bucknell (1831), 2 B. & Ad. 278. *Mentd.* Whitfield *v.* Faussett (1750), 1 Ves. Sen. 387; Seymour *v.* Vernon (1864), 33 L. J. Ch. 690.

438. Jurisdiction of court to set aside—Void & voidable deeds.]—If a deed is clearly void on the face of it, this ct. has no jurisdiction to set it aside; *aliter* if voidable only, when the ct. will set it aside, if necessary, & upon terms.—BURGESS *v.* RICHARDSON (1861), 29 Reay. 487; 4 L. T. 316; 7 Jur. N. S. 1178; 9 W. R. 512; 51 E. R. 716.

Avoidance of annuity deeds.]—*See* RENTCHARGES & ANNUITIES.

SUB-SECT. 2.—ALTERATION AND ERASURE.

See CONTRACT, Vol. XII., pp. 360-365, 366-368, Nos. 2990-3034, 3045-3074.

Alteration in memorandum of association.]—*See* COMPANIES.

Issue of debentures in blank.]—*See* COMPANIES.

Transfer of shares in blank.]—*See* COMPANIES.

Execution in blank.]—*See* Sect. 5, sub-sect. 4, *ante*.

SUB-SECT. 3.—CANCELLATION.

439. By court—Of forged deed.]—GERRARD *v.* PHITTON (1663), 1 Sid. 170; 82 E. R. 1038.

440. ———.]—MASTERS *v.* BRABAN (1735), 1 Russ. 560, n.; 38 E. R. 216.

Annotation:—*Apprvd.* Peake *v.* Highfield (1826), 1 Russ. 559.

441. ———.]—The ct. has jurisdiction to declare an instrument forged, & to order it to be delivered up.—PEAKE *v.* HIGHFIELD (1826), 1 Russ. 559; 38 E. R. 216.

442. Court of equity—Agreement relating to land—In absence of fraud.]—A ct. of equity will not, in the absence of fraud, entertain a bill for the cancellation of an agreement in writing

relating to land.—ONIONS *v.* COHEN (1865), 2 Hem. & M. 354; 5 New Rep. 400; 34 L. J. Ch. 338; 12 L. T. 15; 11 Jur. N. S. 198; 13 W. R. 420; 71 E. R. 501.

Annotation:—*Consd.* Panama & South Pacific Telegraph Co. *v.* India Rubber, Gutta Percha & Telegraph Works Co. (1875), 10 Ch. App. 520, n.

Of releases & bond granted in award.]—*See* ARBITRATION, Vol. II., p. 551, No. 1828.

Loss or destruction of deeds.]—*See* Sub-sect. 11, *post*.

Rescission of deeds.]—*See* Sub-sect. 20, *post*.

Effect of cancellation, rescission or loss & destruction of deeds.]—*See* Sect. 10, *post*.

Cancellation of bonds.]—*See* BONDS, Vol. VII., pp. 234, 235, Nos. 762, 769.

SUB-SECT. 4.—COVERTURE.

See HUSBAND & WIFE.

SUB-SECT. 5.—DEED EXECUTED WITHOUT BEING READ OR UNDERSTOOD.

See, generally, EQUITY; MISREPRESENTATION & FRAUD; MISTAKE.

443. General rule.]—In the absence of evidence to the contrary there is a legal presumption that a man knows the contents of a deed which he executes.—*Re* COOPER, COOPER *v.* VESSEY (1882), 20 Ch. D. 611; 51 L. J. Ch. 802; 47 L. T. 89; 30 W. R. 648, C. A.

Annotations:—*Mentd.* Manners *v.* Mew (1885), 29 Ch. D. 725; Brocklesby *v.* Temperance Bldg. Soc. (1893), 2 R. 594; *Re* Ingham, Jones *v.* Ingham, [1893] 1 Ch. 352; *Re* De Leeuw, Jakens *v.* Central Advance & Discount Corp'n., [1922] 2 Ch. 540.

444. Without being read.]—ANON. (1684), Skin. 159; 90 E. R. 74.

445. ———.]—BATH (EARL) *v.* MOUNTAGUE (EARL) (1693), 3 Cas. in Ch. 55; 22 E. R. 903; *sub nom.* ALBEMARLE (DUCHESS) & MONK *v.* BATH (EARL), 2 Freem. Ch. 193; Nels. 196; *sub nom.* ALBEMARLE'S (DUKE) CASE, MOUNTAGUE (EARL) *v.* BATH (EARL), 2 Rep. Ch. 417.

Annotations:—*Refd.* Bennet *v.* Vade (1742), 2 Atk. 324; Griffin *v.* Nanson (1798), 4 Ves. 344. *Mentd.* Bertie *v.* Faulkland (1698), 3 Cas. in Ch. 129; Pigott *v.* Penrice (1716), 1 Com. 250; Bagot *v.* Oughton (1726), Fortes. Rep. 332; Fitzgerald *v.* Fauconberge (1731), Fitz-G. 207; Hervey *v.* Hervey (1739), 1 Atk. 561; Middleton *v.* Pryor (1760), Amb. 391; Chapman *v.* Gibson (1791), 3 Bro. C. C. 229; Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1; Haynes *v.* Haynes (1861), 1 Drew & Sm. 426.

446. ———.]—**Acts of party recognising validity of deed.]**—A. took shares in a joint stock co. upon the assurance by a clerk of the co. that he would incur no liability beyond the paid up capital of £1 per share, & signed the deed of settlement without

—FERHAN *v.* BANK OF TORONTO (1860), 10 C. P. 32.—CAN.

g. ———.]—SHAW *v.* GAULT (1860), 10 C. P. 236.—CAN.

r. ———.]—HAIGHT *v.* MCINNIS (1861), 11 C. P. 518.—CAN.

s. ———.]—Pltf. was deft.'s tenant of premises in T. Deft. sold the premises. The deed, dated Oct. 23, was executed on Nov. 15. The deed was registered on Nov. 29.—*Held*: the deed did not become operative from its original delivery by relation back.—OLIVER *v.* MOWAT (1874), 34 U. C. R. 472.—CAN.

t. ———.]—A deed, by common law, has effect from the date of its execution, but the registry act provides, it shall have priority only from the date of its registration.—CRYMBLE *v.* ADAIR, [1818] Beat. 122,

123.—IR.

a. ———.]—PATTISON *v.* TINGLEY (1863), 5 All. 553.—CAN.

PART I. SECT. 8, SUB-SECT. 3.

b. General rule.]—The ct. will, in a proper case, order a deed to be cancelled.—HARKIN *v.* RABIDON (1859), 7 Gr. 243.—CAN.

PART I. SECT. 8, SUB-SECT. 5.

443 i. General rule.]—Where a person signs papers without taking ordinary precautions he cannot afterwards plead not to have known what he was doing.—CHEESMAN *v.* COREY (1913), 13 E. L. R. 469.—CAN.

443 ii. ———.]—Every one who is of sufficient age & entitled to execute a deed, whether he be an infant or a

man of full age, & who executes a deed, must be treated as knowing the contents of the instrument which he executes, whether that instrument be voidable or not.

Where a party knowingly executes a deed & knows he is receiving a benefit under it, & does not choose to look into it & see to what extent it may harm him, & how it may affect any property that may be coming to him, that cannot, years after, be taken as an excuse for his not having exercised his right of disaffirmance.—DEA *v.* TAREHIN (1899), 8 Nfld. L. R. 187.—NFLD.

444 i. Without being read.]—A deed executed by a person making his mark is not invalidated by the mere omission to read it over to him.—DOE *d.* BIGGARD *v.* MILLARD (1840), [1823-1900], 1 Ont. Dig. 1880.—CAN.

Sect. 8.—Avoidance of and defences to actions on deeds: Sub-sect. 5.]

reading it. At the time of his signing the deed it contained a false sheet limiting the liability of shareholders to the amount of their shares, this clause not being contained in the deed as originally registered. The deed was never examined by A., & he received dividends upon his shares, & continued to hold them until the company was wound up:—*Held*: A., who had signed the deed without examination, & had continued to receive dividends, holding himself out to the public as a shareholder, could not escape from liability as a contributory.—*Re ATHENAEUM LIFE ASSURANCE SOCIETY, SHEFFIELD'S CASE* (1859), John. 451; 28 L. J. Ch. 325; 32 L. T. O. S. 310; 5 Jur. N. S. 216; 7 W. R. 214; 70 E. R. 499.

447. ————*J*.—*ALLIANCE CREDIT BANK OF LONDON v. OWEN* (1908), *Times*, May 27.

448. ————*Party illiterate or blind—Deed read over falsely.*—*SHULTER'S CASE* (1611), 12 Co. Rep. 90; 77 E. R. 1366.

Annotation:—*Reid, Pigot's Case* (1615), 11 Co. Rep. 26 b.

449. ————*J*.—It seems plain on principle & on authority that if a blind man, or a man who cannot read or who for some reason not implying negligence forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, then, at least, if there be no negligence, the signature so obtained is of no force; & it is invalid (*BYLES, J.*).—*FOSTER v. MACKINNON* (1869), L. R. 4 C. P. 704; 38 L. J. C. P. 310; 20 L. T. 887; 17 W. R. 1105.

Annotations:—*Consd. Howatson v. Webb* (1907), 97 L. T.

c. ————*Party illiterate or blind.*—Where a blind & illiterate person had put his mark to a mtge. without its being read over to him, although he desired such reading:—*Held*: not a sufficient execution.—*OWENS v. THOMAS* (1866), 6 C. P. 383.—*CAN.*

d. ————*J*.—A mtge. was not read over to defts., who were unable to read, & had requested that it should be read over to them:—*Held*: as defts. were illiterate & the mtge. had not been read over to them on request, they could not be bound.—*LETOURNEAU v. CARBONNEAU* (1904), 35 S. C. R. 110.—*CAN.*

e. ————*J*.—A deed by a man 77 years old, who could not read writing, in favour of his agent, which was scrolled by the agent without any evidence of instructions, & not read over:—*Held*: set aside.—*PATERSON v. SMYTH* (1809), Hume, 921.—*SCOT.*

f. ————*Should require deed to be read.*—The rule that an illiterate person has a right to have a deed read or explained to him is subject to the qualification that he should require it to be read or explained.—*CHIVERIE v. KNIGHT* (1873), 1 P. E. L. 448.—*CAN.*

g. ————*J*.—The blindness of the grantor operates as a requisition to read the deed.—*BLACKWOOD v. GREGG* (1831), *Hayes*, 277.—*IR.*

448. ————*Deed read over falsely.*—Where the subscribing witness to an agreement signed by a person who could not write, swore that the agreement was not read as it stood upon the record:—*Held*: no execution.—*HATTON v. FISH* (1850), 8 U. C. R. 177.—*CAN.*

h. ————*Party's own neglect.*—Defts., who by their own showing, had never taken the trouble to read over

a deed although they had every opportunity of so doing, set up that they were induced to execute it by the false & fraudulent representation of plff.:—*Held*: defts. by their own negligence had precluded themselves from such defence.—*DOMINION BANK v. BLAIR* (1880), 30 C. P. 591.—*CAN.*

451 i. *Without being understood—Party ignorant of rights.*—Where a party has no clear understanding of her legal rights & legal position the deed is not binding.—*NOTE v. DAVIS* (1893), 19 V. L. R. 485.—*AUS.*

451 ii. ————*J*.—A deed having been executed in circumstances making the conveyance voluntary:—*Held*: the grantee, must prove the grantors understood the nature & effect of the deed; & as it did not appear to have been explained before being executed, it was held invalid.—*FRASER v. RODNEY* (1865), 12 Gr. 154.—*CAN.*

451 iii. ————*J*.—A married woman, who could neither read nor write, joined in a conveyance to bar her dower. It was not explained to her that, by joining, her estate would be liable in any way:—*Held*: invalid as against the separate estate of the widow.—*BURROWS v. LEAVENS* (1881), 29 Gr. 475.—*CAN.*

451 iv. ————*J*.—It is the duty of a notary to explain to an illiterate grantor the legal & equitable obligations imposed by the deed & consequent on its execution.—*AYOTTE v. BOUCHER* (1883), 9 S. C. R. 460.—*CAN.*

451 v. ————*J*.—A deed executed by a party not conversant of its contents, is void at law.—*BLACKWOOD v. GREGG* (1831), *Hayes*, 277.—*IR.*

451 vi. ————*J*.—A wife, prior to her marriage, being entitled to a sum of money charged upon land, the husband after marriage having been

730. *Reid, Favell v. Wright* (1891), 64 L. T. 85; *Lewis v. Clay* (1897), 67 L. J. Q. B. 224; *Lloyd v. Grace, Smith, [1911] 2 K. B. 489.* *Mentd. Soc. Générale v. Metropolitan Bank* (1873), 27 L. T. 849; *Cleaver v. Kirkman v. Wentworth* (1880), 5 Ex. D. 96; *Onward Bldg. Soc. v. Smithson, [1893] 1 Ch. 1*; *Herdman v. Wheeler, [1902] 1 K. B. 361*; *Bagot v. Chapman, [1907] 2 Ch. 222*; *Chaplin v. Brammall, [1908] 1 K. B. 233*; *Carlisle & Cumberland Banking Co. v. Bragg, [1911] 1 K. B. 489*; *Roe v. Naylor* (1918), 87 L. J. K. B. 958.

450. *Without being understood—Party incapable of understanding.*—On a question whether a deed was void in law on the ground of unsoundness of mind in the person by whom it was executed, the judge directed the jury that the question for them to try was, whether B. was a person of sound mind or not; & that to constitute such unsoundness of mind as should avoid a deed at law, the person executing must be incapable of understanding & acting in the ordinary affairs of life.—*BALL v. MANNIN* (1829), 3 Bli. N. S. 1; 1 Dow. & Cl. 380; 6 E. R. 568.

Annotation:—*Mentd. R. v. O'Connell* (1844), 5 State Tr. N. S. 1.

451. *Without being understood—Party ignorant of rights.*—Where a person had been induced to sign an agreement for compromise to release her rights, in consideration of an annuity, to an estate which had been devised to her by will, on the ground that it had not been well executed, & it having appeared, subsequent to such agreement, that there was a former will containing a similar devise to the same party, & well executed, of which she had not an adequate knowledge at the time of such compromise:—*Held*: the transaction having taken place in ignorance of her true rights, the agreement for compromise ought to be set aside.—*SMITH v. PINCOMBE* (1852), 3 Mac. & G. 653; 20 L. T. O. S. 10; 16 Jur. 205; 42 E. R. 411, L. C.

452. ————*All material facts not disclosed.*]

paid a part of the charge, settled the remainder upon the wife and her issue: the issue of the marriage, being ignorant of the settlement, & their rights thereunder, afterwards join their father in a deed of assignment of the charge to a creditor of the father, who had notice of the settlement:—*Held*: the latter deed was void as against the issue, having been executed under misrepresentation, & in ignorance of their rights.—*ASHIE v. LOWE* (1832), 1 Ir. L. Rec. N. S. 145.—*IR.*

451 vii. ————*J*.—A deed, executed by a married woman, she being misinformed as to the contents of it, which were prejudicial to her:—*Held*: not binding upon her.—*BLAKE v. HYLAND* (1838), 2 Dr. & Wal. 397.—*IR.*

451 viii. ————*J*.—Defts. signed a document purporting to be a guarantee, in the honest belief that it was a document of a wholly different nature, the mistake not being due to any negligence on their part:—*Held*: not bound by the document.—*BANK OF IRELAND v. M'MANAMY, [1916] 2 I. R. 161.*—*IR.*

451 ix. ————*J*.—A party granting a discharge which he believes to include "all his claims" is entitled to reduce it on its turning out that there were at the time competent to him claims of which he knew nothing.—*PURDON v. ROWAT'S TRUSTEES* (1856), 19 Dunl. (Ct. of Sess.) 206; 29 Sc. Jur. 99.—*SCOT.*

451 x. ————*J*.—A deed, granted under error of one's legal powers, is inept.—*MURRAY'S TRUSTEES v. MURRAY* (1872), 10 Macph. (Ct. of Sess.) 778; 44 Sc. Jur. 545.—*SCOT.*

1. ————*Deed read over falsely.*—Falsely reading a deed before execution will avoid the deed at law.—*BLACKWOOD v. GREGG* (1831), *Hayes*, 277.—*IR.*

—A deed obtained from a tenant in tail by his brothers without adequate consideration was set aside, on the ground that pltf. did not know that he was entitled to the whole estate, & because the deed was executed without disclosing to him all the material facts, which were known to his brothers, & because there was reason to suppose that pltf. was actually misled.—*STURGE v. STURGE* (1849), 12 Beav. 229; 19 L. J. Ch. 17; 14 Jur. 159; 50 E. R. 1049; *subsequent proceedings* (1850), 2 H. & Tw. 469, L. C.

453. — Lack of independent advice.]—A solr., who was a trustee for a married woman under a settlement & also her husband's solr., prepared a deed by which she conferred a benefit on a son of the solr. & renounced rights she had under the settlement. After hearing the solr.'s explanation of the deed she executed it:—*Held*: she was not bound by the deed, on the ground that the real effect of it on her rights & position was not in fact explained to her, & also on the ground that it was the duty of the solr. to take care that she did not execute the deed without having independent advice.—*WILLIS v. BARRON*, [1902] A. C. 271; 71 L. J. Ch. 609; 86 L. T. 805; 18 T. L. R. 602, H. L.; *affg.* S. C. *sub nom.* *BARRON v. WILLIS*, [1900] 2 Ch. 121, C. A.

Annotations:—*Refd.* Weston v Fairbridge [1923] 1 K. B. 667. *Mentd.* Wright v. Carter, [1903] 1 Ch. 27; Bank of Africa v. Cohen, [1909] 2 Ch. 129; Howes v. Bishop, [1909] 2 K. B. 390; Bank of Montreal v. Stuart, [1911] A. C. 120; Moody v. Cox & Hatt (1917), 116 L. T. 740.

See, also, HUSBAND & WIFE.

453 i. — Lack of independent advice.]—Where a woman, illiterate, executed a deed, & had no professional or other competent adviser in the matter, & did not understand the nature or effect of the transaction:—*Held*: not binding.—*McLAURIN v. McDONALD* (1865), 12 Gr. 82.—*CAN.*

453 ii. ——Pltf., who was illiterate, executed a deed without taking any advice:—*Held*: pltf. not bound.—*McEACHERN v. SOMERVILLE*, *McEACHERN v. WHITE* (1876), 37 U. C. R. 609.—*CAN.*

453 iii. ——Pltf., who was illiterate, executed a deed in favour of deft., having no advice or assistance except that of her husband, who was also illiterate:—*Held*: the transaction could not stand.—*KOKORUTZ v. IRWIN* (1912), 19 W. L. R. 945; 1 W. W. R. 774.—*CAN.*

453 iv. ——Where mtgcs. deliberately exclude a friend of an illiterate foreigner, who is with him at his request to advise him as to the effect of his acts, from the room where the foreigner is persuaded to sign a mtgc. which he does not understand, the mtgc. will be set aside.—*KARDOSY v. MASSEY-HARRIS* (1916), 34 W. L. R. 808; 10 W. W. R. 839.—*CAN.*

453 v. ——In order to charge a pardanshin woman upon an instrument executed by her, it is requisite that the person relying on such a document should give satisfactory evidence that it has been explained & understood by her.—*SUDISHT LAL v. SHEOBHARAT KOER* (1881), 1 L. R. 7 Cal. 245.—*IND.*

453 vi. ——Release of an annuity given by an illiterate person without professional assistance.—*GARVEY v. M'MINN* (1846), 9 I. Eq. R. 526.—*IR.*

454 i. — Ignorance of true purport of deed.]—Equity will not give relief merely on the ground that one of the parties to a deed misunderstood its true construction & legal effect at the time of execution.—*CAMPBELL v.*

EDWARDS (1876), 24 Gr. 152.—*CAN.*

454 ii. ——Where children parties to a deed execute it without having been made aware of its contents, & owing to imperfect explanation are under the impression that it is merely an authority to collect rents, the deed is not void, but voidable only.—*INDER v. SIEVWRIGHT, LARNACH v. SIEVWRIGHT* (1899), 18 N. Z. L. R. 348.—*N.Z.*

454 iii. ——Where at the time of execution the settlor is not in a fit state of health to transact business, & is inexperienced in legal business, & the solr. who prepared the deed is a complete stranger, & the deed contains unusual clauses going beyond what is necessary for giving effect to the wishes expressed by the settlor, the clearest evidence is required that the settlor at the time of signing the deed fully understood it, & for such evidence the ct. looks to the solr. who prepared the deed, & if such evidence is not forthcoming the deed cannot be upheld. The mere formal reading over of the deed is not enough.—*ANDERSON v. ANDERSON* (1903), 23 N. Z. L. R. 101.—*N.Z.*

454 iv. ——A deed of settlement is not effectual, which has been executed by a party found to be capable of disposing of her estate, but not in such a state of mind as to enable her to judge correctly with regard to the effect of the deed as depriving her of all power of revoking or altering it, & as not being her free & voluntary act.—*WATSON v. NOBLE* (1827), 4 Sh. (Ct. of Sess.) 200.—*SCOT.*

454 v. ——A general allegation by a party *sciens et prudens*, that he had granted a document under an erroneous belief of its meaning, is not relevant to set it aside.—*MACLAGAN v. DICKSON* (1832), 11 Sh. (Ct. of Sess.) 185.—*SCOT.*

g. — Intoxication.]—The mere fact of a person executing a deed while intoxicated, will not, as a rule, suffice to set such deed aside, unless undue advantage was taken.—*CLARKSON v. KITSON* (1853), 4 Gr. 244.—*CAN.*

454. — Ignorance of true purport of deed.]—*DOE d. LLOYD v. BENNETT*, No. 202, *ante.*

455. ——Where a lessor covenanted that upon or at any time before the expiration of the term granted by the lease, he would at the request of the lessee, his exors., administrators, or assigns, grant a new lease for & during the life of the lessee or his nominee, or for & during such a period or number of years as the lessee, his exors., administrators, or assigns should think fit:—*Held*: on it appearing that it was the intention of the lessor to renew the lease only for the life of the lessee & at the time of the execution of the lease he was kept in ignorance of the full effect of the covenant, the lessee could only enforce a renewal for life.—*PRICE v. POWER* (1868), 10 L. T. 442.

456. ——A tenant in tail barred the entail & resettled the family estate, reserving powers to jointure & charge portions. He executed this settlement under the influence of an old friend of the family, & it was prepared by the family solr., who took his instructions from the friend, & the deed was read over to the settlor, who did not understand its effect, but thought it to be some instrument to confirm portions. Two years afterwards, the settlor married, & upon that occasion executed a settlement reciting the earlier deed & executing the power to jointure. In 1865, having got possession of the earlier deed, he filed a bill to set it aside without prejudice to the jointure:—*Seemle*: the earlier deed might have been set aside but for its subsequent confirmation by the

J. ——An improvident deed, obtained by a tavern keeper from a boarder who was greatly addicted to intemperance, was set aside with costs.—*McCREGOR v. BOULTON* (1866), 12 Gr. 288.—*CAN.*

k. ——A person given to drinking made a deed to his wife, understanding what he was doing, but without professional advice:—*Held*: good.—*COURIGAN v. COURIGAN* (1868), 15 Gr. 341.—*CAN.*

l. ——An old man, greatly addicted to drinking, executed deeds of all his property, real & personal, to the tavern keeper with whom he boarded, & accepted the latter's bond for his support for life:—*Held*: the deeds should be set aside.—*HUME v. COOK* (1869), 16 Gr. 84.—*CAN.*

m. ——In order to avoid a deed made by an intoxicated person two things must be established: his incapacity to contract & his equitable right to be relieved.—*JONES v. CALKIN* (1876), 3 Pag. 358.—*CAN.*

n. ——A ct. of equity will not assist a party who has, whilst another was intoxicated, obtained a deed from him. On the other hand, equity will not assist a party to get rid of a deed or agreement merely because he was intoxicated at the time. If there was any unfair advantage taken of a party's situation, or any contrivance or management to draw him into drink, he might be a proper object of relief in equity. Extreme intoxication, which deprives a man of his reason, will invalidate a deed obtained from him in that condition.—*NAGLE v. BAYLOR* (1842), 3 Dr. & War. 80.—*IR.*

o. ——A daughter & her husband having obtained from her father, who was addicted to habits of intoxication, a deed, & under the erroneous impression that unless he executed it he might be reduced to poverty:—*Held*: not binding.—*McDIARMID v. McDIARMID* (1828), 4 Sh. (Ct. of Sess.) 583.—*SCOT.*

Sect. 8.—Avoidance of and defences to actions on deeds: Sub-sects. 5, 6, 7, 8, 9, 10 & 11.]

settlement on the marriage.—*JARRATT v. ALDAM* (1870), L. R. 9 Eq. 463; 39 L. J. Ch. 349; 22 L. T. 192; 18 W. R. 511.

Annotation:—Consd. Hoblyn v. Hoblyn (1889), 60 L. T. 499. See, also, Sub-sect. 16, post.

SUB-SECT. 6.—DELIVERY AS ESCROW.

See Sect. 5, sub-sect. 2, ante.

SUB-SECT. 7.—DISCLAIMER OR REPUDIATION.

457. General rule—Estate cannot vest compulsorily.]—You shall no more force a man to accept of a release against his will than of a deed of grant; & the subsequent refusal makes the deed void *ab initio* (*HOLT, C.J.*).—*WANKFORD v. WANKFORD* (1699), 1 Salk. 299; *Holt, K. B.* 311; 11 Mod. Rep. 38; 91 E. R. 265.

Annotations:—Mentd. Hudson v. Hudson (1737), 1 Atk. 460; *Thrustout d. Levick v. Coppin* (1772), 2 Wm. Bl. 801; *Doe d. Gurnons v. Knight* (1826), 8 Dow. & Ry. K. B. 348; *Freakley v. Fox* (1829), 9 B. & C. 130; *Brazier v. Hudson* (1836), 8 Sim. 67; *Pringle v. Crooks* (1839), 3 Y. & C. Ex. 666; *Tomlin v. Tomlin* (1841), 1 Haro. 236; *Creswick v. Woodhead* (1842), 4 Man. & G. 811; *Harrison v. Harrison* (1846), 1 Rob. Ecol. 406; *Ford v. Beech* (1848), 11 Q. B. 852; *Ryalls v. Bramall* (1848), 1 Exch. 734; *Venables v. East India Co.* (1848), 2 Exch. 633; *Belshaw v. Bush* (1851), 11 C. B. 191; *Lowe v. Pesket* (1855), 25 L. T. O. S. 146; *Sengram v. Knight* (1867), 2 Ch. App. 628; *Re Bourne, Davey v. Bourne*, [1906] 1 Ch. 697; *Hewson v. Shelley*, [1913] 2 Ch. 384.

458. —.]—No man can by grant at common law vest in another an estate against his will. Therefore, where a tenant in tail granted lands to the use of X. & Y., upon trust for sale, & the deed was enrolled as a disentailing assurance, & X. & Y. disclaimed their estate:—*Held*: the disentailing assurance was rendered inoperative by the disclaimer.—*PEACOCK v. EASTLAND* (1870), L. R. 10 Eq. 17; 39 L. J. Ch. 534; 22 L. T. 706; 18 W. R. 856.

Annotation:—Mentd. Savill v. Bethell, [1902] 2 Ch. 523.

459. —.]—*STANDING v. BOWRING*, No. 267, ante.

460. May be by deed.]—A devisee in fee may by deed disclaim the estate devised.—*TOWNSON v. TICKELL* (1819), 3 B. & Ald. 31; 106 E. R. 575.

Annotations:—Apprvd. & Fold. Begbie v. Crook (1835), 2 Scott, 128. *Consd. Doe d. Chidgey v. Harris* (1847), 16 M. & W. 517. *Reid. Peacock v. Eastland* (1870), L. R. 10 Eq. 17. *Mentd. Doe d. Palmer v. Andrews* (1827), 4 Bing. 348; *Doe d. Winder v. Lawes* (1837), 7 Ad. & El. 195; *Browell v. Reed* (1842), 1 Hare, 434; *Siggers v. Evans* (1855), 5 E. & B. 367; *Xenos v. Wickham* (1862), 13 C. B. N. S. 381.

461. —.]—A devisee in fee may, by deed, disclaim the estate devised, & after such disclaimer has no interest in the estate.—*BEGBIE v. CROOK* (1835), 2 Bing. N. C. 70; 2 Scott, 128; 4 L. J. C. P. 264; 132 E. R. 28.

462. Deed not essential.]—Where a trustee renounces simply by parol it is sufficient if he disclaims at the bar, & it is not necessary that he should execute a deed of disclaimer.—*FOSTER v. DAWBER* (1860), 1 Drew. & Sm. 172; 8 W. R. 646; 62 E. R. 343.

463. —.]—The renunciation of an exor. need not be under seal.—*In the Goods of BOYLE* (1864), 3 Sw. & Tr. 426; 4 New Rep. 120; 33 L. J. P. M. & A. 109; 10 L. T. 541; 28 J. P. 424; 164 E. R. 1340.

464. —.]—Testator appointed B. & A. trustees & exors. of his will. B. alone proved the will. A. never disclaimed by deed, but expressed his intention not to act:—*Held*: A. had by his conduct disclaimed the office of trustee, a deed not being essential to make a disclaimer effectual.—*Re BIRCHALL, BIRCHALL v. ASHTON* (1889), 40 Ch. D. 436; 60 L. T. 369; 37 W. R. 387, C. A.

465. Conduct sufficient.]—It is most prudent that a deed of disclaimer should be executed by a person named trustee, who refuses to accept the trust, but there may be conduct which amounts to a clear disclaimer (*LEACH, M.R.*).—*STACEY v. ELPIN* (1833), 1 My. & K. 195; 2 L. J. Ch. 50; 39 E. R. 655.

466. —.]—*Re BIRCHALL, BIRCHALL v. ASHTON*, No. 464, ante.

467. Disclaimer by deed after assent in words.]—*Qu.*: whether a devisee in trust can disclaim by deed after previous assent to the devise in words.—*DOE d. CHIDGEY v. HARRIS* (1847), 16 M. & W. 517; 16 L. J. Ex. 190; 8 L. T. O. S. 414; 12 J. P. 39; 153 E. R. 1294.

Annotations:—Mentd. Young v. Grove (1847), 4 C. B. 668; *Venables v. East India Co.* (1848), 18 L. J. Ex. 266; *Wright v. Wilkin* (1860), 2 B. & S. 232; *Re Lay, Royal General Theatrical Fund Assocn. v. Kydd*, [1899] 2 Ch. 149.

468. Cannot be revoked.—To sustain subsequent action against party liable.]—If a bond be delivered to another to the use of the obligee & it is tendered to him & he refuses it, now the delivery has lost its force, & the obligee can never after agree to it & the obligor may say it is not his deed (*per CUI.*).—*WHEELDALE'S CASE* (1604), 5 Co. Rep. 119 a; 77 E. R. 239.

Annotations:—Reid. Wankford v. Wankford (1698), 1 Salk. 299. *Mentd. Winchcombe v. Pigot* (1615), 2 Bulst. 246; *Lyn v. Wyn* (1665), O. Bridg. 122; *Chappel v. Vaughan* (1670), 1 Sid. 420; *Boson v. Sandford* (1690), 1 Show. 101; *Prigg v. Adams* (1692), 2 Salk. 674; *Thompson v. Leach* (1698), 1 Ld. Raym. 313; *Collins v. Blantern* (1767), 2 Wils. 341; *Abbot v. Smith* (1774), 2 Wm. Bl. 947; *Colton v. Goodridge* (1776), 2 Wm. Bl. 1108; *Evans v. Lewis* (1794), cited 1 Wms. Saund. 291 d; *Richards v. Heather* (1817), 1 B. & Ald. 29; *Edwards v. Brown* (1831), 1 Cr. & J. 307; *Hill v. Manchester & Salford Water Works Co.* (1833), 5 B. & Ad. 866; *Ward v. Lumley* (1860), 24 J. P. 150; *Latter v. White* (1870), L. R. 5 Q. B. 622; *David v. Sabin*, [1893] 1 Ch. 523.

469. Where inoperative—Conveyance operating under Statute of Uses—Disclaimer by grantee to uses.]—*GORTON'S CASE* (1629), 2 Roll. Abr. 787.

470. — Purchaser for value refusing to take conveyance.]—Where lands or easements are compulsorily acquired under the powers of a statute which does not of itself operate as a conveyance, the local authority, or other the purchasers are bound, if the vendor so require, to take a formal conveyance, their position after the notice to treat & ascertainment of the price, being the same as that of an ordinary purchaser.—*Re CARY-ELWES' CONTRACT*, [1906] 2 Ch. 143; 75 L. J. Ch. 571; 94 L. T. 845; 70 J. P. 345; 54 W. R. 480; 22 T. L. R. 511; 50 Sol. Jo. 464; 4 L. G. R. 838.

471. What amounts to—Release with intent to disclaim.]—The more one examines the distinction between disclaimer & release, the less one sees the worth of it. If a person, who is appointed co-trustee by any instrument, executes no other act than a conveyance to his co-trustees, where the meaning & intent of that conveyance is disclaimer, the distinction is not sufficiently broad for the ct. to act upon. I can find no case which has decided, nor can I see any reasons for deciding, that where the intent of the release is disclaimer, the inference that the releasor has accepted the estate shall

PART I. SECT. 8, SUB-SECT. 7.

462 i. Deed not essential.]—It is not essential to the validity of a disclaimer of a grant of land that it should be by deed.—*MOFFATT v. SCRATCH* (1885), 12 A. R. 157.—*CAN.*

prevent the effect of it (LORD ELDON, C.).—*NICLOSON v. WORDSWORTH* (1818), 2 Swan. 365; 36 E. R. 655, L. C.

Annotations:—*Consd.* *Small v. Marwood* (1829), 9 B. & C. 300; *Urch v. Walker* (1838), 3 My. & Cr. 702. *Refd.* *Begbie v. Crook* (1835), 2 Scott, 128; *Wellesley v. Withers* (1855), 25 L. T. O. S. 79; *Xenos v. Wickham* (1862), 13 C. B. N. S. 381. *Mentd.* *Lane v. Debenham* (1853), 11 Hare, 188.

— *Copyholds.*—*See* COPYHOLDS, Vol. XIII., p. 81, No. 1055.

472. — Not surrender of lease.—*Executrices* of a tenant from year to year signed the following instrument, "We do hereby renounce & disclaim, & also surrender & yield up to the lessor possession of that messuage called B."—*Held*: a surrender, & not a disclaimer.—*DOE d. WYATT v. STAGG* (1839), 5 Bing. N. C. 564; 7 Scott, 690; 9 L. J. C. P. 73; 3 Jur. 1127; 132 E. R. 1217.

473. Effect of—Avoids deed ab initio.—*WANKFORD v. WANKFORD*, No. 457, *ante*.

474. — Where estate has already vested.—*THOMPSON v. LEACH* (1692), 3 Lev. 281; 3 Mod. Rep. 296; 2 Vent. 198; 83 E. R. 691; *sub nom.* *LEACH v. THOMPSON*, 1 Show. 296; *sub nom.* *LEECH v. THOMPSON*, Carth. 211; *sub nom.* *LEECH'S CASE*, Carth. 250, H. L.; *subsequent proceedings*, *sub nom.* *THOMPSON v. LEACH* (1698), 2 Salk. 618.

Annotations:—*Consd.* *Townson v. Tickell* (1819), 3 B. & Ald. 31; *Peacock v. Eastland* (1870), L. R. 10 Eq. 17; *Standing v. Bowring* (1885), 31 Ch. D. 282. *Refd.* *Taylor d. Atkyns v. Horde* (1757), 1 Burr. 60; *Doe d. Chidgey v. Harris* (1847), 16 M. & W. 517; *Siggers v. Evans* (1855), 5 E. & B. 367; *Xenos v. Wickham* (1862), 13 C. B. N. S. 381; *Mallott v. Wilson*, [1903] 2 Ch. 494. *Mentd.* *Thompson v. Leach* (1698), 2 Salk. 618; *Ashley v. Branwood* (1734), Kel. W. 201; *Yates v. Roen* (1738), 2 Stra. 1104; *Zouch d. Abbot v. Parsons* (1765), 3 Burr. 1794; *Bahue v. Hutton* (1831), 2 Tyr. 17; *Garland v. Cartislie* (1837), 4 Scott, 587; *Muller's Margarine v. I. R. Comrs.* (1899), 69 L. J. Q. B. 291.

475. — —.—A termor of years in premises belonging to B., mortgaged to C. by way of security for debt all personal property to which A. was entitled except any leaseholds which C., by endorsement on the deed, should declare not to be therein included. The mtge. deed was dated Mar. 11. A quarter's rent of the premises became due Mar. 25, & C. was apprised for the first time of the lease held by A. on July 8, & at once endorsed the deed to the effect that the lease was not included in it. In an action for rent:—*Held*: the lease at once on execution of the deed vested in C., & C. could not by the endorsement divest himself of it, & so defeat the rights of B., a stranger to the deed.

The question simply put comes to this: Could deft. when all A.'s leaseholds once vested in him, divest himself of them the next day by means of this exception. He could do no such thing (KELLY, C.B.).—*DEBENHAM v. DIGBY* (1873), 28 L. T. 170; 21 W. R. 359.

476. — By joint covenantee—Other covenantee cannot sue on covenants.—A., by indenture, covenanted with B. & C., their exors., administrators, & assigns, to pay a sum of money, to be held by them on certain trusts. C. did not assent to or execute the deed, & subsequently by an indenture, to which neither A. nor B. were parties, disclaimed all the trusts of the first indenture:—*Held*: B. could not alone sue A. upon the covenant during the lifetime of C.—*WETHERELL v. LANGSTON* (1847), 1 Exch. 634; 17 L. J. Ex. 338; 154 E. R. 269.

Annotations:—*Consd.* *Linwood v. Squire* (1850), 5 Exch. 234. *Refd.* *Beer v. Beer* (1852), 12 C. B. 60. *British*

Empire Mutual Life Assec. v. Browne (1852), 12 C. B. 723; *Salmon v. Webb* (1852), 3 H. L. Cas. 510. *Mentd.* *Sickel v. Borah* (1864), 3 New Rep. 438.

477. — By grantee to uses.—*PEACOCK v. EASTLAND*, No. 458, *ante*.

478. — By trustee of settlement—Settlement not merely void.—*JONES v. JONES* (1874), 31 L. T. 535; 23 W. R. 1.

Annotation:—*Consd.* *Mallott v. Wilson*, [1903] 2 Ch. 494.

479. — Settlor becomes trustee.—By a voluntary settlement of 1806, real estate was granted unto & to the use of a trustee upon certain trusts. The settlement contained the usual covenant for further assurance but no power of revocation by the settlor. In 1867 the trustee executed a deed of disclaimer, & the settlor also purported to put an end to the settlement:—*Held*: the settlement was not thereby rendered inoperative, but the trust was imposed on the settlor in whom, by operation of law, the estate had revested after the creation of the trust.—*MALLOTT v. WILSON*, [1903] 2 Ch. 494; 72 L. J. Ch. 604; 80 L. T. 522.

See, further, TRUSTS & TRUSTEES.

SUB-SECT. 8.—DURESS AND UNDUE INFLUENCE.

See CONTRACT, Vol. XII., pp. 92–112.

SUB-SECT. 9.—ILLEGALITY.

See CONTRACT, Vol. XII., pp. 234–303.

Of bonds.—*See* BONDS, Vol. VII., pp. 166–179, Nos. 32–171.

SUB-SECT. 10.—INFANCY.

See INFANTS & CHILDREN.

SUB-SECT. 11.—LOSS OR DESTRUCTION.

Cancellation.—*See* Sub-sect. 3, *ante*.

Rescission.—*See* Sub-sect. 20, *post*.

Actions upon lost or destroyed deeds—Relief in equity.—*See* EQUITY.

480. Accidental destruction of seal.—Upon *non est factum*, the eating of the seal by mice after the issue joined, & before trial, does not vacate the bond, if the jury find that at the time of plea pleaded, it was deft.'s deed.—*NICHOLS v. HAYWOOD* (1545), 1 Dyer, 59 a; 73 E. R. 130.

Annotations:—*Consd.* *Whelpdale's Case* (1604), 5 Co. Rep. 119 a. *Refd.* *Michaells Case* (1588), Owen, 8.

481. —.—*MICHELL v. STOCKWITH* (1588), Gouldsb. 83; Cro. Eliz. 120; 75 E. R. 1010; *sub nom.* *MICHAEL'S CASE*, Owen, 8.

482. —.—*ARGOLL (LADY) v. CHENEY* (1626), Palm. 402; Lat. 226; 81 E. R. 1143.

Annotation:—*Refd.* *Davidson v. Cooper* (1843), 11 M. & W. 778.

483. —.—If it was sealed, though the seal be broken off, yet it may be read; as we read recoveries after the seal is broken off; & so of wills & deeds (TWISDEN, J.).—*CLERKE v. HEATH* (1669), 1 Mod. Rep. 11; 86 E. R. 691.

484. Where seal removed & refixed.—*ANON.* (1573), Ben. & D. 105; 123 E. R. 311.

485. Where several bound by one deed—Effect of destruction of seal of one—On several

PART I. SECT. 8. SUB-SECT. 11.

480 i. Accidental destruction of seal.—A deed had no seal on it when produced at the trial, but there was a mark

of where the seal had been, & the witness to its execution swore he had put a seal on it before execution. It was contended on deft.'s part that the

covenant was invalid, not being proved to be under seal:—*Held*: a good deed.—*STEWART v. CLARK* (1863), 13 C. P. 203.—*CAN.*

Sect. 8.—Avoidance of and defences to actions on deeds: Sub-sects. 11, 12, 13, 14, 15, 16, 17 & 18.]

obligation.]—MATTHEWSON v. LYDIATE (1597), Cro. Eliz. 546; 78 E. R. 792; sub nom. MATTHEWSON'S CASE, 5 Co. Rep. 22 b.

Annotations:—*Consd.* Constable v. Cloberry (1626), Poph. 161; Collins v. Prosser (1823), 1 B. & C. 682. *Refd.* Pigot's Case (1614), 11 Co. Rep. 26 b; Redhead v. Cathgut (1783), 2 Barn. K. B. 373.

486. — Effect of destruction of seal of one—On joint obligation.]—MATTHEWSON v. LYDIATE, No. 485, ante.

—*See* BONDS, Vol. VII., pp. 193, 238, Nos. 323, 799–801.

487. Removal of seal by settlor.]—BECKROW'S CASE (1628), Het. 138; 124 E. R. 405.

488. Mortgage found cancelled in possession of mortgagee.]—If a mtgee. cancels a mtge., & it is found so in his possession, it is as much a release as cancelling a bond, but it does not convey or revert the estate in the mtgor., for that must be done by some deed (LORD HARDWICKE, C.).—HARRISON v. OWEN (1738), 1 Atk. 520; West temp. Hard. 527; 26 E. R. 328, L. C.

489. Deed found cancelled among papers of grantor.]—A deed poll, found cancelled among the papers of the grantor, after his decease was decreed, under the circumstances, to be enforced.—SLUYSKEN v. HUNTER (1815), 1 Mer. 40; 35 E. R. 592.

490. Removal of signature & seal—Whether effected with intention of cancellation.]—Def't's ancestor gave a bond in a penal sum, conditioned to pay, after M.'s death, £1,000 to such person or persons as she should, by deed or will, appoint:—*Held*: (1) such alternative power to appoint a sum of money was meant to be ambulatory during the life of the person who was to make the appointment; & therefore an execution of it by deed might be revoked by cancellation *animo cancellandi*, though it contained no power of revocation; (2) as the mere act of cutting off her name & seal from the deed was equivocal, it might be explained, & its effect done away, by showing, from what was said by her at the time, that she did it under a mistaken notion that she had provided an effectual appointment by her will made after the deed, & whether she mistook the contents of her will at the time she cut off her name & seal, & made the declaration before mentioned, or whether she mistook the legal operation of her will, the mistake annulled the cancellation.—PERROTT v. PERROTT (1811), 14 East, 423; 104 E. R. 665.

Annotations:—*As to* (1) *Refd.* Alsager v. Close (1842), 10 M. & W. 576. *As to* (2) *Refd.* Beardsley v. Lacey (1897), 67 L. J. P. 35.

Secondary evidence of.]—*See* EVIDENCE.

Presumption in favour of lost deed—Grant of easement.]—*See* EASEMENTS & PROFITS A PRENDRE.

SUB-SECT. 12.—LUNACY.

See LUNATICS & PERSONS OF UNSOUND MIND.

SUB-SECT. 13.—MISDESCRIPTION OF PARTIES.

491. Variance between name in body of deed & signature.]—If John execute a deed in which he is named James, it is not his deed.—FIELD v. WINLOW (1802), Cro. Eliz. 897; 78 E. R. 1121.

Annotations:—*Apld.* Evans v. King (1745), Willes, 554. *Refd.* Clarke v. Istead (1686), 1 Lut. 894; Knight v. Wells Corp'n. (1694), 1 Lut. 508; Chatfield v. Parker (1828), 7 L. J. O. S. K. B. 13.

492. —If Edmund execute a deed in which he is named Edward he may plead that it is not his deed.—WATKINS v. OLIVER (1620), Cro. Jac. 558; 79 E. R. 478, Ex. Ch.

Annotations:—*Apld.* Evans v. King (1745), Willes, 554. *Refd.* Maby v. Shepherd (1822), Cro. Jac. 640; Knight v. Wells Corp'n. (1694), 1 Lut. 508.

493. — Difference in spelling.]—CROMWELL v. GRUMSDEN, No. 101, ante.

494. — Mistake.]—An indenture of apprenticeship purported to be made between John B. of the one part & J. R. of the other part, & was to the effect that John B. bound himself apprentice to J. R., & covenanted with him, & the indenture purported to be executed by Joseph B. The removing magistrates took the examination of Joseph B., in which he stated that he was the person who executed the indenture, & that he was called John B. in the indenture by mistake:—*Held*: this was not such an ambiguity as to render the deed void.—R. v. WOOLDALE (INHABITANTS) (1844), 6 Q. B. 549; 1 New Sess. Cas. 377; 14 L. J. M. C. 13; 4 L. T. O. S. 132 a; 9 J. P. 85; 9 Jur. 83; 115 E. R. 206.

495. —A trader assigned all his property & effects to a trustee for the benefit of his creditors, the trustee being therein described throughout as James James, but executing the deed by his true name of James Janes:—*Held*: the misdescription did not prevent the property from passing to him.—JANES v. WHITBREAD (1851), 11 C. B. 406; 20 L. J. C. P. 217; 17 L. T. O. S. 78; 138 E. R. 530.

Annotations:—*Mentd.* Coates v. Williams (1852), 7 Exch. 205; Cox v. Hickman (1860), 8 H. L. Cas. 268; Hidsen v. Barclay (1864), 3 H. & C. 361; Mason v. Briton Medical & General Life Ass'n. (1888), 4 T. L. R. 755.

496. Addition of false description—"Knight."]—KWRE (LORD) v. STRICKLAND (1610), Cro. Jac. 210; 79 E. R. 207; *sub nom.* EVERS' (LORD) CASE & STRICKLAND, 1 Bulst. 21.

Annotation:—*Consd.* R. v. Chester Bp. (1697), 1 Ld. Raym. 292.

497. Gift to bishop with wrong christian name.]—NORWICH (BP.) CASE (undated), Co. Litt. 3 a.

Annotations:—*Refd.* R. v. Chester Bp. (1697), 1 Ld. Raym. 292; Howley v. Knight (1840), 14 Q. B. 240.

498. Signature by courtesy title.]—A recovery suffered by the son of a peer may pass, though the acknowledgment be signed with his name of courtesy, & not with his true name, provided he be

p. Removal of signature & seal—By accident—Effect of.]—If it be clear that a deed, once perfect, has afterwards had its seal & signature torn off, by accident, or the effect of time, such mutilation does not render it invalid.—TODD v. CAIN (1868), 16 U. C. R. 616.—CAN.

q. Tearing of deed—Reconstruction of pieces—Effect of.]—In a moment of anger against ptfl., grantor tore up his deed, the pieces of which ptfl. collected & stitched together:—*Held*: the deed was executed & delivered.—MCDONALD v. MCDONALD (1879), 44 U. C. R. 291.—CAN.

PART I. SECT. 8, SUB-SECT. 13.

493 i. Variance between name in body of deed & signature—Difference in spelling.]—The patent for land issued to Michael Corrigan, & the name was so spelt in the deed from him under which ptfl. claimed, but was signed Michael Corrgan:—*Held*: no variance.—PRINCE v. MCLEAN (1859), 17 U. C. R. 463.—CAN.

r. Execution in wrong name.]—H. P., was married to G. G. conveyed to M., but executed the deed by the name of P., as if she were sole:—*Held*: the deed was good.—FRINGLE v. ALLAN

(1859), 18 U. C. R. 575.—CAN. *

s. —.—In a mtge., the mtgee. by mistake was described by a name which was not her real name, & which was one she had never assumed or been known by:—*Held*: the legal estate did not pass to her by the mortgage.—BURTON v. DOUGALL (1899), 30 O. R. 543.—CAN.

t. —.—A corporation's name in a deed, even if there is a variance, will be sufficient if it is substantially correct, & it is the corporation intended.—PICTOU COUNTY v. NEW GLASGOW (1915), 48 N. S. R. 424.—CAN.

described on the record as "commonly called lord, etc."—NEWARK (VOUCHEE) (1832), 9 Bing. 397; 131 E. R. 665.

See, further, BONDS, Vol. VII., pp. 164, 165, Nos. 8-23.

SUB-SECT. 14.—MISREPRESENTATION AND FRAUD.

See MISREPRESENTATION & FRAUD; FRAUDULENT & VOIDABLE CONVEYANCES.

SUB-SECT. 15.—MISTAKE.

See MISTAKE.

SUB-SECT. 16.—NON EST FACTUM.

See, *non*, R. S. C., Ord. 19, r. 15.

Execution by blind & illiterate persons.]—See Sect. 5, sub-sect. 6, E., *ante*.

499. Meaning of plea—When available.]—NATIONAL PROVINCIAL BANK OF ENGLAND v. JACKSON, No. 133, *ante*.

500. ———.]—(1) If a man knows that the deed is one purporting to deal with his property, & he executes it, it will not be sufficient for him in order to support a plea of *non est factum* to show that a representation was made to him as to the contents of the deed (WARRINGTON, J.).

(2) If the plea of *non est factum* is to succeed the deed must be wholly, & not partly void (WARRINGTON, J.).—HOWATSON v. WEBB, [1907] 1 Ch. 537; 76 L. J. Ch. 346; 97 L. T. 730; *affd.*, [1908] 1 Ch. 1, C. A.

Annotations:—As to (1) *Distd.* Bagot v. Chapman, [1907] 2 Ch. 222. *Generally*, *Mentd.* Carlisle & Cumberland Banking Co. v. Bragg, [1911] 1 K. B. 489; Browne v. Lewis (1916), 86 L. J. K. B. 326.

501. ———.]—Pltfs. sued deft. on a guarantee. To that, by way of defence, deft. may say that it is not his deed, *non est factum*. Suppose it is held to be his deed, pltfs., of course, get their judgment. But suppose that it is held not to be his deed & he succeeds on *non est factum*, the case is not necessarily over, because pltfs. may say, "True, you have established it is not your deed, but you are estopped from saying that it is not your deed, & we can recover against you, although it is not your deed." It is only in the latter case that estoppel comes into action. Estoppel has nothing to do with the first case; nor has negligence, for negligence has only to do with estoppel. The true way to ascertain whether a deed is a man's deed I conceive is this, namely, to see whether he has attached his signature with the intention that that which preceded his signature should be taken to be his act & deed (BUCKLEY, L.J.).

I entirely assent to the exposition which has been given of the law with regard to *non est factum* as a defence. It is a branch, as I understand it, of the doctrine which involves the principle that,

in order to make a contract, there must be a consenting mind, & that there is really no consensus where there is no intention to do an act which would constitute the making of a contract (KENNEDY, L.J.).—CARLISLE & CUMBERLAND BANKING CO. v. BRAGG, [1911] 1 K. B. 489; 80 L. J. K. B. 472; 104 L. T. 121, C. A.

Actions for misrepresentation & fraud or mistake.]—See MISREPRESENTATION & FRAUD; MISTAKE; FRAUDULENT & VOIDABLE CONVEYANCES.

SUB-SECT. 17.—NON-EXECUTION BY PARTY.

See Sect. 5, sub-sect. 7, *ante*.

SUB-SECT. 18.—PARTIAL VALIDITY.

502. Whether deed may be void in part—& good in part.]—If some of the covenants in an indenture, or of the conditions indorsed on a bond, are against law & some lawful, the covenants or conditions which are against law are void *ab initio*, & the others remain good.—PIGOT'S CASE (1614), as reported in 11 Co. Rep. 26 b; 77 E. R. 1177.

Annotations:—*Apld.* Bagot v. Chapman, [1907] 2 Ch. 222. *Refd.* Collins v. Gwynne (1831), 5 Moo. & P. 276; Bank of Australasia v. Brethart (1847), 6 Moo. P. C. C. 152; Howatson v. Webb, [1908] 1 Ch. 1. *Mentd.* Miller v. Manwaring (1635), Cro. Car. 397; Colton v. Goodridge (1776), 2 Wm. Bl. 1108; Master v. Miller (1791), 4 Term Rep. 320; Sanderson v. Symons (1819), 4 Moore, C. P. 42; Falmouth v. Roberts (1841), 11 L. J. Ex. 180; Mason v. Bradley (1843), 11 M. & W. 590; Davidson v. Cooper (1844), 13 M. & W. 343; Mollett v. Wackerbarth (1847), 5 C. B. 181; Agricultural Cattle Insco. v. Fitzgerald (1851), 16 Q. B. 432; Burchfield v. Moore (1854), 3 E. & H. 683; Gardner v. Walsh (1855), 5 E. & B. 83; Crookewit v. Fletcher (1857), 1 H. & N. 838; Simons v. C. W. Ity. (1857), 2 C. B. N. S. 620; Ward v. Lumley (1860), 24 J. P. 150; Adsett v. Hives (1863), 33 Beav. 52; Aldous v. Cornwell (1868), L. R. 3 Q. B. 573; Caldwell v. Parker (1869), 17 W. R. 955; Robinson v. Mollett (1875), L. R. 7 H. L. 802; Suffell v. Bank of England (1882), 9 Q. B. D. 555; Crediton Bp. v. Exeter Bp., [1905] 2 Ch. 455; Wild v. Simpson, [1919] 2 K. B. 544.

Whether alteration need be material to invalidate contract, see CONTRACT, Vol. XII., Part VII., Sect. 8.

503. ———.]—There are numerous cases to the effect that the circumstances that one part of the deed is void does not make the deed altogether void, but that, although one stipulation or matter be nugatory, other parts of the deed may be binding (BRAMWELL, B.).—PAYNE v. BRECON CORPN. (1858), 3 H. & N. 572; 27 L. J. Ex. 495; 31 L. T. O. S. 328; 22 J. P. 600; 6 W. R. 801; 157 E. R. 597.

Annotations:—*Refd.* Pickering v. Ilfracombe Ry. (1868), L. R. 3 C. P. 235. *Mentd.* Bush v. Martin (1863), 2 H. & C. 311; Chambers v. Manchester & Milford Ity. (1864), 5 B. & S. 588; A.-G. v. Newcastle-upon-Tyne Corpn. & N. E. Ry. (1889), 23 Q. B. D. 492.

504. ———.]—Where there are two deeds on the same parchment, one may be good & the other void.—BAGOT v. CHAPMAN, [1907] 2 Ch. 222; 76 L. J. Ch. 523; 23 T. L. R. 502.

Annotation:—*Dbtd.* Howatson v. Webb, [1908] 1 Ch. 1.

505. ———.]—HOWATSON v. WEBB, No. 500, *ante*

PART I. SECT. 8, SUB-SECT. 16.

a. Necessity for pleading.]—In order to except to the execution of a deed, deft. should plead *non est factum*.—BURNS v. ROBERTSON (1850), 8 U. C. R. 280.—CAN.

499 i. Meaning of plea—When plea available.]—A person who signs a document knowing its general character cannot succeed on a defence of *non est*

factum, because it contains larger powers than he was led to believe by the person who induced him to execute it, or because he executed it without knowing or asking what it contained.—CANADA FURNITURE CO. v. STEPHENSON (1910), 19 Man. L. R. 618.—CAN.

PART I. SECT. 8, SUB-SECT. 18.

502 i. Whether deed may be void in part—& good in part.]—Where a party

succeeds in establishing the illegality of an instrument, he will not be allowed to enforce any stipulation that may be contained therein for his benefit.—A.-G. v. NIAGARA FALLS INTERNATIONAL BRIDGE CO. (1873), 20 Gr. 490.—CAN.

502 ii. ———.]—A deed may be good in part, though void in part.—MCISAAC v. HENEBERRY (1873), 20 Gr. 348.—CAN.

Sect. 8.—Avoidance of and defences to actions on deeds: Sub-sects. 18, 19, 20 & 21.]

Bonds void or illegal in part.]—See BONDS, Vol. VII., pp. 160, 167, Nos. 30-42.

Contracts void or illegal in part.]—See CONTRACT, Vol. XII., pp. 290-296, Nos. 2388-2433.

SUB-SECT. 19.—RELEASE.

See BONDS, Vol. VII., pp. 230-232, Nos. 723-743; CONTRACT, Vol. XII., pp. 497 *et seq.*

Discharge by making obligor executor.]—See EXECUTORS & ADMINISTRATORS.

SUB-SECT. 20.—RESCISSION.

Cancellation.]—See Sub-sect. 3, *ante*.

Loss or destruction of deed.]—See Sub-sect. 11, *ante*.

Rescission on ground of mistake.]—See MISTAKE. 506. Whether redelivery of deed amounts to acquittance.]—WABERLEY v. COCKEREL (1542), Dyer, 51 a; 73 E. R. 112.

Annotations:—Refd. Marshall v. Freake (1622), Palm. 287; Cage v. Acton (1699), 12 Mod. Rep. 288.

507. —.]—CROSS v. POWEL (1596), Cro. Eliz. 483; 78 E. R. 735.

508. —.]—Suppose an obligee delivers up a bond with an intent to discharge the debt, the debt will certainly be thereby discharged (LORD HARDWICKE, C.).—RICHARDS v. SYMS (1740), Barn. Ch. 90; 2 Eq. Cas. Abr. 617; 27 E. R. 507, L. C.

Annotations:—Refd. Cross v. Sprigg (1849), 6 Harc. 552. Mentd. Hassell v. Tynte (1756), Amb. 318; Duffield v. Elwes (1827), 1 Bl. N. S. 497.

509. Exchange of indentures—In settlements of apprenticeship.]—R. v. ST. MARY KALENDAR, WINCHESTER (INHABITANTS) (1748), Burr. S. C. 274; 2 Bott's Poor Laws, 6th ed. 433.

Annotation:—Consd. R. v. Weddington (1774), Burr. S. C. 768.

510. —.]—R. v. TITCHFIELD (INHABITANTS) (1763), Burr. S. C. 511; 2 Bott's Poor Laws, 6th ed. 434.

See, further, MASTER & SERVANT.

SUB-SECT. 21.—REVOCATION.

511. Where consent of certain parties necessary—Death of one party—Powers of survivors.]—GARDNER v. SAVILL (1620), 2 Roll. Rep. 178; 81 E. R. 736.

512. Power of revocation—Restrainable by later deed before exercised.]—LEIGH v. WINTER (1638), W. Jo. 411; 82 E. R. 215.

Annotations:—Refd. Buller v. Waterhouse (1676), T. Jo. 94; West v. Borney (1819), 1 Russ. & M. 431.

513. —Whether implied in deed—Alternative power to appoint money.]—PERROTT v. PERROTT (1899), No. 490, *ante*.

PART I. SECT. 8, SUB-SECT. 21.

b. Where consent of certain parties necessary.]—A contract sealed & delivered by one party, which is subject to the approval of the other party, cannot be revoked by the former before the latter has had a reasonable time within which to signify his assent.—WATEROUS ENGINE WORKS Co. v. PRATT (1899), 30 O. R. 538.—CAN.

c. —.]—A renunciation in a deed of the right to revoke, except by mutual consent, does not bar revocation by one of the parties alone.—

JARDINE v. CURRIE (1830), 8 Sh. (Ct. of Sess.) 937; 5 Fac. Coll. 760.—SCOT.

512 i. Power of revocation—Restrainable by later deed before exercised.]—Demandant in March executed a power of attorney to M. to demand her dower, to compound for her claim, & to accept such sum in lieu thereof, either by annual payments or in one sum, as he should think fit, & to execute releases of such dower. On May 2, he released, in her name, to defts. her dower. The power was revoked on May 23.—Held: the revocation of the power could not avoid the release.—

514. —Licence for patent.]—Deft. who was the owner of certain patents, by deed granted to plffs. the exclusive right to use & exercise the patented inventions during the unexpired residues of the terms of the letters patent, & to manufacture, sell & dispose of the articles manufactured under the letters patent as they should think fit for their absolute benefit. The licence was expressed to be granted in consideration of £150, & certain royalties, & also of plffs. agreeing to advertise & push the sale of the inventions, & endeavour to further their success. The deed contained a power for plffs. to determine the licence by giving deft. six calendar months' notice in writing, but no express power for deft. to determine the licence. Deft. being dissatisfied with plffs. for not pushing the inventions sufficiently & for other reasons, began himself to manufacture & sell the articles, subject to the patents, for his own benefit; & sent plffs. written notice purporting to revoke the licence on the ground of their breaches of covenant in not pushing & advertising the inventions, not paying the royalties punctually & deviating from the specifications in manufacturing the articles:—Held: a covenant must be implied in the deed not to revoke it until the end of the unexpired residues of the terms of the patents.—GUYOT v. THOMSON, [1894] 3 Ch. 388; 64 L. J. Ch. 32; 71 L. T. 416; 8 R. 810; 11 It. P. C. 541, C. A.

515. —Must be reserved—Deed of appointment.]—HATCHER v. CURTIS & ANDERSON (1680), Freem. Ch. 61; 22 E. R. 1058; *sub nom.* ANON., 2 Eq. Cas. Abr. 671, L. C.

516. —.]—If an appointment is made in the form of a will it is revocable in its own nature as the will is, but that is not the case of a deed without the power of revocation (LORD TALBOT, C.).—HUNGERFORD v. WINTOR (1730), Amb. App. O. 839; 27 E. R. 525.

Annotation:—Mentd. Northumberland v. Egremont (1768), Amb. 657.

517. —.]—The husband, by a deed of separation, covenanted with a trustee for the wife, in consideration of being indemnified from all debts which might be contracted by her during the separation, to release his remainder in fee in certain estates to such uses as his wife should by deed or will appoint; with power to the wife to revoke the uses of such deed or will. The wife executed the power by deed, which she afterwards altered, & re-executed:—Held: as the deed of appointment contained no power of revocation, although it was contained in the instrument creating the original power, the re-execution was void.—WORRAIL v. JACOB (1817), 3 Mer. 256; 36 E. R. 98.

Annotations:—Refd. Roberts v. Williams (1841), 11 L. J. Ch. 65; Hall v. Hall, Hall v. Hall (1872), L. R. 14 Eq. 365. Mentd. Jee v. Thurlow (1824), 2 B. & C. 547; Jones v. Waite (1839), 5 Bing. N. C. 341; Frampton v. Frampton (1841), 4 Beav. 287; Wilson v. Wilson (1845), 14 Sim. 405; Brailey v. Brailey, [1922] P. 15.

518. —.]—By a marriage settlement certain funds were settled upon trust for

WILLIAMS v. COBBOURG TOWN TRUST COMRS. (1864), 23 U. C. R. 330.—CAN.

513 i. —Whether implied in deed.]—A father by deed gave the custody of his child to its grandparents:—Held: the father could revoke the deed.—Re HUTCHINSON (1912), 26 O. L. R. 113, 601; 22 O. W. R. 390; 3 O. W. N. 1552.—CAN.

d. How effected.]—A revocation by deed can set aside a deed.—ALLA AIYAPPA v. NUNDULA PERAIYA & PERAMBHOTLU (1866), 3 Mad. 82.—IND.

the children of the marriage in such shares & in such manner as the husband & wife during their joint lives by deed, with or without power of revocation & new appointment, should appoint; & in default of, & subject to such joint appointment, then as the survivor of them should by deed, with or without power of revocation, & new appointment, or by will, appoint. The husband & wife made a joint appointment, of part of the trust funds, with a proviso that the appointment thereby made was made "subject to the power of revocation & new appointment mentioned in the settlement." After the death of the wife, the husband executed a deed revoking the joint appointment & making a new appointment of the fund:—*Held*: the husband & wife had power in their joint appointment to reserve a power of revocation & new appointment to the survivor; & such a power of revocation & new appointment was effectually reserved in the joint appointment.—*Re HARDING, ROGERS v. HARDING*, [1894] 3 Ch. 315; 63 L. J. Ch. 725; 71 L. T. 269; 42 W. R. 677; 38 Sol. Jo. 631; 7 R. 414, C. A.

519. — Declaration of trust.]—A creditor, by memorandum in writing without power of revocation, directed her debtor to pay part of his debt by instalments to herself, & to invest part of the residue, by like instalments, for the benefit of certain volunteers, payable to them after her decease. By a second memorandum the creditor directed her debtor to continue the payment of the debt by similar instalments to herself, & not to accumulate any portion of it for the *cestuis que trust*. Both memorandums were written by the debtor, & signed by the creditor without notice to the *cestuis que trust*, & part of the residue settled by the first memorandum was paid to the creditor by the debtor according to the directions in the second memorandum:—*Held*: the first memorandum constituted a complete declaration of trust in favour of the *cestuis que trust*, & was irrevocable by the settlor.—*PATERSON v. MURPHY* (1853), 11 Hare, 88; 22 L. J. Ch. 882; 21 L. T. O. S. 86; 17 Jur. 298; 68 E. R. 1198.

Annotations:—*Refd.* *Petty v. Petty* (1853), 22 L. J. Ch. 1065; *Re Chrimmes, Locovich v. Chrimmes*, [1917] 1 Ch. 30. *Mentd.* *Lambe v. Orton* (1860), 8 W. R. 202.

520. — A fiduciary power—Limitation of exercise of.]—By a marriage settlement, the husband & wife settled trust funds, including two policies of life insurance, upon trust for the wife for life, & then for the husband for life, & then to the children, as they should by deed, with or without power of revocation jointly appoint & subject thereto as the survivor should by deed or will appoint. The husband & wife by deed jointly appointed the settlement funds subject to their life interests upon trust for their only child for life & then for her children, reserving a power of revocation thereunder to the husband & wife or the survivor. Upon the death of the husband, the widow, who had for some years paid the premiums on the policies, claimed a lien on the policy moneys for the amount so paid. The wife wrote to the trustees that if she were not entitled as of right to a lien on the policy moneys she would revoke the existing appointment to the daughter & release her money of appointing other than the daughter, & then would direct repayment of the premiums by the trustees to her out of the policy moneys:—*Held*: the power to revoke was a fiduciary power, & could not be exercised otherwise than in accordance with the purpose & objects of the original power; & the trustees ought not to pay upon a revocation, release, & request

made with the avowed object of benefiting the appointer.—*Re JONES' SETTLEMENT, STUNT v. JONES*, [1915] 1 Ch. 373; 84 L. J. Ch. 406; 112 L. T. 1067; 59 Sol. Jo. 304.

521. Voluntary deed—Not revocable—Unless power to revoke reserved.]—*VILLIERS v. BEAUMONT* (1882), 1 Vern. 100; 23 E. R. 342, L. C.

Annotation:—*Refd.* *Bill v. Cureton* (1835), 2 My. & K. 503.

522. — — —.]—*IRONS v. SMALLPIECE*, No. 11, ante.

523. — — — No fraud, undue influence or mistake alleged.]—Where there is no fraud, no undue influence, no fiduciary relation between donor of a gift & donee, no mistake induced by those who derive any benefit by it, a gift, whether by mere delivery, or by deed, is binding on the donor (*LINDLEY, L. J.*).—*OGILVIE v. LITTLEBOY* (1897), 13 T. L. R. 399, C. A.; *affd. sub nom. OGILVIE v. ALLEN* (1899), 15 T. L. R. 291, H. L.

524. — — — Although retained by donor.]—*ROBERTS v. WILLIAMS* (1841), 4 Hare, 129; 11 L. J. Ch. 65; 5 Jur. 1057; 67 E. R. 589; *subsequent proceedings* (1844), 4 Hare, 129.

Annotation:—*Mentd.* *Harner v. Priestley* (1853), 16 Beav. 569.

525. — — — Although power of revocation not reserved.]—The absence of a power of revocation, & the fact that the attention of the settlor has not called to that absence, do not make a voluntary settlement invalid.—*HALL v. HALL* (1873), 8 Ch. App. 430; 42 L. J. Ch. 444; 28 L. T. 383; 21 W. R. 373, L. C. & L. J.

Annotation:—*Refd.* *Henry v. Armstrong* (1881), 30 W. R. 472.

526. — — —.]—The absence of a power of revocation in a voluntary settlement is not, in itself, sufficient reason for setting the deed aside on the application of the settlor.—*HENRY v. ARMSTRONG* (1881), 18 Ch. D. 608; 44 L. T. 918; 30 W. R. 472.

Annotation:—*Refd.* *Ogilvie v. Littleboy* (1897), 13 T. L. R. 399.

527. — Should contain power of revocation.] Where a young person is minded to make a voluntary settlement in favour of a parent a power of revocation should be inserted.—*POWELL v. POWELL*, [1900] 1 Ch. 243; 69 L. J. Ch. 164; 82 L. T. 84; 44 Sol. Jo. 134.

Annotations:—*Mentd.* *Cavendish v. Strutt* (1903), 19 T. L. R. 483; *Wright v. Carter*, [1903] 1 Ch. 27; *Howes v. Bishop*, [1909] 2 K. B. 390.

528. Donatio mortis causa—Right of settlor to revoke on recovery.]—Where a person considering himself *in articulo mortis*, without any undue influence or pressure on the part of his relations or friends, makes a voluntary settlement, by deed, of the whole of his property, & the deed contains no power of revocation, if the donor afterwards recovers he is entitled to ask that such deed may be delivered up to be cancelled, upon the ground that no such power of revocation was inserted.—*FORSHAW v. WELSBY* (1860), 30 Beav. 243; 30 L. J. Ch. 331; 4 L. T. 170; 7 Jur. N. S. 299; 9 W. R. 225; 54 E. R. 882.

Annotations:—*Refd.* *Contts v. Acworth* (1869), L. R. 8 Eq. 558; *Hall v. Hall* (1873), 8 Ch. App. 430.

See, further, GIFTS.

529. Power of attorney by deed—Revocation need not be by deed.]—It is not necessary that a power of attorney given by deed should be revoked by deed.—*R. v. WAIT* (1823), 11 Price, 518; 1 Bing. 121; *Russ. & Ry.* 505; 7 Moore, C. P. 473; 147 E. R. 551, Ex. Ch.

Deeds of arrangement.]—*See* BANKRUPTCY & INSOLVENCY, Vol. V., pp. 1179–1182, Nos. 9532–9552.

Settlements.]—*See* SETTLEMENTS.

Assurance of land—By will.]—*See* WILLS.

SECT. 9.—RECTIFICATION.

See EQUITY; MISTAKE.

SECT. 10.—EFFECT OF CANCELLATION, RE-SCISSION AND LOSS AND DESTRUCTION OF DEEDS.

Cancellation.—See Sect. 8, sub-sect. 3, *ante*.**Rescission.**—See Sect. 8, sub-sect. 20, *ante*.

530. Deed not avoided by.]—The cancelling of a deed does not avoid the deed, or divest the estate of a trustee therein named, & the trust thereby created must be performed (*per CTR.*).—**LEECH (LORD) v. LEECH** (1674), 2 Rep. Ch. 100; 21 E. R. 628.

Annotations:—**Refd.** *Roe d. Berkeley v. York Archbp.* (1805), 6 East, 86. **Mentd.** *Harvey v. Harvey* (1722), 2 P. Wms. 21; *Garrard v. Lauderdale* (1831), 2 Russ. & M. 451.

531. Will not divest estate already vested.]—**LEECH (LORD) v. LEECH**, No. 530, *ante*.

532. —.]—I hold clearly that the cancelling of a deed will not divest property which has once been vested by transmutation of possession (**EYRE, C.J.**).—**BOLTON v. CARLISLE (BP.)** (1793), 2 Hy. Bl. 259; 126 E. R. 540.

Annotations:—**Refd.** *Doe d. Lewis v. Bingham* (1821), 4 B. & Ald. 672; *Hewlin v. Shippam* (1826), 5 B. & C. 221; *Jenkin v. Pease* (1840), 6 M. & W. 722; *R. v. Paulson*, [1921] 1 A. C. 271.

533. —.]—The distinction of a deed does not revest the rights conveyed by it (**HOLBOYD, J.**).—**DOE d. LEWIS v. BINGHAM** (1821), 4 B. & Ald. 672; 106 E. R. 1082.

Annotations:—**Refd.** *Re Athenaeum Life Assce. Soc., Richmond's Case & Painter's Case* (1858), 4 K. & J. 305. **Mentd.** *Doe d. Broughton & Stow v. Gully* (1829), 4 Man. & Ry. K. B. 249; *Jones v. Jones* (1838), 2 L. J. Ex. 249; *Hibblewhite v. McMorine* (1840), 6 M. & W. 200; *Adcroft v. Hivos* (1863), 33 Reav. 52.

534. — Assignment of bankrupt's goods.]—**NELTHORPE v. DORRINGTON** (1674), 2 Lev. 113; 83 E. R. 475.

Annotations:—**Refd.** *R. v. Paulson*, [1921] 1 A. C. 271. **Mentd.** *Brown v. Hedges* (1708), 1 Salk. 290; *Addison v. Overend* (1796), 6 Term Rep. 766; *Scott v. Godwin* (1797), 1 Bos. & P. 67; *Sedgworth v. Overend* (1797), 7 Term Rep. 279; *Wyburd v. Tuck* (1799), 1 Bos. & P. 458; *Jones v. Smith* (1848), 1 Exch. 831.

535. — Deed of grant.]—**WOODWARD v. ASHTON** (1676), Freeman. K. B. 429; 2 Mod. Rep. 95; 1 Vent. 296; 89 E. R. 320.

Annotation:—**Refd.** *Moss v. Mills* (1805), 6 East, 144.

536. — Settlement.]—**HUDSON'S (LADY) CASE** (1704), cited 2 Vern. 476; 2 Eq. Cas. Abr. 52, pl. 5; 23 E. R. 905.

Annotations:—**Refd.** *Clavering v. Clavering* (1704), Prec. Ch. 235; *Cecil v. Butcher* (1821), 2 Jac. & W. 565; *Doe d. Garnons v. Knight* (1826), 5 B. & C. 671.

537. — Separation deed — Deed retained by settlor.]—**SEPALINO v. TWITTY** (1729), Cas. temp. King, 75; 25 E. R. 231.

538. — Mortgage.]—**HARRISON v. OWEN**, No. 488, *ante*.

539. —.]—Pltf. having advanced to F. two sums of money, received as a security two bills of sale of goods, by way of mtge., dated Mar. & May, 1841. The sums advanced having afterwards been incorporated with a debt of

£1,100 due from F. to pltf., & secured by an assignment of a policy of assurance of F.'s life, dated June, 1841, the bills of sale were thereupon cancelled. The goods had always remained in the possession of F., the mtgor.:—**Held:** the effect of the cancellation was not to release the debt, & revest the interest of the goods in F.—**GUMMER v. ADAMS** (1843), 13 L. J. Ex. 40.

540. — Surrender of lease.]—Since Stat. Frauds, a lease for years cannot be surrendered by cancelling of the indenture without writing (**GILBERT, C.B.**).—**MAGENNIS v. MAC-CULLOGH**, (*temp.* 1714–1727), Gilb. Ch. 235; 25 E. R. 163. **Annotation:**—**Refd.** *Roe d. Berkeley v. York Archbp.* (1805), 6 East, 86.

541. —.]—The mere cancelling in fact of a lease is not a surrender of the term thereby granted within Stat. Frauds, which requires such surrender to be by deed or note in writing, or by act or operation of law.—**ROE d. BERKELEY (EARL) v. YORK (ARCHBP.)** (1805), 6 East, 86; 102 E. R. 1219; *sub nom.* **DOE d. BERKELEY (EARL) v. YORK (ARCHBP.)**, 2 Smith, K. B. 160.

Annotations:—**Refd.** *Doe d. Lewis v. Bingham* (1821), 4 B. & Ald. 672; *Doe d. Wilmot v. Pickering* (1823), 3 Dow. & Ry. K. B. 497; *Hamerton v. Stead* (1824), 3 B. & C. 475; *Golding v. Fenn* (1828), 1 Man. & Ry. K. B. 647; *Doe d. Courtail v. Thomas* (1829), 9 B. & C. 288; *Doe d. Rochester Bp. v. Bridges* (1831), 9 L. J. O. S. K. B. 113; *Doe d. Egremont v. Courtenay* (1848), 11 Q. B. 702; *Lovell v. Smith* (1857), 3 C. B. N. S. 120; *Ward v. Lumley* (1860), 1 L. T. 376; *Noble v. Ward* (1867), L. R. 2 Exch. 135. **Mentd.** *R. v. Hughes* (1826), 5 B. & C. 886; *Doe d. Biddulph v. Poole* (1848), 11 Q. B. 713.

542. —.]—A. demised certain premises to B., which B. demised to C., reserving rent; the interest of B. was afterwards sold to D., upon which D. obtained from A. a new lease, the lease to B. having been cancelled; B. & D. afterwards distrained for rent, in the name of D.; upon which occasion D. declared that the premises belonged to him:—**Held:** the cancellation & new lease did not operate as a surrender of the interest of B.—**WOOTLEY v. GREGORY** (1828), 2 Y. & J. 536; 148 E. R. 1031.

Annotation:—**Mentd.** *Trent v. Hunt* (1853), 9 Exch. 14.

543. —.]—The cancellation of a lease is not a surrender by operation of law.—**DOE d. COURTAIL v. THOMAS** (1829), 9 B. & C. 288; 4 Man. & Ry. K. B. 218; 7 L. J. O. S. K. B. 214; 109 E. R. 107.

Annotations:—**Mentd.** *Doe d. Rogers v. Rogers* (1833), 5 B. & Ald. 755; *Doe d. Egremont v. Date* (1842), 11 L. J. Q. B. 220; *Worham v. Pemberton, Newenham v. Pemberton* (1817), 1 De G. & Sm. 644; *Re Chancellor* (1850), 16 L. T. O. S. 323.

544. —.]—The cancelling of a lease by the mutual consent of both parties does not destroy the estate vested in the lessee.—**WARD (LORD) v. LUMLEY** (1860), 5 H. & N. 87; 29 L. J. Ex. 322; 1 L. T. 376; 24 J. P. 150; 8 W. R. 184; 157 R. 1112; *subsequent proceedings*, 5 H. & N. 656.

Annotations:—**Mentd.** *Wishart v. Fowler* (1864), 4 B. & S. 674; *Kelner v. Baxter* (1866), L. R. 2 C. P. 174; *Oakley v. Monck* (1866), 4 H. & C. 251; *Abbott v. Bates* (1874), 30 L. T. 470; *Shaw v. Lomas* (1888), 59 L. T. 477.

545. — Voluntary assignment.]—**Re WAX'S TRUSTS**, No. 263, *ante*.

546. Does not prevent use as evidence—To prove

PART I. SECT. 10.

530 i. Deed not avoided by.]—If a deed has become mutilated by accident, or the effect of time, such mutilation does not render it invalid.—**DOE d. ELLIS v. MCGILL** (1850), 8 U. C. R. 224.—**CAN.**

531 i. Will not divest estate already vested.]—The cancellation of a deed does not divest the estate which has passed by it.—**DOE d. BURR v. DENISON** (1850), 8 U. C. R. 185.—**CAN.**

531 ii. —.]—**FRASER v. FRALICK** (1861), 21 U. C. R. 343.—**CAN.**

531 iii. —.]—**FRASER v. FRASER** (1864), 14 C. P. 70.—**CAN.**

531 iv. —.]—A deed purporting to convey land to M. was executed by pltf., in circumstances that disentitled M. to hold it as a valid deed entitling him to the beneficial interest in the property. The grantee, M., afterwards conveyed the land to R.:—**Held:** the ct. refused to remove the invalid deed.

—**FRASER v. RODNEY** (1865), 12 Gr. 154.—**CAN.**

531 v. —.]—The cancellation of a deed does not divest the estate which has passed by it.—**LAUR v. WHITE** (1868), 18 C. P. 99.—**CAN.**

531 vi. —.]—The cancellation of a deed of land by the grantee does not divest his title or revest it in the grantor.—**BAULD v. ROSS** (1898), 31 N. S. R. 33.—**CAN.**

execution.]—ANON. (1726), Gilb. Ch. 183; 25 E. R. 128.

547. ———.]—WARD (LORD) v. LUMLEY, No. 544, *ante*.

548. Reconveyance not necessary.]—*Semble*: where a deed is declared void in equity & cancelled, a reconveyance is not necessary.—HOUGHTON v. HOUGHTON (1852), 15 Beav. 278; 21 L. J. Ch. 482; 17 Jur. 99; 51 E. R. 545.

Annotations:—Folld. A.-G. v. Magdalen College, Oxford (1854), 18 Beav. 223. *Mentd.* Beanland v. Bradley (1854), 2 Sm. & G. 339; Cobbett v. Brock (1855), 20 Beav. 524; Wright v. Vanderplank (1855), 2 K. & J. 1; Dimsdale v. Dimsdale (1856), 25 L. J. Ch. 806; Hartopp v. Hartopp (1856), 21 Beav. 259; Bury v. Oppenheim (1859), 26 Beav. 594; Head v. Godlee, Reynolds v. Godlee (1859), John. 536; Jenner v. Jenner (1860), 2 De G. F. & J. 359; James v. Holmes (1862), 31 L. J. Ch. 567; Chambers v. Crabbe (1865), 34 Beav. 457; Potts v. Surr (1865), 34 Beav. 543; Turner v. Collins (1871), 7 Ch. App. 329; Carnegie v. Carnegie (1874), 30 L. T. 460; Fane v. Fane (1875), L. R. 20 Eq. 698; Lovell v. Wallis (1884), 50 L. T. 681; Allicard v. Skinner (1887), 36 Ch. D. 145; Hoblyn v. Hoblyn (1889), 41 Ch. D. 200; Bischoff's Trustee v. Frank (1903), 89 L. T. 188.

549. ———.]—A.-G. v. MAGDALEN COLLEGE, OXFORD (1854), 18 Beav. 223; 23 L. J. Ch. 844; 24 L. T. O. S. 7; 18 Jur. 363; 52 E. R. 88; *reusd.* on other grounds, *sub nom.* ST. MARY MAGDALEN, OXFORD v. A.-G. (1857), 6 H. L. Cas. 189, H. L.

Annotations:—*Mentd.* A.-G. v. Davey (1859), 4 De G. & J. 136; A.-G. v. Payne (1859), 27 Beav. 168; Magdalen Hospital v. Knott (1878), 8 Ch. D. 709; Bobbett v. S. E. Ry. (1882), 9 Q. B. D. 424.

550. No action maintainable.]—In an action against a mutual assurance society by one of the members assured, in which it appeared from the rules that the members were mutual insurers, the policy being for a term of years, the premium to be paid by half-yearly instalments, & one of the rules set out providing that if a premium should not be paid within a certain time after it became due, the directors might cancel & declare void the policy. Plea, that a premium having remained unpaid for the time specified, the directors then cancelled & declared void the policy:—*Held*: the cancellation, even assuming that it was after the liability arose, had the effect of avoiding the policy *ab initio*, & destroying any right of action that might previously have accrued to assured under it.—BAMBERGER v. COMMERCIAL CREDIT MUTUAL ASSURANCE SOCIETY (1855), 15 C. B. 676; 24 L. J. C. P. 115; 1 Jur. N. S. 500; 3 C. L. R. 568; 139 E. R. 590.

Of bonds.]—*See* BONDS, Vol. VII., p. 234, Nos. 764–767.

SECT. 11.—DISCHARGE OF CONTRACTS MADE BY DEEDS.

See CONTRACT, Vol. XII., pp. 351–353, Nos. 2915–2937.

Part II.—Instruments Under Hand—Non-Testamentary.

SECT. 1.—IN GENERAL.

551. What amounts to—Under R. S. C., Ord. 54a, r. 1—Any written instrument—Carrying legal or equitable rights or liabilities.]—A summons was taken out under Order 54a by the trustee of a bkpt. who claimed an interest under a contract of sale of certain real estate & option of repurchase conferred on the bkpt., asking certain questions which involved the construction of the written document:—*Held*: the contract was an instrument within the meaning of the rule.

Various points have been raised on this rule. First of all, is this a written instrument? It seems to me that the word “instrument” was meant to receive a wide construction, & that it would apply to any written document under which any right or liability, whether legal or equitable, exists (STIRLING, J.).—MASON v. SCHUPPISSER (1899), 81 L. T. 147; 43 Sol. Jo. 718.

552. ———. Articles of association.]—MORGAN'S BREWERY CO. v. CROSSKILL, [1902] 1 Ch. 898; 71 L. J. Ch. 585; 10 Mans. 235.

Annotation:—*Refd.* Cyclists' Touring Club v. Hopkinson (1909), 79 L. J. Ch. 82.

553. ———. Under Larceny Act, 1861 (c. 96), s. 1—Printed rules of savings bank.]—Prisoner was a trustee & treasurer & secretary of a savings bank. By the rules, which were duly certified, the secretary was to receive the money from the depositors, & pay it over to the treasurer. He was indicted, under 20 & 21 Vict. c. 54, in one set of counts, as a trustee of money for a public purpose, in another set as trustee for the benefit of the depositors in the savings bank, & charged with the fraudulent appropriation:—*Held*: he was liable under the statute as a trustee, under an express trust created by instrument in writing; since the set of rules of the savings bank was an instrument in writing within the meaning of the

Act.—R. v. FLETCHER (1862), L. & Ca. 180; 31 L. J. M. C. 206; 6 L. T. 545; 26 J. P. 789; 8 Jur. N. S. 649; 10 W. R. 753; 9 Cox, C. C. 189, C. C. R.

Annotation:—*Refd.* R. v. Davies, [1913] 1 K. B. 573.

554. ———. Under Civil Procedure Act, 1833 (c. 42), s. 28—Written application for loan.]—A letter of appln. for a loan until a day named therein, which does not show an obligation to pay on the face of it, is not “an instrument by virtue of which the debt is payable at a certain time,” within the meaning of the above Act.—TAYLOR v. HOLT (1864), 3 H. & C. 452; 34 L. J. Ex. 1; 11 L. T. 347; 13 W. R. 78; 159 E. R. 607.

Annotation:—*Mentd.* Dene v. Sawyer (1872), 26 L. T. 646.

555. ———. Award determining payment of accounts.]—An award made upon a joint traffic agreement between two railway cos. determined that accounts should be rendered by each co. to the other in May; that a payment should be made on account of the balance appearing to be due on the face of the accounts so exchanged, & that this payment should be made as soon after June 1 as possible & not later than June 15:—*Held*: no interest could be recovered under the above Act; since there was no “debt or sum certain payable by virtue of a written instrument at a certain time,” within the meaning of that statute.—LONDON, CHATHAM & DOVER RY. CO. v. SOUTH EASTERN RY. CO., [1893] A. C. 429; 63 L. J. Ch. 93; 69 L. T. 637; 58 J. P. 36; 1 R. 275, H. L.; *affy.*, [1892] 1 Ch. 120, C. A.

Annotations:—*Refd.* Re Horner, Fooks v. Horner, [1896] 2 Ch. 188; Thakur Ganesh Bakhsh v. Thakur Harihar Bakhsh (1904), 20 T. L. R. 401. *Mentd.* Page v. Cloete (1892), 36 Sol. Jo. 647; Phillips v. Homfray, [1892] 1 Ch. 465; Fletcher v. L. & Y. Ry., [1902] 1 Ch. 901; Johnson v. R. [1904] A. C. 817; Stearns v. Village Main Reef Gold Mining Co. (1904), 48 Sol. Jo. 700; Toronto Ry. v. Toronto Corp., [1906] A. C. 117; Di Ferdinando v. Simon, Smite, [1920] 3 K. B. 409.

Sect. 1.—In general. Sect. 2: Sub-sects. 1, 2, 3, 4, 5, 6, 7, 8, 9 & 10.]

556. — Under Apportionment Act, 1834 (c. 22) —Order of the court.]—I have looked at the authorities & I think that they establish that there is no apportionment in this case. An order of ct. is not an instrument within the meaning of the Act (LORD ROMILLY, M.R.).—JODRELL v. JODRELL (1869), L. R. 7 Eq. 461; 38 L. J. Ch. 507; 20 L. T. 349; 17 W. R. 602.

557. — Under Prescription Act, 1832 (c. 71), s. 3.—Licence to enjoy right—Signed by licensee only.]—A., the owner of a house, brought an action to restrain B. from obstructing the access of light to his windows. A document signed by K. only (through whom plff. derived his title) was set up in defence:—*Held*: the document though signed by the licensee only, was a consent or agreement within the above Act.—BEWLEY v. ATKINSON (1879), 13 Ch. D. 283; 49 L. J. Ch. 153; 41 L. T. 603; 28 W. R. 638, C. A.

*Annotations:—*Consd. Smith v. Colbourne, [1914] 2 Ch. 533. *Reid*, Mitchell v. Cantrill (1887), 37 Ch. D. 56; Simpson v. Godmanchester Corpn. (1895), 64 L. J. Ch. 837; Ruscoe v. Grounsell (1903), 89 L. T. 426; Hyman v. Van Den Bergh, [1907] 2 Ch. 616. *Mentd.* Re Thompson, *Ex p.* Baylis, [1894] 1 Q. B. 462; Re Jones, [1895] 2 Ch. 719; Gardner v. Hodgson's Kingston Brewery Co., [1901] 2 Ch. 198; Greenhalgh v. Brindley, [1901] 2 Ch. 324; Bake v. French (No. 2), [1907] 2 Ch. 215; Tucker v. Oldbury U. C. (1912), 81 L. J. K. B. 668.

558. — Under 16 & 17 Vict. (c. 96), s. 4.—Reception order in lunacy.]—Pltf. was taken to & detained in deft.'s asylum as a person of unsound mind under an order signed by pltf.'s husband & containing a statement of questions & answers concerning pltf. Pltf. having brought an action against deft. for maliciously & without reasonable or probable cause assaulting & imprisoning her:—*Held*: the answers were a sufficient compliance with the requirements of the above Act.—LOWE v. FOX (1887), 12 App. Cas. 206; 56 L. J. Q. B. 480; 56 L. T. 406; 51 J. P. 468; 36 W. R. 25, 11. L.

*Annotations:—*Mentd. Re Smith's Estate, Clements v. Ward (1887), 35 Ch. D. 589; Hulley v. Silversprings Bleaching Co., [1922] 2 Ch. 268.

See, further, LUNATICS & PERSONS OF UNSOUND MIND.

559. — Under Forgery Act, 1861 (c. 98), s. 38.—Forged telegram.]—The prisoner was indicted, under the above sect., for obtaining certain money by means "of a certain forged instrument, to wit, a forged telegram." It appeared that the prisoner, who was a clerk in a post office, sent to a bookmaker a telegram offering a bet on a certain horse for a certain race. The telegram purported to have been handed in prior to the running of the race, & the bookmaker accepted the bet & ultimately paid the amount won on that understanding. In reality the telegram was despatched by the prisoner after he had received the news that the race had been won by the horse in question:—*Held*: the telegram was a forged instrument within the meaning of the above Act.—R. v. RILEY, [1896] 1 Q. B. 309; 65 L. J. M. C. 74; 74 L. T. 254; 60 J. P. 519; 44 W. R. 318; 12 T. L. R. 178; 40 Sol. Jo. 240; 18 Cox, C. C. 285, C. C. R.

*Annotations:—*Folld. R. v. Howse (1912), 107 L. T. 239; R. v. Cade, [1914] 2 K. B. 209.

560. — Forged envelope & betting slip.]—An envelope was sent through the post in order to get the date stamped upon it. It was then used to enclose a betting slip. The betting slip was inserted after the result of the race was known but the envelope bore a stamped date

anterior to the running of the race:—*Held*: the envelope & betting slip constituted a forged instrument within Forgery Act, 1861 (c. 98), s. 38.—R. v. Howse (1912), 107 L. T. 239; 76 J. P. 151; 28 T. L. R. 186; 56 Sol. Jo. 225; 23 Cox, C. C. 135; 7 Cr. App. Rep. 103, C. C. A.

561. — Under Forgery Act, 1913 (c. 27), s. 7.—Forged letter.]—The prisoner was indicted under above Act for obtaining certain money by means of "a certain forged instrument, to wit, a forged request for the payment of one pound." The document in question was a letter purporting to come from & to be signed by a man employed by the prosecutor to whom it was addressed:—*Held*: the letter was an "instrument" within above Act, sect. 7.—R. v. CADE, [1914] 2 K. B. 209; 83 L. J. K. B. 796; 110 L. T. 624; 78 J. P. 240; 30 T. L. R. 289; 58 Sol. Jo. 288; 24 Cox, C. C. 131; 10 Cr. App. Rep. 23, C. C. A.

See, further, CRIMINAL LAW & PROCEDURE.

562. — Under Stamp Act, 1891 (c. 39), sch. 1 —Agreement not under seal—For hire of chattel for consideration.]—In an action on an agreement in writing not under seal between a telephone co. & R. for hire of a private wire for £12 per annum:—*Held*: the agreement was chargeable with an *ad valorem* duty under the above Act, & not merely with a stamp duty of 6d. as an agreement.—NATIONAL TELEPHONE CO., LTD. v. INLAND REVENUE COMRS., [1900] A. C. 1; 69 L. J. Q. B. 43; 81 L. T. 546; 64 J. P. 420; 48 W. R. 210; 16 T. L. R. 58, H. L.

*Annotations:—*Folld. Durham County Electrical Power Distribution Co. v. I. R. Comrs., [1909] 2 K. B. 604. *Reid*, Gartside's (Brookside Brewery) v. I. R. Comrs. (1900), 82 L. T. 686; Underground Electric Rys. of London & Glyn, Mills, Currie v. I. R. Comrs., [1916] 1 K. B. 306. *Mentd.* British Oil & Cake Mills v. I. R. Comrs., [1903] 1 K. B. 689; Speyer v. I. R. Comrs., [1907] 1 K. B. 246.

563. — — — — —.]—By an agreement in writing not under seal between the Co. & a customer, the Co. agreed to supply to the customer for a period of seven years electric energy for motive power, heating & lighting purposes, on the customer's premises at a fixed charge of £57 10s. per quarter & an additional 1d. per unit as indicated by meter:—*Held*: the agreement was chargeable with an *ad valorem* duty of 2s. 6d. per cent. on the aggregate amount of the minimum quarterly payments for seven years as being a "security" for sums of money at stated periods under clause 1 of the heading, "Bond Covenant or Instrument of any kind whatsoever," in Sched. I. of the Stamp Act, 1891.—COUNTY OF DURHAM ELECTRICAL POWER DISTRIBUTION CO. v. INLAND REVENUE COMRS., [1909] 2 K. B. 604; 78 L. J. K. B. 1158; 101 L. T. 51; 73 J. P. 425; 25 T. L. R. 672; 8 L. G. R. 1088, C. A.

*Annotation:—*Reid. Underground Electric Rys. of London & Glyn, Mills, Currie v. I. R. Comrs., [1914] 3 K. B. 210.

564. "Deed, instrument or will"—Power to appoint by — Instrument in writing not under seal.]—A bequest of personal property to three trustees, A., B. & C., "upon trust to dispose of the same in whatever way A. shall, by any deed or deeds, instrument or instruments, or by his will, appoint; provided that no such deed, instrument or will shall be taken to be an execution of this power, unless the deed, instrument or will be executed after my decease"; & subject thereto, upon trust for A. for life:—*Held*: to be a power exercisable by an instrument in writing, whether a deed or not, if such instrument sufficiently referred to the power or to the property subject to it, or if it made a general gift & the appointor, had no property of his own to which it could refer.—

BRODRICK v. BROWN (1855), 1 K. & J. 328; 69 E. R. 484.

Annotations:—**Apld.** **Hall v. Bromley** (1887), 35 Ch. D. 642. **Refd.** **Re Waterhouse**, **Waterhouse v. Ryley** (1907), 98 L. T. 30.

565. Cannot create freehold or quasi freehold interest.—**DOSSEE v. DOE d. EAST INDIA CO.** (1859), 1 L. T. 345; *sub nom.* **ANUNDOMOHEY DOSSEE v. EAST INDIA CO.**, 8 W. R. 245, P. C.

Construction of deeds & instruments under hand, *see* Part III., *post*.

SECT. 2.—NECESSITY FOR AND REQUISITES OF.

SUB-SECT. 1.—ACKNOWLEDGMENTS.

See LIMITATION OF ACTIONS.

SUB-SECT. 2.—APPOINTMENTS.

566. Of agents.—It is clearly settled now, that an agent need not be authorised in writing; also, that an agreement in writing may be dissolved by parol (**LORD ELDON**, C.).—**COLES v. TRECOTHICK** (1804), 9 Ves. 234; 1 Smith, K. B. 233; 32 E. R. 592, L. C.

Annotations:—**Folld.** **Graham v. Musson** (1839), 7 Scott, 769. **Refd.** **Emmerson v. Heelis** (1809), 2 Taunt. 38. **Mentd.** **Randall v. Errington** (1805), 10 Ves. 423; **Blagden v. Bradbear** (1806), 12 Ves. 466; **Morse v. Royal** (1806), 12 Ves. 355; **Buckmaster v. Harrop** (1807), 13 Ves. 456; **Peacock v. Evans**, **Evans v. Peacock** (1809), 16 Ves. 512; **Kemeys v. Proctor** (1813), 3 Ves. & B. 57; *Re Robinson & Farrand, Ex p. Holdsworth* (1814), 1 Mont. D. & De G. 475; **Copis v. Middleton** (1817), 2 Madd. 410; **Kenney v. Wexham** (1822), 6 Madd. 355; **Henderson v. Barnewall** (1827), 1 Y. & J. 387; **Gosbell v. Archer** (1835), 2 Ad. & El. 500; **Carter v. Palmer** (1842), 8 Cl. & Fin. 657; **Strickland v. Turner** (1852), 7 Exch. 208; **Tottenham v. Green** (1863), 32 L. J. Ch. 201; **Coles v. Bristowe** (1868), L. R. 6 Eq. 149; **Seal v. Claridge** (1881), 7 Q. B. D. 516; **Plowright v. Lambert** (1885), 52 L. T. 646; **Luddy's Trustee v. Peard** (1886), 33 Ch. D. 500; **Potter v. Peters** (1895), 64 L. J. Ch. 357; *Re Boles & British Land Co.'s Contract* (1901), 71 L. J. Ch. 130.

See, further, **AGENCY**, Vol. I., pp. 282–284, Nos. 144–155.

Of proxy in company matters.—*See* COMPANIES.

Of trustees—In bankruptcy.—*See* BANKRUPTCY, Vol. IV., p. 211, Nos. 1956, 1957.

Of trusts generally.—*See* TRUSTS & TRUSTEES.

To property.—*See* POWERS.

SUB-SECT. 3.—ASSIGNMENTS.

Choses in action—Whether writing or deed necessary for assignment of.—*See* CHOSSES IN ACTION, Vol. VIII., p. 424, Nos. 35 *et seq.*

What amounts to assignments of.—*See* CHOSSES IN ACTION, Vol. VIII., p. 442, Nos. 189 *et seq.*

Voluntary assignment.—*See* CHOSSES IN ACTION, Vol. VIII., p. 496, Nos. 613 *et seq.*

Contract.—*See* CONTRACT, Vol. XII., p. 606, No. 5020.

Copyright.—*See* COPYRIGHT, Vol. XIII., pp. 189–191, Nos. 236 *et seq.*

For benefit of creditors.—*See* BANKRUPTCY & INSOLVENCY, Vol. IV., pp. 48–71, Nos. 399 *et seq.*

Insurance policy.—*See* INSURANCE.

Leasehold.—*See* LANDLORD & TENANT; SALE OF LAND.

Mortgage debt.—*See* MORTGAGE.

Patents.—*See* PATENTS & INVENTIONS.

Trust.—*See* TRUSTS & TRUSTEES.

SUB-SECT. 4.—BILLS OF EXCHANGE.

See BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS, Vol. VI., p. 14, Nos. 38 *et seq.*

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SUB-SECT. 5.—BILLS OF SALE.

See BILLS OF SALE, Vol. VII., pp. 3 *et seq.*

SUB-SECT. 6.—CONTRACTS.

See, generally, **CONTRACT**, Vol. XII., pp. 51–172, Nos. 277–1269.

Promise by executor to answer damages out of own estate.—*See* EXECUTORS & ADMINISTRATORS.

Relating to land or interest therein.—*See* LANDLORD & TENANT; MORTGAGE; SALE OF LAND.

Sale of goods.—*See* SALE OF GOODS.

Bills of exchange, promissory notes & negotiable instruments.—*See* BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS, Vol. VI., p. 14.

Agreements of partnership.—*See* PARTNERSHIP.

Agreements between solicitor & client as to remuneration.—*See* SOLICITORS.

Agreements with railway companies relating to carriage of goods.—*See* RAILWAYS & CANALS.

Agreement with pawnbrokers—Where loan exceeds 40 shillings.—*See* PAWNS & PLEDGES.

Agreements between master & servant.—*See* MASTER & SERVANT.

Memorandum & articles of association of companies.—*See* COMPANIES.

Charterparty.—*See* SHIPPING & NAVIGATION.

Transfer of shares.—*See* COMPANIES.

SUB-SECT. 7.—GUARANTEE.

See GUARANTEE.

SUB-SECT. 8.—NOTICES.

Of assignment of choses in action.—*See* CHOSSES IN ACTION, Vol. VIII., p. 466, Nos. 378 *et seq.*

Of assignment of policy of life assurance.—*See* INSURANCE.

Of distress—Before sale of goods distrained.—*See* DISTRESS.

Of objection to claim to parliamentary vote.—*See* ELECTIONS.

Of removal of pauper.—*See* POOR LAW.

To treat under Lands Clauses Consolidation Act, 1845 (c. 18).—*See* COMPULSORY PURCHASE OF LAND & COMPENSATION, Vol. XI., p. 172, Nos. 494 *et seq.*

To quit.—*See* LANDLORD & TENANT.

Preparatory to recovery of possession before justices.—*See* LANDLORD & TENANT.

To make tenant holding over—Liable for double rent.—*See* LANDLORD & TENANT.

By tenant to remove fixtures or holdings.—*See* LANDLORD & TENANT.

By tenant of claim for compensation for improvements.—*See* Agricultural Holdings Act, 1908 (c. 28), & AGRICULTURE, Vol. II., p. 46.

By mortgagee of intention to deprive occupier of possession.—*See* Agricultural Holdings Act, 1908 (c. 28), & *generally*, AGRICULTURE, Vol. II.

Under Conveyancing & Law of Property Act, 1881 (c. 41), s. 14.—*See* LANDLORD & TENANT; REAL PROPERTY & CHATELS REAL.

Under Settled Land Acts.—*See* SETTLEMENTS.

And see, further, *Titles passim*.

SUB-SECT. 9.—RELEASES.

See CONTRACT.

SUB-SECT. 10.—TRUSTS.

See TRUSTS & TRUSTEES; GIFTS; SETTLEMENTS.

SECT. 3.—EXECUTION.

Contracts.—*See* CONTRACT, Vol. XII., p. 118 *et seq.*

Signature—Agreements between solicitor & client—Within Attorneys & Solicitors Act, 1870 (c. 28), s. 4.—*See* SOLICITORS.

— **By lunatic.**—*See* LUNATICS.

— **Grant of easement of light—Signature by grantee only.**—*See* EASEMENTS & PROFITS A PRENDRE.

— **By agent.**—*See* AGENCY, Vol. I., pp. 275, 276, 277, 281, 623, 629, Nos. 59, 60, 80, 83, 94, 133, 2479, 2531.

Acknowledgment of title.—*See* REAL PROPERTY & CHATELS REAL & MORTGAGE.

Agreement for special remuneration—Under Solicitors' Remuneration Act, 1881 (c. 44), s. 8.—*See* SOLICITORS.

Agreement with seamen.—*See* SHIPPING & NAVIGATION.

Agreement under London Hackney Carriage Act, 1843 (c. 86), s. 23.—*See* STREET & AERIAL TRAFFIC.

Agreement for receipt of partnership profits—Under Partnership Act, 1890 (c. 39), s. 2.—*See* PARTNERSHIP.

Assignment of copyright.—*See* COPYRIGHT, Vol. XIII., p. 189, Nos. 242, 243.

Bills of exchange.—*See* BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS, Vol. VI., pp. 56, 76.

Bills of sale.—*See* BILLS OF SALE, Vol. VII., p. 81.

Contract with pawnbroker—Pawnbrokers Act, 1872 (c. 93), s. 24.—*See* PAWNS & PLEDGES.

Consignment of goods for carriage—Railway & Canal Traffic Act, 1854 (c. 31), s. 7.—*See* CARRIERS, Vol. VIII., pp. 57–60.

Dissolution of building society—Building Societies Act, 1874 (c. 42), s. 32.—*See* BUILDING SOCIETIES, Vol. VII., p. 502, Nos. 287–292.

Disclaimer by trustee in bankruptcy—Bankruptcy Act, 1914 (c. 59), s. 54.—*See* BANKRUPTCY & INSOLVENCY, Vol. V., p. 939, Nos. 7678, 7679.

Execution on behalf of companies.—*See* COMPANIES.

Instrument creating trust.—*See* TRUSTS & TRUSTEES.

Marine insurance policy.—*See* MARINE INSURANCE.

Objection to parliamentary votes—Parliamentary Voters' Registration Act, 1843 (c. 18), s. 7.—*See* ELECTIONS.

Removal of pauper—Poor Law Amendment Act, 1834.—*See* POOR LAW.

Sale of goods.—*See* SALE OF GOODS.

Sale of land.—*See* SALE OF LAND.

Submission to arbitration—Arbitration Act, 1889 (c. 49), s. 27.—*See* ARBITRATION, Vol. II., p. 313.

SECT. 4.—ALTERATION AND ERASURE.

See, generally, CONTRACT, Vol. XII., p. 359 *et seq.*

Policies of insurance.—*See* INSURANCE.

Bills of exchange, promissory notes & negotiable instruments.—*See* BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS, Vol. VI., p. 372, Nos. 2449 *et seq.*

Particular contracts.—*See* TITLES *passim*.

SECT. 5.—RECTIFICATION ON GROUND OF MISTAKE.

See MISTAKE.

Alteration of bills of exchange, etc., to correct mistake.—*See* BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS, Vol. VI., p. 378, Nos. 2486 *et seq.*

SECT. 6.—CANCELLATION.

See, generally, Part I., Sect. 10.

Bills of exchange.—*See* BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS, Vol. VI., p. 369.

Bills of sale.—*See* BILLS OF SALE, Vol. VII., p. 105 *et seq.*

See, further, TITLES *passim*.

Grounds for—Misrepresentation & fraud.—*See* MISREPRESENTATION & FRAUD.

— **Mistake.**—*See* MISTAKE.

Part III.—Interpretation of Deeds and Non-Testamentary Instruments.

SECT. 1.—IN GENERAL.

Bonds.—*See* BONDS, Vol. VII., pp. 182–191, Nos. 199–303.

Contracts—Where conflict of laws.—*See* CONFLICT OF LAWS, Vol. XI., pp. 394–399, Nos. 673–707.

567. General rule—Ambiguous instrument.—In ambiguous contracts the domicile of the parties, the place of execution, the purpose & the various provisions & expressions of the instrument are material to be considered in the construction.—*LANSDOWNE v. LANSDOWNE* (1820), 2 Bli. 60; 4 E. R. 250, H. L.

Annotations:—*Reid. Cope v. Cope* (1848), 15 Sim. 118. *Mentd. Noel v. Rochfort* (1836), 10 Bli. N. S. 483; *Bourne v. Hartley, Bourne v. Mahan* (1854), 2 Eq. Rep. 910.

568. — — — — ——It may be a legitimate mode of determining the meaning of a doubtful document, to place those who have to expound it in the situation of those who made it, & so, perhaps, history may be referred to, to show what facts existed bringing about a statute, & what matters influenced men's minds when it was made (*BRAMWELL, B.*)—*A.-G. v. SILLEM* (1864), 2 H. & C. 431; 10 Jur. N. S. 262; 159 E. R. 178; *sub nom. R. v. SILLIM, THE ALEXANDRA*, 3 New Rep. 299; 11 L. T. 223; *A.-G. v. SILLEM, THE ALEXANDRA CASE*, 33 L. J. Ex. 92; 12 W. R. 257; *on appeal*, 2 H. & C. 581, Ex. Ch.; 10 H. L. Cas. 704, H. L.

Annotations:—*Mentd. R. v. Rumble* (1864), 4 F. & F. 175; *R. v. Stephens* (1866), 7 B. & S. 710; *Unwin v. Clark* (1866), 7 B. & S. 400; *Waterhouse v. Gilbert* (1885), 15

PART III. SECT. 1.

e. Deed incorporated in Local Act—Interests of non-parties affected.—

A deed made between two public bodies & incorporated in a local Act of Parliament, where interests outside those of the contracting parties are

concerned, should be narrowly scrutinised & strictly construed.—*MIRAMAR CORPN. v. R.* (1909), 28 N. Z. L. R. 727.—N.Z.

Q. B. D. 569; *Darlow v. Shuttleworth*, [1902] 1 K. B. 721; *R. v. West Riding of Yorkshire County Council*, [1906] 2 K. B. 676; *National Telephone Co. v. Postmaster-General*, [1913] 2 K. B. 614.

569. What matters are to be considered—Not nature of provisions—If legal.—An instrument is to be construed without advertent to the nature of its provisions, if legal, or to what they would have been, if a particular case had been contemplated.—*MOSLEY v. MOSLEY* (1800), 5 Ves. 248; 31 E. R. 570.

570. —Not matters outside written agreements.—A. agreed to take an assignment of a lease of a house, which was out of repair, from B., & by the agreement it was stipulated that all outgoings should be paid by B. up to Apr. 23; & by an assignment indorsed on the lease, executed by B. but not by A., B. assigned the residue of the term, subject to the performance of all the covenants of the lease, which, from Apr. 22, ought to be observed on the part of the tenant. The lease contained a covenant to keep the premises in repair, & so to deliver them up; & after the assignment, the reversioner sued B. & recovered for dilapidations which occurred before Apr. 22:—*Held*: the judge could not look beyond the written instruments, viz. the written agreement & the assignment.—*HAWKINS v. SHELMAN* (1828), 3 C. & P. 459, N. P.

Annotations.—*Mentd.* *Jenkins v. Robertson* (1853), 1 Eq. Rep. 123; *Gooch v. Clutterbuck* (1899), 68 L. J. Q. B. 808.

571. Construction of two negatives—In grants.—Two negatives may be construed as a negative in grants (*per CUR.*)—*DILLON v. HARPER* (1703), 1 Salk. 328; 2 Ld. Raym. 898; 91 E. R. 290.

572. Application of rules of grammar.—The rules of grammar must give way to the rules of good sense, & where a reasonable interpretation of the whole instrument requires that grammar should be departed from, it must be, & constantly is, departed from (*KNIGHT BRUCE, L.J.*).—*Re NORMAN'S TRUST* (1853), 3 De G. M. & G. 965; 1 Eq. Rep. 53; 22 L. J. Ch. 720; 21 L. T. O. S. 97; 17 Jur. 444; 1 W. R. 220; 43 E. R. 378, L. J.J.

Annotations.—*Refd.* *Hall v. Robertson* (1853), 2 Eq. Rep. 15. *Mentd.* *Pratt v. Mathew* (1856), 22 Beav. 328; *Re Saunders's Trust* (1857), 3 K. & J. 152; *Day v. Barnard* (1860), 1 Drew. & Sim. 351; *Clarke v. Colls* (1861), 9 H. L. Cas. 602.

573. Words of reference.—There is no rule of law or of grammatical construction that words of reference in a deed such as "the said," or "as aforesaid," must necessarily refer to the last or immediate antecedent (*CHANNELL, B.*).—*TETLEY v. WANLESS* (1866), L. R. 2 Exch. 21; 4 H. & C. 613; 36 L. J. Ex. 25; 15 L. T. 255; 15 W. R. 356; *affd.* (1867), L. R. 2 Exch. 275, Ex. Ch.

Annotations.—*Mentd.* *Ash v. Pouppeville* (1867), L. R. 3 Q. B. 86; *Foster v. Gamgee* (1876), 1 Q. B. D. 666; *Harper v. Linthorpe, Dinsdale Smelting Co.* (1909), 101 L. T. 608.

574. Deeds of compromise—Construed only as

to rights in dispute—Parties not deprived of other rights.—Deeds of compromise of ascertained specific questions will not be construed so as to deprive any party thereto of any right not then in dispute & not in contemplation by any of the parties to the deed.—*CLOUTRE v. STOREY*, [1911] 1 Ch. 18; 80 L. J. Ch. 193; 103 L. T. 617, C. A.

Annotation.—*Mentd.* *Thompson v. Thompson*, [1923] 2 Ch. 205.

575. Force majeure clause.—A force majeure clause should be construed in each case with a close attention to the words which precede or follow it, & with a due regard to the nature & general terms of the contract. The effect of the clause may vary with each instrument.—*LEBEAUPIN v. CRISPIN*, [1920] 2 K. B. 714; 89 L. J. K. B. 1024; 124 L. T. 124; 36 T. L. R. 739; 64 Sol. Jo. 652; 25 Com. Cas. 335.

Annotations.—*Mentd.* *Di Ferdinando v. Simon, Smits*, [1920] 3 K. B. 409; *S.S. Celia v. S.S. Voltorno*, [1921] 2 A. C. 544; *Re British American Continental Bank, Goldzieher & Penco's Claim*, [1922] 2 Ch. 575.

SECT. 2.—BY WHOM CONSTRUED—JUDGE OR JURY.

Parcel or no parcel—Question for jury.—See Part III., Sect. 10, sub-sect. 1, A., *post*.

576. General rule.—Land cannot be appurtenant to a messuage, but such word may be construed to pass the land by the intention of the parties.

It is the office of judges to take & expound the words which common people use to express their meaning, according to their meaning (*per CUR.*).—*HILL v. GRANGE* (1555), 1 Plowd. 104; 2 Dyer, 130 b; 75 E. R. 253.

Annotations.—*Consd.* *Finch's Case* (1607), 6 Co. Rep. 63 a; *Attoe v. Hemmings* (1612), 2 Bulst. 281; *Ongley v. Chambers* (1824), 1 Bing. 483; *Doe d. Winter v. Perratt*, *Doe d. Viney v. Perratt*, *Doe d. Slade v. Perratt* (1843), 6 Man. & G. 314; *Cuthbert v. Robinson* (1882), 51 L. J. Ch. 238. *Refd.* *Tyringham's Case* (1584), 4 Co. Rep. 36 a; *Wood v. Payne* (1590), Cro. Eliz. 186; *Pain v. Malory* (1601), Cro. Eliz. 832; *Pepeys v. Cretton* (1727), Gilb. Ch. 249; *Doe d. Meyrick v. Meyrick* (1832), 2 Cr. & J. 223; *Hinchliffe v. Kinnoul* (1838), 5 Bing. N. C. 1; *Hopkins v. Helmore* (1838), 3 Nev. & P. K. R. 453; *Pannell v. Mill* (1846), 3 C. B. 625; *Waterpark v. Fonnell* (1859), 7 W. R. 634; *Ferguson v. L. B. & S. C. Ry.* (1863), 3 De G. J. & Sm. 653; *Thomas v. Owen* (1887), 20 Q. B. D. 225; *Roe v. Siddons* (1888), 22 Q. B. D. 224; *Schwann v. Cotton*, [1916] 2 Ch. 120; *Hansford v. Jago*, [1921] 1 Ch. 322. *Mentd.* *Anon.* (1561), Ben. & D. 29, (5); *Luttrell's Case* (1601), 4 Co. Rep. 84 b; *Wade's Case* (1601), 5 Co. Rep. 114 a; *Lowe's Case* (1609), 9 Co. Rep. 122 b; *Lofield's Case* (1612), 10 Co. Rep. 106 a; *Rowles v. Mason* (1612), 2 Brownl. 192; *Clay & Barnett's Case* (1613), Godb. 236; *Clun's Case* (1613), 10 Co. Rep. 127 a; *Stukoley v. Butler* (1614), Hob. 168; *Crabbe v. Tooker* (1627), Poph. 204; *Banker's Case* (1695), Skln. 601; *Loddington v. Kime* (1695), 3 Lev. 431; *Rockingham v. Oxenden* (1711), 2 Salk. 578; *Startup v. Macdonald* (1843), 6 Man. & G. 593.

577. —.—It is very dangerous to admit the contents & sufficiencies of deeds to be proved by

PART III. SECT. 2.

576 i. General rule.—It is the duty of the judge to construe a written contract, & of the jury to decide upon surrounding facts & circumstances, if any, to vary it.—*IVSON v. MASON* (1862), 12 C. P. 475.—*CAN.*

576 ii. —.—The question of the construction of a contract where it is unambiguous is for the judge, but where it is doubtful what constitutes the contract, this question should be submitted to the jury.—*MACADAM v. KICKBUSH* (1904), 10 B. C. R. 358.—*CAN.*

576 iii. —.—The meaning of the contract being a question for the ct. & not for the jury, it was a misdirection on the part of the trial judge to leave

the question of the meaning of the contract to the jury.—*J. F. GERRITY Co. v. BRAGG* (1919), 53 N. S. R. 296; 50 D. L. R. 284.—*CAN.*

576 iv. —.—The question of what is the proper inference to be drawn from the terms of a document is a question of law.—*CHOCKALINGAM PILLAI v. MAYANDI CHETTIAR* (1896), 1 L. R. 19 Mad. 485.—*IND.*

576 v. —.—The meaning of words in a document is a question of fact, though the effect of the words is a question of law.—*RAM NARAIN SINGH v. CHOTA NAOPUR BANKING ASSOCN.* (1915), 1 L. R. 43 Cal. 332.—*IND.*

576 vi. —.—*PLUCK v. DIGGES* (1828), 2 Hud. & B. 1.—*IR.*

576 vii. —.—*Held*: the judge, instead of submitting the meaning of the words "mosses & turbaries" as a question for the jury, ought to have construed them himself, & directed a verdict accordingly.—*QUINN v. SHIELDS* (1877), 1 I. R. 11 C. L. 254.—*IR.*

576 viii. —.—In an action for implementation of a written contract, where a question of construction is raised, this question should be decided by the ct., before the cause is remitted to proof.—*FRIER v. HADDINGTON* (1871), 10 Maeph. (Ct. of Sess.) 118; 44 Sc. Jur. 76.—*SCOT.*

576 ix. —.—*RANSOHOFF & WISSLER v. BURKELL* (1897), 25 R. (Ct. of Sess.) 284; 35 Sc. L. R. 229.—*SCOT.*

Sect. 2.—By whom construed—judge or jury.]

the testimony of witnesses, the construction of deeds being the office of the ct.—**SUFFOLK (EARL) v. GREENVILL (1641)**, 3 Rep. Ch. 89; 21 E. R. 738.

578. —.—[The construction of all written instruments belongs to the ct. alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, & the surrounding circumstances, if any, have been ascertained as facts by the jury; & it is the duty of the jury to take the construction from the ct. either absolutely if there be no words to be construed as words of art, or phrases used in commerce & no surrounding circumstances to be ascertained, or conditionally when those words or circumstances are necessarily referred to them (*per* CUR.).—**NEILSON v. HARFORD (1841)**, 8 M. & W. 806; 1 Web. Pat. Cas. 295; 11 L. J. Ex. 20; 151 E. R. 1266.

Annotations:—**Consd.** *Allen v. Rawson (1845)*, 1 C. B. 551. *Apld.* *Berwick v. Horsfall (1858)*, 4 C. B. N. S. 450. **Consd.** *Betts v. Menzies (1862)*, 10 H. L. Cas. 118. **Foll.** *Hill v. Evans (1862)*, 4 De G. F. & J. 288. **Consd.** *Peck v. North Staffordshire Ry. (1863)*, 10 H. L. Cas. 473; *Lewis v. G. W. Ry. (1877)*, 47 L. J. Q. B. 131. **Reid.** *Stead v. Williams (1844)*, 7 Man. & G. 818; *Unwin v. Heath (1855)*, 5 H. L. Cas. 505; *Hills v. London Gas Light Co. (1860)*, 5 H. & N. 312; *Simpson v. Holliday (1865)*, 5 New Rep. 340. **Mentd.** *Cook v. Pearce (1843)*, 8 Q. B. 1054; *Millingen v. Picken (1845)*, 1 C. B. 799; *Beard v. Egerton (1849)*, 8 C. B. 165; *Hull v. Bolland (1856)*, 27 L. T. O. S. 221; *Stoner v. Todd (1876)*, 4 Ch. D. 58; *Edison & Swan United Electric Light Co. v. Holland (1888)*, 4 T. L. R. 686; *Re North Western Rubber Co. & Huttenbach, [1908]* 2 K. B. 907.

579. —.—[If there is one principle more clearly established than another in English Law it is surely this: It is for the ct. to construe a written document. It is irrelevant & improper to ask what the parties, prior to the execution of the instrument, intended or understood (**COZENS-HARDY, M.R.**).—**LOVELL & CHRISTMAS, LTD. v. WALL (1911)**, 104 L. T. 85; 27 T. L. R. 236, C. A.

Annotation:—**Mentd.** *Slack v. Hancock (1912)*, 107 L. T. 14.

580. —.—[The general rule is that the construction of a written contract is for the ct., except where technical terms are introduced (**MAULE, J.**).—**PHILLIPS v. AFLALO (1842)**, 4 Man. & G. 846; 12 L. J. C. P. 49; 134 E. R. 348.

581. —.—[The construction of a specification, as the construction of all other written instruments, belongs to the ct., but the explanation of the words or technical terms of art, the phrases used in commerce, & the proof & results of the processes which are described, & in a chemical patent, the ascertainment of chemical equivalents, are matters of fact upon which evidence may be given, contradictory testimony may be adduced, & upon which it is the province & right of a jury to decide.—**HILL v. EVANS (1862)**, 4 De G. F. & J. 288; 31 L. J. Ch. 457; 8 Jur. N. S. 525; 45 E. R. 1195, L. C.

Annotations:—**Reid.** *Young v. Fernie (1864)*, 4 Giff. 577; *Thomson v. American Braided Wire Co. (1889)*, 6 R. P. C. 518; *Re Gaulard & Gibbs' Patent (1890)*, 7 R. P. C. 367. **Mentd.** *Hills v. Liverpool United Gaslight Co. (1862)*, 32 L. J. Ch. 28; *Nelson v. Betts (1871)*, 40 L. J. Ch. 317; *De Vitro v. Betts (1873)*, L. R. 6 H. L. 319; *Croysdale v. Fisher (1884)*, *Griffin's Patent Cases* 73; *Lawrence v. Perry (1885)*, *Griffin's Patent Cases* 143; *Pirrie v. York Street Flax Spinning Co. (1894)*, 11 R. P. C. 429; *Lewis & Stirkler's Patent (1896)*, 14 R. P. C. 24; *Molassine Co. v. Townsend (1905)*, 23 R. P. C. 31; *Consett Industrial & Provident Soc. v. Consett Iron Co., [1922]* 2 Ch. 135.

585 l. Mercantile contract.—Mercantile phrases.—[The construction of a mercantile contract is for the ct., unless it contains words of a technical or conventional use in the trade to which the contract relates.—**NORNHEIMER v. ROBINSON (1878)**, 2 A. R.

582. —.—[The construction of a contract, unless there is something peculiar to the words, by reason of the custom of the trade to which the contract relates, is for the ct.—**BOWES v. SHAND (1877)**, 2 App. Cas. 455; 46 L. J. Q. B. 561; 36 L. T. 857; 25 W. R. 730; 3 Asp. M. L. C. 461, H. L.; *revisg.* *S. C. sub nom. SHAND v. BOWE (1877)*, 2 Q. B. D. 112, C. A.

Annotations:—**Consd.** *Sutro v. Heilbut, Symons (1916)*, 86 L. J. K. B. 330. **Reid.** *Re General Trading Co. & Van Stolk's Comrs. (1911)*, 16 Com. Cas. 95; *Re Sutro & Heilbut, Symons, [1917]* 2 K. B. 348; *Manbre Saccharine Co. v. Corn Products Co., [1919]* 1 K. B. 198; *Fisher, Reeves v. Armour, [1920]* 2 K. B. 329; *Aron v. Comptoir Wegimont, [1921]* 3 K. B. 435; *Diamond Alkali Export Corp'n. v. Bourgeois, [1921]* 3 K. B. 443. **Mentd.** *West Ham Grdns. v. St. Matthew, Bethnal Green Churchwardens, etc., [1896]* A. C. 477; *Re Goodbody & Balfour & Williamson (1899)*, 5 Com. Cas. 59; *Nelson v. Nelson Line (Liverpool) (No. 3), Re Nelson & Nelson Line (Liverpool) (1907)*, 77 L. J. K. B. 97; *The Annie Johnson, The Kronprinzessin Margareta, [1918]* P. 154; *Hartley v. Hymans, [1920]* 3 K. B. 475; *Taylor v. Bank of Athens, Pinnock v. Same (1922)*, 91 L. J. K. B. 776.

583. Word upon a record.—Inspection of record.—[The inspection of a record is within the peculiar province of the ct., & therefore if a doubt arise as to any word upon a record, the ct. & not the jury, must resolve that doubt.—**R. v. HUCKS (1816)**, 1 Stark. 521, N. P.

Annotation:—**Mentd.** *R. v. Colclough (1882)*, 15 Cox, C. C. 92

584. Mercantile contract.—[The construction of a mercantile contract is matter for the jury.—**SMITH v. BLANDY (1825)**, Ry. & M. 257, N. P.

585. —. Mercantile phrases.—[Defts. wrote to plffs., & offered them a "quantity of "good" barley, to which plffs. answered that they accepted the offer, expecting defts. would give them "fine" barley. Defts., in reply, stated, that their letter contained no such expression as "fine" barley, & that therefore they declined to ship the same. In an action against defts. for not delivering the barley:—**Held**: it was for the jury to say whether the words "good" & "fine" were mercantile phrases, & then the ct. were to determine the meaning of the contract.—**HUTCHISON v. BOWKER (1839)**, 5 M. & W. 535; 9 L. J. Ex. 24; 151 E. R. 227.

586. —. Whether made upon printed terms.—[The master of a steam-tug, of which defts. were owners, was employed by plff. to tow his smack out of a harbour. In so doing the smack was stranded through the alleged negligence of the master. Plff. had on previous occasions hired defts.' steam tug, & on paying the charge had received a receipt, upon the back of which was printed a notice that defts. would not be answerable for damage occasioned by any supposed negligence of their servants:—**Held**: it was a question for the jury whether the contract was made on the terms printed on the back of the receipts.—**SYMONDS v. PAIN (1861)**, 6 H. & N. 709; 30 L. J. Ex. 256; 158 E. R. 293.

Annotation:—**Reid.** *R. v. Dennis, [1894]* 2 Q. B. 458.

587. —. Addition of implied term.—Whether dissolution of contract implied on frustration of adventure.—[The question whether a term should be implied in the contracts providing for their dissolution on the ground of the frustration of the commercial adventure was a question of law for the ct.—**Re COMPTOIR COMMERCIAL ANVERSOIS & POWER SON & Co., [1920] 1 K. B. 868; 89**

305.—CAN.

1. Conveyance.—Plan.—[Where a conveyance describes the property by reference to a plan, the plan becomes incorporated with the conveyance, & just as much part of the description as if it had been drawn upon the face

of the conveyance, & to determine what passes by the conveyance, the description & plan alone are to be looked at, their construction being a question of law.—**SMITH v. MILLIONS (1889)**, 16 A. R. 140; 15 O. R. 453.—**CAN.**

Sect. 2.—By whom construed—judge or jury. Sect. 3:
Sub-sects. 1 & 2.]

term which imports one thing in a scientific sense, & another in a commercial sense:—*Qu.*: whether it is for the judge or the jury.—**HILLS v. LONDON GAS-LIGHT CO.** (1857), 27 L. J. Ex. 60.

559. ———.]—**HILL v. EVANS**, No. 581, *ante*.

600. ———.]—**BOWES v. SHAND**, No. 582, *ante*.

601. ———.]—**ROBEY v. ARNOLD** (1898), 14 T. L. R. 220, O. A.

602. ———.]—**Patent ambiguity**.—**HILLS v. LONDON GAS-LIGHT CO.**, No. 598, *ante*.

603. ———.]—**Latent ambiguity—Question of evidence**.—In a "sett," or lease, of a mine, the boundary line was thus described, "a line drawn from J. V.'s house," to a bound-stone; & in the description of the parcels in the lease, it was said, "which premises are particularly described by the map on the back of this sett." On this map the boundary line appeared to be drawn from the north-east corner of the house. The position of the house itself was incorrectly represented on the map:—*Held*: the judge was bound to look to the map as forming part of the deed, & (*dis.* **LORD WESTBURY**) to tell the jury that the line was to be drawn as marked on the map.

In this case, it being ascertained that the house itself was incorrectly laid down in the map, it was impossible to know by an examination of the deeds, or by their construction alone, from what corner of the house the boundary line was to be drawn; that consequently there was a latent ambiguity, which was to be determined by evidence, & was not dependent on construction (**LORD WESTBURY**, L.J.).—**LYLE v. RICHARDS** (1860), L. R. 1 H. L. 222; 35 L. J. Q. B. 214; 15 L. T. 1; 30 J. P. 659; 12 Jur. N. S. 947, H. L.

604. **Contract not wholly in writing**.—In an action for money had & received, by an allottee of railway scrip, for the recovery of his deposit on the abandonment of the scheme, it appeared that the deposit was paid into one of the banks mentioned in the prospectus of the co., on account of the co. & to their credit, deft. being a member of the managing & also of the provisional committee, & upon appln. by pltf. for a return of his deposit, he received from the attorney of the co. an answer, to the effect that arrangements for that purpose were being made:—*Held*: as the evidence in the case did not depend altogether upon written instruments, but upon other matters of fact, it was a question for the jury, & not for the judge, what was the contract between the parties.—**MOORE v. GARWOOD** (1849), 4 Exch. 681; 19 L. J. Ex. 15; 14 L. T. O. S. 224; 154 E. R. 1388, Ex. Ch.

Annotations:—**Consd.** **Foster v. Mentor Life Assco.** (1854), 3 E. & B. 48. *Mentd.* **Hudspeth v. Yarnold** (1850), 9 C. B. 625; **Ward v. Londesborough** (1852), 12 C. B. 252; **Hegarty v. Milne** (1854), 14 C. B. 627.

605. ———.]—**BEGG v. FORBES**, No. 591, *ante*.

606. ———.]—**C. made a written proposal to D., deft., for the exchange to him of a new engine for an old one, with £10 & a ton of iron. D. afterwards verbally assented to these terms, with the exception of the ton of iron, & in the course of the conversation, advised C. to remove the fittings at once, & subsequently told him that he could not allow the engine to remain on his premises beyond quarter-day. Before quarter-day, C. sold the old engine to pltf., but deft. refused to let pltf. have**

it, alleging that the bargain was, as the written proposal rather imported, that it was not to be removed until the new engine was completely fitted up, & that this had not been done. In an action against D. for conversion of the old engine, the judge told the jury that it was for them to consider, under all the circumstances, whether or not the contract between C. & D. was for an immediate transfer of the old engine, & if so, to find for pltf., which they did:—*Held*: as the written proposal had not been accepted *simpliciter*, the real contract was by parol, & the direction was right.—**STONES v. DOWLER** (1860), 29 L. J. Ex. 122, Ex. Ch.

607. ———.]—**BOLCKOW v. SEYMOUR**, No. 1431, *post*.

608. **Ambiguous memorandum—Agreement not to prosecute—Construction with reference to previous conversation**.—Deft.'s name was forged by one J. to a joint & several promissory note for £20, dated Nov. 7, 1869, & purporting to be made in favour of pltf., by deft. & J. While the note was current deft. signed the following memorandum, in order to prevent the prosecution of the forger, at the same time denying that the signature to the note was his or written by his authority: "I hold myself responsible for a bill dated Nov. 7, 1869, for £20, bearing my signature & J.'s in favour of B. (pltf.)." At the trial of an action against deft. on the note, the judge ruled that this memorandum was a ratification, & directed the jury that the only question for them was, whether deft. signed it. It being admitted that he did, a verdict was entered for pltf.:—*Held*: a misdirection.

Semle: the memorandum being ambiguous in its terms, it should have been left to the jury to say what its real meaning was when looked at in connection with the circumstances under which it was signed.—**BROOK v. HOOK** (1871), L. R. 6 Exch. 89; 40 L. J. Ex. 50; 24 L. T. 34; 19 W. R. 508.

Annotations:—*Refd.* **Brodie v. Brodie**, [1917] P. 271. *Mentd.* **Bolton Partners v. Lambert** (1889), 41 Ch. D. 295; **Jones v. Merioneth Permanent Benefit Bldg. Soc.**, [1891] 2 Ch. 587; **Marsh v. Joseph** (1896), 66 L. J. Ch. 128.

609. **Whether writing meant as contract**.—**CLEVER v. KIRKMAN**, No. 1447, *post*.

610. **Last instrument—Parol evidence of contents**.—Where a written instrument has been lost, & parol evidence of its contents has been received, its construction is still for the ct., & not for the jury.—**BERWICK v. HORSFALL** (1858), 4 C. B. N. S. 450; 27 L. J. C. P. 193; 31 L. T. O. S. 117; 22 J. P. 659; 4 Jur. N. S. 615; 6 W. R. 471; 140 E. R. 1160.

611. **Obscurity of handwriting**.—A question arising at *Nisi Prius*, from the obscurity of the handwriting, what the words of a written instrument produced in evidence really were, the Lord Chief Justice decided it, & refused to have it put to the jury.—**REMON v. HAYWARD** (1835), 2 Ad. & El. 666; 111 E. R. 256.

Annotations:—*Mentd.* **Doe d. Marlow v. Wiggins** (1843), 4 Q. B. 367; **Bartlett v. Dimond** (1845), 14 M. & W. 49.

SECT. 3.—RULES OF CONSTRUCTION.

SUB-SECT. 1.—SAME IN EQUITY AS AT LAW.

612. **General rule**.—In construing agreements, I know no difference between a ct. of law & a ct. of equity (**LORD MANSFIELD, C.J.**).—**HOTHAM v.**

PART III. SECT. 3, SUB-SECT. 1.

6121. **General rule**.—Equity, in con-

struing the effect of a contract, never departs from what appears on the face of the instrument to be the intention

of the parties, unless contrary to some principle of law.—**PENTLAND v. STOKES** (1812), 2 Ball & B. 73.—*IR.*

EAST-INDIA CO. (1779), 1 Doug. K. B. 272; 99 E. R. 178.

Annotations.—*Mentd.* Beatson v. Schank (1803), 3 East, 233; Thomson v. Brown (1817), 1 Moore, C. P. 358; Cordwett v. Hunt (1818), 8 Taunt. 596.

613. —.]—A legal instrument is not to be construed by the acts of the parties.

It is truly said, the construction of covenants is the same in equity as at law. But though the construction is the same, it is most certain, the performance may differ in the one ct. from what it is in the other. At law a covenant must be strictly & literally performed. In equity it must be really & substantially performed according to the true intent & meaning of the parties, so far as circumstances will admit (ARDEN, M.R.).—EATON v. LYON (1798), 3 Ves. 690; 30 E. R. 1223.

Annotations.—*Consd.* Doe d. Jersey v. Smith (1819), 1 Brod. & Bing. 97; Maxwell v. Ward (1824), M'Cle. 458. *Refd.* Davis v. West (1806), 12 Ves. 475; Sanders v. Pope (1806), 12 Ves. 282; Reynolds v. Pitt (1812), 19 Ves. 134; Howard v. Fanshawe (1895), 64 L. J. Ch. 666.

614. —.]—As to liens on the goods of one man in the possession of another, I know of no difference between the rules of decision in cts. of law, & in cts. of equity (GRANT, M.R.).—GLADSTONE v. BIRLEY (1817), 2 Mer. 401; 35 E. R. 993.

Annotations.—*Refd.* Gilles v. Grover (1832), 6 Bill. N. S. 277. *Mentd.* Belcher v. Capper (1842), 4 Man. & G. 502; Pearson v. Goschen (1864), 17 C. B. N. S. 352; Gray v. Carr (1871), L. R. 6 Q. B. 522; McLean & Hope v. Fleming (1871), L. R. 2 Sc. & Div. 128.

615. —.]—The construction of a written instrument is the same in equity as at law.—BALL v. STORIE (1823), 1 Sim. & St. 210; 1 L. J. O. S. Ch. 214; 57 E. R. 84.

Annotations.—*Mentd.* Milltown v. Stewart (1837), 8 Sim. 371; Parsons v. Bignold (1843), 7 Jur. 591.

616. —.]—Action on a promissory note. Plea on equitable grounds, that deft. made the notes jointly with J. for J.'s accommodation & as surety for J., & that the notes were delivered to pltf. & taken by him on an agreement between them that deft. should be liable as surety only, & with notice that he was surety only, & that afterwards pltf., without deft.'s consent, gave time to J., but for which he might have obtained payment. On demurrer:—*Held:* though the absolute written contract between deft. & pltf. contained in the note could not be varied by parol in equity any more than at law, yet an equity arose from the relation of surety & principal between deft. & J., & the notice thereof to pltf. at the time he took the note, & therefore the plea was good.—POOLEY v. HARRADINE (1857), 7 E. & B. 431; 26 L. J. Q. B. 156; 28 L. T. O. S. 367; 3 Jur. N. S. 488; 5 W. R. 405; 119 E. R. 1307.

Annotations.—*Consd.* Raynor v. Fussey (1859), 28 L. J. Ex. 132; Greenough v. McClelland (1860), 2 E. & E. 429; Lawrence v. Walmisley (1862), 5 L. T. 798; Bailey v. Edwards (1864), 4 B. & S. 761; Ewin v. Lancaster (1865), 6 B. & S. 571; Rouse v. Bradford Banking Co., [1894] 2 Ch. 32. *Refd.* Mutual Loan Fund Assocn. v. Sudlow (1858), 5 Jur. N. S. 338; Taylor v. Burgess (1859), 5 H. & N. 1; Re Davies & Troughton, Ex p. Clennell, etc. (Trustees of Hackney Permanent Benefit Bldg. Soc.) (1861), 4 L. T. 60; Wake v. Harrop (1862), 7 L. T. 96; Rogers v. Hadley (1863), 2 H. & C. 227; Price v. Kirkham, Pool, Appleby & Bullock (1864), 3 H. & C. 437; Oriental Financial Corpn. v. Overend, Gurney (1871), 7 Ch. App. 145, n.; Phillips v. Foxall (1872), L. R. 7 Q. B. 666; Swire v. Redman (1876), 1 Q. B. D. 536; Leicestershire Banking Co. v. Hawkins (1900), 16 T. L. R. 317.

617. —.]—There is no equitable construction of an agreement distinct from its legal construc-

tion.—SCOTT v. LIVERPOOL CORPN. (1858), 3 De G. & J. 334; 28 L. J. Ch. 230; 32 L. T. O. S. 265; 5 Jur. N. S. 105; 7 W. R. 153; 44 E. R. 1297, L. C.

Annotations.—*Mentd.* Ormes v. Beadel (1860), 2 Giff. 168; Russell v. Sa Da Bandeira (1862), 13 C. B. N. S. 149; Stadhard v. Lee (1863), 3 B. & S. 364; Bliss v. Smith (1865), 34 Beav. 508; Re Brighton Club & Norfolk Hotel Co. (1865), 35 Beav. 204; Goodyear v. Weymouth & Melcombe Regis Corpn. (1865), Har. & Ruth. 67; Cooke v. Cooke (1867), L. R. 4 Eq. 77; Hood v. N. E. Ry. (1870), 19 W. R. 266; Wadsworth v. Smith (1871), L. R. 6 Q. B. 332; Larivière v. Morgan (1872), 7 Ch. App. 554, n.; Edwards v. Aberayron Mutual Ship Insee. Soc. (1876), 1 Q. B. D. 563; Hart v. Hart (1881), 18 Ch. D. 670; Botterill v. Ware Grdns. (1886), 2 T. L. R. 621.

618. —.]—The construction of a contract is clearly matter of law; & if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be in law (LORD CHELMSFORD, C.).—MIDLAND GREAT WESTERN RY. OF IRELAND v. JOHNSON (1858), 6 H. L. Cas. 798; 31 L. T. O. S. 240; 4 Jur. N. S. 643; 10 E. R. 1509; *sub nom.* MIDLAND GREAT WESTERN RY. OF IRELAND CO. v. KINDER, 6 W. R. 510, II. L.

Annotation.—*Consd.* Stanley v. Nuneaton Corpn. (1913), 108 L. T. 986.

619. —.]—It seems to me to be absurd & ridiculous to suppose that the same words in the same contract should be held to have one meaning in a Ct. of Law & another in a Ct. of Equity (LORD ESHER, M.R.).—*Re TERRY & WHITE'S CONTRACT* (1886), 32 Ch. D. 14; 55 L. J. Ch. 345; 54 L. T. 353; 34 W. R. 379; 2 T. L. R. 327, C. A.

Annotations.—*Mentd.* Re Aspinall & Powell's Contract (1889), 5 T. L. R. 446; Re Fawcett & Holmes' Contract (1889), 42 Ch. D. 150; Jacobs v. Revell, [1900] 2 Ch. 858; Vowles v. Bristol, etc. Bldg. Soc. (1900), 44 Sol. Jo. 592; Hollwell v. Seacombe, [1906] 1 Ch. 426.

620. —.]—An equitable estate in fee cannot be formally limited by deed without words of inheritance or their statutory equivalents. Though the estates are in fact only equitable, still the strict legal construction must be followed (CHITTY, J.).—*Re WHISTON'S SETTLEMENT, LOVATT v. WILLIAMSON*, [1894] 1 Ch. 661; 63 L. J. Ch. 273; 70 L. T. 681; 42 W. R. 327; 38 Sol. Jo. 253; 8 R. 175.

Annotations.—*Appld.* Dearberg v. Lotchford (1895), 72 L. T. 489. *Consd.* Re Irwin, Irwin v. Parkes, [1904] 2 Ch. 752. *Distd.* Re Tringham's Trusts, Tringham v. Greenhill, [1904] 2 Ch. 487. *Expld. & Appld.* Re Bostock's Settlement, Norrish v. Bostock, [1921] 2 Ch. 469. *Refd.* Re Gillies' Settlement, Archer v. Penney, [1917] 2 Ch. 205.

621. —.]—I think here strict legal conveying language has been used & it must receive its legal meaning (STERNDALE, M.R.).—*Re BOSTOCK'S SETTLEMENT, NORRISH v. BOSTOCK*, [1921] 2 Ch. 469; 91 L. J. Ch. 17; 126 L. T. 145; 66 Sol. Jo. (W. R.) 7, C. A.

SUB-SECT. 2.—SAME FOR ALL DOCUMENTS AND INSTRUMENTS.

622. **General rule.**—I shall state as precisely as I can what I understand from the decided cases to be the principles on which the cts. of law act in construing instruments in writing, & a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language it is impossible to know what that intention is without inquiring further & seeing what the circumstances were with reference to which the words

PART III. SECT. 3, SUB-SECT. 2.

622 i. **General rule.**—In construing a contract containing terms some of which are in writing & others printed in a common form, if there is any

doubt as to the meaning of the whole greater weight should be given to the written portion, inasmuch as it embodies the language & terms selected by the parties themselves as best

suited to express their meaning.—RYAN v. FERGUSON (1909), 8 C. L. R. 731.—AUS.

g. Mercantile documents.—The document being a mercantile one, must

Sect. 3.—Rules of construction: Sub-sects. 2 & 3, A.]

were used, & what was the object appearing from those circumstances which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used. In construing written instruments I think the same principle applies. In the cases of wills testator is speaking of & concerning all his affairs, & therefore, evidence is admissible to show all that he knew, & the ct. has to say what is the intention indicated by the words when used with reference to those extrinsic facts, for the same words used in two wills may express one intention when used with reference to the state of one testator's affairs & family, & quite a different one when used with reference to the state of another testator's affairs & family. In the case of a contract the two parties are speaking of certain things only, & therefore, the admissible evidence is limited to those circumstances of & concerning which they use these words. In neither case does the ct. make a will or a contract such as it thinks testator or the parties wished to make, but declares what the intention indicated by the words used under such circumstances really is, & this, as applied to the construction of statutes, is no new doctrine (LORD BLACKBURN).—*RIVER WEAR COMRS. v. ADAMSON* (1877), 2 App. Cas. 743; 47 L. J. Q. B. 193; 37 L. T. 543; 42 J. P. 244; 26 W. R. 217; 3 Asp. M. L. C. 521. H. L.; *affg.* (1876), 1 Q. B. D. 546, C. A.; *re sq.* (1873), 29 L. T. 530.

Annotations:—Consd. Butterley Co. v. New Hunknall Colliery Co., [1910] A. C. 381; Hollishead v. Hazleton, [1916] 1 A. C. 428; O'Grady v. Willmot, [1916] 2 A. C. 231. *Apld.* Davies v. Powell Duffryn Steam Coal Co., [1917] 1 Ch. 488. *Consd.* G. W. Ry. & Mid. Ry. v. Bristol Corp'n., [1918], 87 L. J. Ch. 414. *Apld.* *Re* Burnyeat, Burnyeat v. Ward, [1923] 2 Ch. 62. *Reid.* Western Counties Ry. v. Windsor & Annapolis Ry. (1882), 7 App. Cas. 175; Eastman Photographic Materials Co. v. Comptroller-General of Patents, Designs & Trade Marks, [1895] A. C. 571; A.-G. v. Gas Light & Coke Co. (1902), 18 T. L. R. 517; Metropolitan Water Board v. New River Co. (1904), 20 T. L. R. 687; Badische Anilin und Soda Fabrik v. Hickson, [1906] A. C. 419; *Re* Gibbs, Martin v. Harding, [1907] 1 Ch. 465; Jones v. Hulton, [1909] 2 K. B. 444; Broken Hill Proprietary Co. v. Peninsular & Oriental Steam Navigation Co., [1917] 1 K. B. 688; Valentine v. Hyde, [1919] 2 Ch. 129; Hudson's Bay Co. v. MacKay (1920), 36 T. L. R. 469; Rhondra's Claim, [1922] 2 A. C. 339. *Mentd.* The Merle (1874), 31 L. T. 447; Eglinton v. Norman (1877), 46 L. J. Q. B. 557; Stoomvaart Maatschappij Nederland v. Peninsular & Oriental Steam Navigation Co. (1880), 5 App. Cas. 876; Arrow Shipping Co. v. Tyne Improvement Comrs., The Crystal, [1894] A. C. 508; G. N. Plee. & Brompton Ry. v. A.-G. (1908), 98 L. T. 731; Jackson v. S.S. Blanche, [1908] A. C. 126; Nicolle v. Nicolle, [1922] 1 A. C. 284.

623. —.]—I do not know what testator meant except by the words he has used. For myself, I am prepared to look at the instrument such as it is; to see the language that is used in it; to look at the whole of the document, & not to part of it; & having looked at the whole of the document, to see, if I can, through the instrument what was in the mind of the testator. Those are general principles for the construction of all instruments, & to that extent it may be said that they are canons of construction (LORD HALSBURY, C.).—*Re JODRELL, JODRELL v. SEALE* (1890), 44 Ch. D. 590; 59 L. J. Ch. 538; 63 L. T. 15; 38 W. R. 721, C. A.; *on appeal, sub nom.*

SEALE-HAYNE v. JODRELL, [1891] A. C. 304, H. L.

Annotations:—Reid. In the Goods of Ashton, [1892] P. 83; *Re* Deakin, Starkey v. Eyres, [1894] 3 Ch. 565; *Re* Jeans, Upton v. Jeans (1895), 13 R. 627; *Re* Wood, Wood v. Wood, [1902] 2 Ch. 542; *Re* Cozens, Miles v. Wilson, [1903] 1 Ch. 138; *Re* Corseilis, Freeborn v. Napper, [1906] 2 Ch. 316; *Re* Green, Bath v. Cannon, [1914] 1 Ch. 134; *Re* Winn, Burgess v. Winn (1916), 86 L. J. Ch. 124. *Mentd.* *Re* Gue, Smith v. Gue, [1892] W. N. 132; *Re* Lowe, Danily v. Platt (1892), 61 L. J. Ch. 415; *Re* Stone, Baker v. Stone (1895), 12 R. 415; *Re* Parker, Parker v. Osborne, [1897] 2 Ch. 208; *Re* De Wilton, De Wilton v. Montefiore, [1900] 2 Ch. 481; *Re* Kiddle, Gent v. Kiddle (1905), 92 L. T. 724; *Re* Helliwell, Pickles v. Helliwell, [1916] 2 Ch. 580.

624. —.]—This ct., as all other ct.s., is bound to take the meaning of a written document from its contents, & not from parol explanation. In considering written documents, of whatever nature they may be, it is a cardinal rule, applicable to all cases, that no parol explanation shall be received. Evidence of the circumstances under which it was written may be given, but a parol explanation of the words cannot be received. There is no principle more important than that to which I have referred. You may show that a written document was obtained by fraud, & then it becomes mere waste paper; or you may show that circumstances were agreed to be stated in the document & improperly left out, & these facts may be restored to the document itself; but you cannot attempt to explain the contents of a written document by evidence as to what the parties said or merely intended at the time, except it was reduced into writing (DR. LUSHINGTON).—*THE GLASGOW PACKET* (1844), 2 Wm. Rob. 306; 3 Notes of Cases, 107; 3 L. T. O. S. 263; 8 Jur. 674.

625. —.]—If there is anything else in the will that qualifies & cuts down the meaning that the statute gives to such words you must take the whole instrument together on the ordinary principles of construction of any document whatever (LORD HALSBURY, C.).—*CRUMPE v. CRUMPE*, [1900] A. C. 127; 69 L. J. P. C. 7; 82 L. T. 130, H. L.

626. Policy of Insurance. —]—The same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz. that it is to be construed according to its sense & meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, & popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, & in order to effectuate the immediate intention of the parties to that contract, be understood in some other special & peculiar sense. The only difference between policies of assurance, & other instruments in this respect is, that the greater part of the printed language of them, being invariable & uniform, has acquired from use & practice a known & definite meaning, & that the words superadded in writing, subject indeed always to be governed in point of construction by the language & terms with which they are accompanied, are entitled nevertheless, if there should be any reasonable doubt upon the

be liberally construed for the purpose of giving effect to the intention of the parties.—*FANE v. BANCROFT* (1897), 30 N. S. R. 33.—CAN.

b. Mortgage by husband of wife's real property. —]—In a mtgc. by a

husband of his wife's chattels real, the ct. will look at the instrument to ascertain the real intention of the mtgor.: whether merely to give a security, or also, actually change the property in the equity of redemption; & such intention is to be ascertained

by applying to the instrument the ordinary rules of construction, coupled with the presumption on which the ct. acts in such cases.—*M'CULLAGH v. LITTLEDALE* (1875), 9 I. R. Eq. 465.—IR.

sense & meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language & terms selected by the parties themselves for the expression of their meaning, & the printed words are a general formula adapted equally to their case & that of all other contracting parties upon similar occasions & subjects (LORD ELLENBOROUGH, C.J.).—*ROBERTSON v. FRENCH* (1803), 4 East, 130; 102 E. R. 779.

Annotations:—*Consd.* Hunter v. Leathley (1830), 10 B. & C. 858; Carr v. Montefiore (1864), 5 B. & S. 408; Gunnin v. Tyrrie (1864), 4 B. & S. 680; Hart v. Standard Marine Insce. (1889), 22 Q. B. D. 499. *Apld.* Glynn v. Marketson, [1893] A. C. 351. *Consd.* Sanday v. British & Foreign Marine Insce., [1915] 2 K. B. 781; *Re* Sutro & Heiblit, Symons, [1917] 2 K. B. 348. *Reid.* Lang v. Anderdon (1824), 3 B. & C. 495; Alsager v. St. Katherine's Dock Co. (1845), 14 M. & W. 794; G. W. Ry. v. Carpalla United China Clay Co., [1909] 1 Ch. 218. *Mentd.* *Ex p.* Yallop (1808), 15 Ves. 60; Spitta v. Woodman (1810), 2 Taunt. 416; Horneyer v. Lushington (1812), 15 East, 46; Prie v. Anderson (1812), 4 Taunt. 652; Gladstone v. Clay (1813), 1 M. & S. 418; Park v. Hammond (1816), 6 Taunt. 495; Prouting v. Hammond (1819), 8 Taunt. 688; Rickman v. Carstairs (1833), 5 B. & Ad. 651; Saqi & Lawrence v. Stearns (1910), 103 L. T. 583; Cave v. Horsell, [1912] 3 K. B. 533.

627. —[5]—Policies of insurance are to be constructed according to the same rules as all other written contracts, namely, by ascertaining the intention of the parties, to be gathered in the first instance from the words of the instrument, but interpreted if necessary, by the surrounding circumstances.—*CARR v. MONTEFIORE* (1864), 5 B. & S. 408; 4 New Rep. 169; 33 L. J. Q. B. 256; 11 L. T. 157; 10 Jur. N. S. 1069; 12 W. R. 870; 2 Mar. L. C. 119; 122 E. R. 883, Ex. Ch.

See, generally, INSURANCE.

628. Deed & contract.]—The same sense is to be put upon the words of a contract in an instrument under seal, as would be put upon the same words in an instrument not under seal, for the same intention must be collected from the same words of a contract in writing, whether with or without a seal (LORD ELLENBOROUGH, C.J.).

A covenant is nothing more than an agreement, in construing which we have only to look to the fair meaning of the parties to it (BAYLEY, J.).—*SEDDON v. SENATE* (1810), 13 East, 63; 104 E. R. 290.

629. Contract & wills—Admission of extrinsic evidence—Distinction between two clauses of instrument—Scope of inquiry.]—GRANT v. GRANT (1870), 1 L. R. 5 C. P. 727; 30 L. J. C. P. 272; 22 L. T. 829; 18 W. R. 951, Ex. Ch.

Annotations : — **Distd.** *Re Taylor, Cloak v. Hammond* (1886), 34 Ch. D. 255. **Consd.** *G. W. Ry. & Mid. Ry. v. Bristol Corpn.* (1918), 87 L. J. Ch. 414. **Refd.** *In the Goods of O'Reilly* (1873), 43 L. J. P. 5; *Sherratt v. Mountford* (1873), 8 Ch. App. 928; *Merrill v. Morton* (1881), 17 Ch. D. 382; *Re Parker, Bentham v. Wilson* (1881), 17 Ch. D. 262; *In the Goods of Ashton*, [1892] P. 83; *Bank of New Zealand v. Simpson*, [1900] A. C. 182; *Charrington v. Woolder*, [1914] A. C. 71. **Mentd.** *Re Kilvert's Trusts* (1871), 7 Ch. App. 170; *Re Fry's Estate, Matthews v. Greenman* (1874), 31 L. T. 8; *Wells v. Wells* (1874), L. R. 18 Eq. 504; *Re Gue, Smith v. Gue* (1892), 36 Sol. Jo. 698; *Re Greuc, Bath v. Cannon*, [1914] L. Ch. 131.

630. Specification of patent.]—The patent must be construed in the way in which all documents ought to be construed, by giving the ordinary & natural meaning to the words used, looking at

the instrument as a whole, & having an explanation of any technical words requiring explanation, & if, so construing them, I find something old claimed, in clear & unambiguous words, I must read the claim as applying to what is old, even though the result of such a construction, if correct, would be that the patent must be held invalid in any proceedings taken to challenge its validity. If, however, I find the claim fairly capable of two constructions, one of which might be fatal to the validity of the patent, as making it claim something old, but the other of which construction would avoid such invalidation of the patent, I should certainly prefer to put, & should feel bound to put, such a construction upon the claim as would render the patent valid (NORTH, J.).

—SUGG v. BRAY (1884), *Griffin's Patent Cases*, 210.

Annotation :—**Mentd.** Sharp v. Brauer (1886), Griffin's Patent Cases, 205.

631. Covenant.—In construing a covenant in a lease for the purpose of ascertaining whether it is a covenant for perpetual renewal or not, the same rule of construction applies as in construing any other contract, & the rule is that the intention of the parties to the contract is to be ascertained from the language used.—*SWINBURNE v. MILBURN* (1884). 53 L. J. Q. B. 226; 50 L. T. 311; 48 J. P. 548; 32 W. R. 400, C. A.; *reversd.* on other grounds, 9 App. Cas. 844, H. L.

Annotation :—**Rofd.** Wynn v. Conway Corpn., [1914] 2 Ch. 705.

Bye-laws of corporations.]—See CORPORATIONS, Vol. XIII., p. 333, Nos. 717 *et seq.*

Wills.—*See* WILKS.

Statutes.]—*See* STATUTES.

SUB-SECT. 3.—ACCORDING TO INTENTION OF
PARTIES.

A. In General.

632. General rule.—Reasonable construction.]—If a man will speak of the constructions of relations in our law, commonly when an obscure thing comes in construction of law, men will construe the intent of the parties. As in obscure statutes, & those which admit of a double intendment, & not an express intention, the intents & minds of the makers are to be construed; & in every deed & condition, which are private laws between party & party, a reasonable & equal intention shall be construed, although the words sound to a contrary meaning (*per Cur.*).—**BOLD v. MOLINEUX** (1537), 1 Dyer, 14 b; 73 E. R. 31.

Annotations:—**Consd.** *Roe d. Bamford v. Hayley* (1810), 12 East, 464. **Refd.** *Blamford v. Blamford* (1615), 3 Bulst. 98; *R. & Waller v. Hanger* (1615), 3 Bulst. 1. **Mentd.** *Buckmore's Case* (1609), 8 Co. Rep. 86 a; *Portington's Case* (1613), 10 Co. Rep. 35 a; *Chaloner v. Davis* (1697), 1 Lut. 565.

633. —.] — READE v. BULLOCKE (1544), 1 Dyer, 56 b; 73 E. R. 125.

Annotations:—*Reid*. Altham's Case (1610), 8 Co. Rep. 150 a. *Ment*. Hill v. Pilkington (1591), Cro. Eliz. 244; Lampet's Case (1612), 10 Co. Rep. 46 b; Paradine v. Jane (1647), Aleyn. 26; Reynolds v. Woolmer (1672), Freem. K. B. 41; Cage v. Acton (1699), 1 Ld. Raym. 515; Rock v. Leighton (1699), 1 Salk. 310.

into personalty.—*LANGDON v. KORFF*
(1885), 6 N. S. W. Eq. 30; 2 N. S. W.
W. N. 47.—**AUS.**

633 ii. — .]—LUNT v. ESTABROOKS
(1846). 3 Kerr. 144.—CAN.

633 li. a. — J.—DOE d. CAMPBELL v.
CROOKS (1852). 9 U. C. R. 639.—CAN.

633 iii. —.]—A deed absolute in form decreed to be only a mortgage, on

PART III. SECT. 3, SUB-SECT. 3.—A.

632 I. *General rule—Reasonable construction.*—Where an instrument is susceptible of two meanings, one of which is reasonable & probable, & the other altogether improbable, it ought to be construed in the former sense, unless it is clear that the other construction was intended.—JONES v. MCINTOSH (1874), 2 Pug. 343.—CAN.

§ 33 1. General rule.—Where in a deed dealing with real estate, there is power of sale given to the trustees in terms discretionary merely, but where there is such obvious intention as to render a sale necessary to carry out the purpose of the deed as disclosed in it, the ct. will construe the power along with the rest of the deed as being directory, so as to convert the property

Sect. 3.—Rules of construction: Sub-sect. 3, A.]

634. —.]—(1) Deeds shall be taken most beneficially for the party to whom they are made (STAUNFORD, J.).

(2) A deed shall never be void where the words may be applied to any intent to make it good (STAUNFORD, J.).

(3) Words shall be construed according to the intent of the parties & not otherwise (STAUNFORD, J.).

(4) Every part of the deed ought to be compared with the other & one entire sense made thereof (STAUNFORD, J.).

(5) The nature of an *habendum* is to give, enlarge, & qualify, & the habendum here is good, for the thing in substance was granted in the premises (SAUNDERS, J.).—THROCKMERTON v. TRACY (1555), 1 Plowd. 145; 2 Dyer, 124 a; 75 F. R. 222.

Annotations:—As to (3) *Refd.* Berry v. Perry (1615), 3 Bulst. 62; Petty v. Goddard (1662), O. Bridge 35; Fisher

satisfactory evidence that such was the intention.—HILLOCK v. FRIZZLE & SALTER (1863), 5 All. 655.—CAN.

633 iv. —.]—WIGLE v. STEWART (1869), 28 U. C. R. 427.—CAN.

633 v. —.]—LANG v. MATTHEWMAN (1871), 32 U. C. R. 126.—CAN.

633 vi. —.]—It being the reasonable presumption from all the circumstances that this was the intention of the parties; & the ct. will give effect to that construction.—MARON v. GREAT WESTERN RY. Co. (1871), 31 U. C. R. 73.—CAN.

633 vii. —.]—BLUNT v. MARSH (1888), 1 Terr. L. R. 126.—CAN.

633 viii. —.]—The intention of the parties to a deed is paramount & must govern regardless of consequences.—BARTHEL v. SCOTTEN (1895), 24 S. C. R. 367.—CAN.

633 ix. —.]—The nature of the contract depended upon the intentions of the parties as disclosed by the last instrument signed by them in relation thereto.—PAGNUELO v. CHOQUETTE (1903), 34 S. C. R. 102.—CAN.

633 x. —.]—That, in order to ascertain the scope & effect of the covenant, regard was to be had to the object which it was designed to accomplish.—Re ROBERTSON & DEFOE (1911), 25 O. L. R. 286; 20 O. W. R. 712; 3 O. W. N. 431.—CAN.

633 xi. —.]—Pltf. sold certain lands to defts. under agreement of sale by which defts. covenanted among other things to "establish & maintain a station at the foot of M. street at the point indicated in red on the attached blue print" The letters patent incorporating defts. showed they had no authority to establish a railway station. It appeared from the blue print that "station" meant a railway station on the Grand Trunk Pac. Ry. No such station was established, & pltf. brought action for damages for breach of contract:—*Held*: on a consideration of the facts & surrounding circumstances, as defts. co. had under its charter power to procure or induce by contract or otherwise the Grand Trunk Pac. Ry. Co. to establish & maintain a railway station at the point in question, it would appear to be quite beyond doubt that the co. when entering into the covenant was relying entirely upon its ability to procure the railway co. to locate its station there, & the parties contracted upon that understanding, & the covenant was construed in the light of the above.—NORQUAY v. GRAND TRUNK PACIFIC TOWN & DEVELOPMENT CO., LTD. (1915), 32 W. L. R. 766; 9 W. W. R. 347; 25 D. L. R. 59.—CAN.

633 xii. —.]—CHONG JAN v. QUONG WO ON (1922), 68 D. L. R. 65.—CAN.

633 xiii. —.]—ARUNACHELLA CHETTIAR v. RAMIAH NAIDU (1906), 1 L. R. 30 Mad. 109.—IND.

633 xiv. —.]—JANARDAN v. ANANT (1908), 1 L. R. 32 Bom. 386.—IND.

633 xv. —.]—MANGAMMA v. RAMAMMA (1914), 1 L. R. 37 Mad. 480.—IND.

633 xvi. —.]—JAWAHIR MAL v. INDOMATI (1914), 1 L. R. 36 All. 201.—IND.

633 xvii. —.]—The ct. has to consider what the contract is, which the parties intended to enter into; & where the words are short & defective, to presume what was the probable intent.—TAGGAHT v. TAGGAHT (1803), 1 Sch. & Lef. 87.—IR.

633 xviii. —.]—A covenant by a lessee not to "mortgage, sell, assign, or otherwise part with this present indenture of lease, or the premises hereby demised, or any part or parcel thereof," is not broken by a deposit of the lease, accompanied by a letter of agreement that the depositors shall have a lien thereon "by way of equitable mortgage"—more especially, if, by reason of the lease also containing a covenant against sub-letting, it may be inferred that the primary intention of the parties to it was to protect the landlord from having a new tenant imposed upon him.—M'KAY v. M'NALLY (1831), 4 Ir. L. Rec. 1st ser. 438.—IR.

633 xix. —.]—In a deed, the extensive & ordinary signification of the word heirs will be limited when the intention of the parties to the deed is quite apparent.—WALL v. WRIGHT (1837), 1 Dr. & Wal. 1.—IR.

633 xx. —.]—In a deed or will the word "or" may be construed to mean "&" & "&" may be construed to mean "or," if such a construction be necessary to give effect to the intention of the party by whom the word is used.—WHITE v. SUPPLE (1842), 2 Dr. & War. 471; 1 Con. & Law. 525.—IR.

633 xxi. —.]—HUGHES v. GLENNY, [1842] Arm. M. & O. 387.—IR.

633 xxii. —.]—PLUNKETT v. MANSFIELD (1845), 2 Jo. & Lat. 344.—IR.

633 xxiii. —.]—Re FAYLE & IRISH FEATHER CO.'S CONTRACT, [1918] 1 I. R. 13.—IR.

633 xxiv. —.]—Re MURPHY & GRIFFIN'S CONTRACT, [1919] 1 I. R. 187.—IR.

633 xxv. —.]—*Held*: in the absence of any mention of the restrictive covenant in the agreement for dissolution, the outgoing partner was bound by the covenant, unless it could be shown that such was not the intention of the parties to the deed.—WILKINSON

v. WIGG (1700), 1 P. Wms. 14. As to (5) *Refd.* Lofield's Case (1612), 10 Co. Rep. 106 a; Miller v. Manwaring (1635), Cro. Car. 397; Foote v. Berkeley (1666), O. Bridge 527; Doe d. Timmis v. Steele (1843), 4 Q. B. 663; Burchell v. Clark (1876), 2 C. P. D. 88. *Generally, Mendt.* Wroteale v. Adams (1558), 1 Plowd. 187; Bellamy's Case (1606), 6 Co. Rep. 38 a; Leyfield's Case (1611), 10 Co. Rep. 88 a; Couden v. Clerke (1619), Hob. 29; Farrington's Case (1625), Cro. Car. 10; Berry v. White (1662), O. Bridge 82; R. v. Trinity House (1662), 1 Keb. 331; Lyn v. Wyn (1665), O. Bridge 122; Graves v. Ashenhurst (1673), Freem. K. B. 77; Lawrence v. Dodwell (1699), 1 Ld. Raym. 438; Freshwater v. Eaton (1717), 1 Stra. 49; Scott v. A'Chez (1743), Park. 21; Hunt v. Gunn (1862), 13 C. B. N. S. 226; Kennedy v. Brown (1863), 13 C. B. N. S. 677; Malcolmson v. O'Dea (1863), 10 H. L. Cas. 593; Hanbury v. Jenkins, [1901] 2 Ch. 401.

635. — **Declaration of trust.**—ANON. (1576), Moore, K. B. 608; 72 E. R. 790.

Annotation:—*Consd.* Greenham v. Gibbeson (1834), 3 L. J. C. P. 128.

636. —.]—A., by indenture covenanted, granted & demised, & to farm let, certain lands to A. B. & A. her son, & to the heirs of the said A.; *habendum* to them from the date of the same

v. PETITT (1889), 7 N. Z. L. R. 342.—N.Z.

633 xxvi. —.]—Where one of the parties to a marriage contract which was executed in Scotland, & in the form of a Scotch deed, the trustees under it being also Scottish, was a domiciled Englishman:—*Held*: the law of Scotland, in accordance with presumed intention of parties, & not the law of England, must determine the construction & legal effect of the deed.—CORBET v. WADDELL (1879), 7 R. (Ct. of Sess.) 200; 17 Sc. L. R. 106.—SCOT.

633 xxvii. —.]—*Held*: it was the intention of the parties as shown by the written portion of the charter-party to contract on the basis of a fixed number of lay-days; & that the intention must prevail over the printed reference to the custom of the port.—ROWTOR S.S. Co. v. LOVE & STEWART, [1916] S. C. (H. L.) 199.—SCOT.

633 xxviii. —.]—In terms of a partnership deed of dissolution the retiring partner ceded all his interest in the partnership assets to the continuing partner, in consideration of a payment by the latter, of the amount shown to be due to the retiring partner by a balance-sheet annexed to the said deed. The continuing partner further undertook to discharge & indemnify the other against all existing & future debts of the firm:—*Held*: the general words of the release covered only the liabilities which were within the knowledge of the parties at the time, & that the retiring partner was liable for his *pro rata* share of a partnership liability not known to the parties at the time, nor figuring in the balance-sheet, & which had after the date of dissolution been paid by the continuing partner.—JOFFE v. FRIEDMAN, [1909] T. S. 775.—S. AF.

633 xxix. —.]—However general the expressions in a contract may be they are restricted in interpretation to those matters only which the parties appear to have contemplated as their objects in contracting, & are not extended to others of which they do not appear to have thought.—SHARP'S ESTATE v. SCHERPERS, [1919] C. P. D. 26.—S. AF.

k. — *Whether covenants dependent or independent.*—Whether covenants are independent covenants depends upon the intention of the parties, as far as it can be gathered from the wording of the covenant, & it must be given the greatest weight.—MACARTHUR v. LECKIE (1893), 9 Man. L. R. 110.—CAN.

l. — *Document badly drawn.*—Where an indenture was drawn in artificially, the ct. altered a word, &

indenture until the end of 99 years; no livery of seisin was made:—*Held*: as livery of seisin was necessary to perfect the estate limited in fee, nothing would have passed but an estate at will, if the deed had stopped there; but as an estate for years was limited in the *habendum*, that was good presently by the delivery of the deed, it appearing to be the intention of the parties.

Construction is always to be made so that the intention of the parties may take effect, if it may stand with the rules of law.—*BALDWIN v. MARTON*, *BALDWIN'S CASE* (1589), 2 Co. Rep. 23 a; 1 And. 223; 76 E. R. 436.

Annotations:—*Refd.* Ph. — *v. Plat* (1671), 2 Keb. 865; *Loddington v. Kime* (1695), 3 Lev. 431.

637. —.]—*CLERE'S CASE* (1599), as reported in *Jenk.* 260; 145 E. R. 186.

Annotations:—*Refd.* *Colt & Glover v. Coventry & Lichfield*, Bp. (1617), Hob. 140; *Altord's Case* (1662), O. Bridg. App. 584; *Leicester's Case* (1675), 1 Vent. 278; *Orby v. Mohun* (1706), Freem. Ch. 291; *Thomlinson v. Dighton* (1711), 10 Mod. Rep. 31; *Denn d. Nowell v. Roake* (1826), 5 B. & C. 720. *Mentd.* *Lovie's Case* (1613), 10 Co. Rep. 78 a; *Udal v. Udal* (1648), Aleyn, 81; *Sacheverell v. Frogate* (1671), 1 Vent. 148, 161; *King v. Welling* (1672), 3 Keb. 95; *Wigou v. Garret* (1675), 3 Keb. 536; *Parker v. Kett* (1701), 1 Ld. Raym. 658; *Fitzgerald v. Fauconberge* (1729), Fitz-G. 207; *Maddison v. Andrew* (1747), 1 Ves. Sen. 57; *Hurst v. Winchelsea* (1758), 2 Keny. 444; *Buckland v. Barton* (1793), 2 Hy. Bl. 136; *Stauden v. Stauden* (1795), 2 Vos. 589; *Maundrell v. Maundrell* (1805), 10 Ves. 246; *Roe d. Berkeley v. York*, Archbp. (1805), 6 East, 86; *Morgan d. Surman v. Surman* (1808), 1 Taunt. 289; *Langley v. Sneyd* (1822), 7 Moore, C. P. 165; *Denn d. Nowell v. Roake* (1830), 6 Bing. 475; *Doe d. Caldecott v. Johnson* (1844), 7 Man. & G. 1047; *Logan v. Bell* (1845), 1 C. B. 872.

638. —.]—The rules laid down in respect of the construction of deeds are founded in law, reason & common sense; that they shall operate according to the intention of the parties, if by law they may; & if they cannot operate in one form they shall operate in that, which by law will effectuate the intention (LORD MANSFIELD, C.J.).—*GOODTITLE d. EDWARDS v. BAILEY* (1777), 2 Cowp. 597; 98 E. R. 1200.

Annotations:—*Consd.* *Roe d. Berkeley v. York*, Archbp. (1805), 6 East, 86. *Refd.* *Corp. v. Corp* (1793), 1 Phillim. 11, n. *Mentd.* *Halford v. Dillon* (1820), 2 Brod. & Bing. 12; *Right d. Jefferys v. Bucknoll* (1831), 2 B. & Ad. 278.

639. —.]—*GIBSON v. MINET* (1791), 2 Bro. Parl. Cas. 48; 1 Hy. Bl. 569; 1 E. R. 784; *affg. S. C. sub nom. MINET v. GIBSON* (1789), 3 Term Rep. 481.

Annotations:—*Refd.* *Master v. Miller* (1791), 4 Term Rep. 320; *Vagliano v. Bank of England* (1889), 23 Q. B. D. 243. *Mentd.* *Bishop v. Hayward* (1791), 4 Term Rep. 470; *Bennett v. Farnell* (1807), 1 Camp. Addenda 180 c; *Ex p. Royal Bank of Scotland* (1815), 19 Ves. 310; *Stone v. Marsh* (1827), 6 B. & C. 551; *Re Jones, Ex p. Jones* (1833), 3 Deac. & Ch. 525; *Taylor v. Mosely* (1833), 6 C. & P. 273; *Saunderson v. Piper* (1839), 5 Bing. N. C. 425; *Beeman v. Duck* (1843), 11 M. & W. 251; *White v. Spettigue* (1845), 13 M. & W. 603; *Hower v. Allan* (1863), 2 H. & C. 688; *Ashpittel v. Bryan* (1864), 5 B. & S. 723; *Re Harris* (1864), 13 W. R. 275; *Sewell v. Burdick* (1884), 10 App. Cas. 74; *Chamberlain v. Young*, [1893] 2 Q. B. 206.

640. —.]—I conceive that all deeds are to be construed, not only strictly according to their words, but, so far as is possible without infringing any rule of law, in such a way as to effectuate the intention of the parties (PEARSON, J.).—*HILBERS*

v. PARKINSON (1883), 25 Ch. D. 200; 49 L. T. 502; 32 W. R. 315.

Annotations:—*Mentd.* *Re Anstis, Chetwynd v. Morgan*, *Morgan v. Chetwynd* (1886), 31 Ch. D. 596; *Mills v. Fox* (1887), 37 Ch. D. 153; *Re Dunsany's Settlement*, *Nott v. Dunsany*, [1906] 1 Ch. 578; *Re E. D. S.*, [1914] 1 Ch. 613.

641. —.]—Deeds shall be construed so as to effectuate the intention for which they were made.—*ANON.* (1589), Cro. Eliz. 163; 78 E. R. 421.

642. —.]—*HEWET v. PAINTER* (1612), 1 Bulst. 174; 80 E. R. 864.

643. —.]—It is the office of every interpreter in all cases, as well divine as humane, to find the true intent & meaning of the parties, if by any way this may be, & when this is once found out, then he ought so to marshal the business, that he swerve not from the rules of law (COKE, C.J.).—*BERRY v. PERRY* (1616), 3 Bulst. 62; 81 E. R. 54; *affd. sub nom. PERRY v. BERRY* (1617), 3 Bulst. 69, Ex. Ch.

Annotations:—*Mentd.* *Elstoun v. Cummins* (1740), 2 Stra. 1144; *Winter v. White* (1819), 3 Moore, C. P. 874.

644. —.]—*TRENCHARD v. HOSKINS*, No. 710, *post*.

645. —.]—*BECK'S CASE* (1630), Litt. 344; 124 E. R. 277.

Annotations:—*Refd.* *Fisher v. Wigg* (1699), 1 Ld. Raym. 622. *Mentd.* *Luddington v. Kime* (1697), 1 Ld. Raym. 203; *Scattergood v. Edge* (1699), 12 Mod. Rep. 278; *Idle v. Cooke* (1705), 2 Ld. Raym. 1144; *Tapner d. Peckham v. Merlott* (1739), Willes, 177; *Doe d. Whayman v. Chaplin* (1810), 3 Taunt. 120.

646. —.]—Judges are to make such exposition of deeds, as that the meaning of the parties may take effect (BARKLEY, J.).—*BLAND'S CASE* (1632), Godb. 448; 78 E. R. 203.

647. —.]—All deeds ought to be construed according to the intention of the parties.—*HERRING v. BROWN* (1688), as reported in *Carth.* 22; 90 E. R. 618, Ex. Ch.

Annotation:—*Refd.* *Tyrell v. Marsh* (1825), 3 Bing. 31.

648. —.]—*ORBY v. MOHUN* (1706), Freem. Ch. 291; *Gilb. Ch.* 45; *Prec. Ch.* 257; 3 Rep. Ch. 102; 2 Vern. 531, 542; 22 E. R. 1218.

Annotations:—*Mentd.* *Evelyn v. Evelyn* (1731), 2 P. Wms. 659; *Harvey v. Harvey* (1739), Barn. Ch. 103; *Taylor d. Atkyns v. Horde* (1757), 1 Keny. 143; *Doe d. Douglas v. Lock* (1835), 2 Ad. & El. 705; *Doe d. Biddulph v. Holo* (1850), 15 Q. B. 818.

649. —.]—A conveyance cannot operate by way of covenant to stand seised, where the intent of the party who conveys appears to be contrary to such a construction.—*DAW v. NEWBOROUGH* (1716), 1 Com. 242; 92 E. R. 1053.

650. —.]—It is a known maxim in law, that *Benigne faciendae sunt interpretationes chartarum ut res magis valeat quam pereat*. There is another that *Verba intentioni et non e contra debent interpretari*. The construction of deeds ought to be favourable, & as near to the apparent intent of the parties as possibly may be & as the law will permit. Too much regard is not to be had to the natural & proper signification of words & sentences to prevent the simple intention of the parties from taking effect (WILLES, C.J.).—*PAIKHURST v. SMITH* (1742), Willes, 327; 125 E. R. 1197; *sub*

construed the residue according to the necessary intention of the parties.—*WELSHMAN v. ROBERTSON* (1875), 1 V. L. R. 124.—*AUS.*

m.—*Mutual mistake may be ignored*.—The parties to a contract may ignore a mutual mistake & carry out their agreement according to their real intention.—*JOHNSON v. CARLIN* (1914), 20 B. C. R. 520.—*CAN.*

n.—*Exclusion of rule—Legal effect binding*.—*Held*: deft. had discharged the mtge. & bill of sale, & it was immaterial that he had no intention of doing

so, or that he was ignorant of the legal effect of his act.—*MAY v. SIEVEWRIGHT* (1893), (1825–1897), N. B. Dig. 314.—*CAN.*

o.—*—*.—A deed, executed for no consideration but which purported to convey title & which was not intended by both the parties to be mere sham, will, if it is known to the grantee & partially acted upon, & if the grantor knew the nature of the transaction, operate to convey the title which it purports to convey & not merely what the grantor intended

to convey.—*AMIRTHATHAMMAL v. PERIASAMI PILLAI* (1909), 1 L. R. 32 Mad. 325.—*IND.*

p.—*—*.—*Held*: although A. & B. only intended to bind themselves during the existence of the mtge. to the bank they were liable under their letter so long as it remained unrecalled & the vessel was in fact mortgaged to any one.—*BRITANNIA STEAMSHIP INSURANCE ASSCOON, LTD. v. DUFF* (1909), S. C. 1261; 46 S. L. R. 894; 2 So. L. T. 193.—*SCOT.*

ect. 3.—Rules of construction: Sub-sect. 3, A.]

om. SMITH *v.* PACKHURST, 3 Atk. 135, H. L.; *ffg.* S. C. *sub nom.* SMITH *d.* DORMER *v.* PARKURST (1740), 7 Mod. Rep. 366.

Annotations.—*Consd.* Cholmondeley *v.* Clinton (1820), 2 Jac. & W. 1. *Apld.* Colmore *v.* Tyndall (1823), 2 Y. & J. 605; Ford *v.* Beech (1848), 11 Q. B. 852. *Refd.* Burton *v.* Barclay (1831), 9 L. J. O. S. C. P. 231; Pannell *v.* Mill (1846), 3 C. B. 825; Beaumont *v.* Salisbury (1854), 24 L. T. O. S. 166. *Mentd.* Pomfret *v.* Windsor (1752), 2 Ves. Sen. 472; Garth *v.* Cotton (1753), 3 Atk. 751; Doe *d.* Atkyns *v.* Horde (1777), 2 Cowp. 689; Doe *d.* Foster *v.* Williams (1777), 2 Cowp. 621; Doe *d.* Jones *v.* Jones (1823), 1 B. & C. 238; Doe *d.* Henry *v.* Gustard (1842), 4 Man. & G. 987.

651. —.]—In doubtful cases where the parties express themselves inaccurately, the cts. will expound their contracts according to their intention. It is a maxim in law so to judge of contracts as to prevent a multiplicity of action (BULLER, J.).—SMITH *v.* MAPLEBACK (1786), 1 Term Rep. 441; 99 E. R. 1186.

Annotations.—*Refd.* Ford *v.* Beech (1848), 11 Q. B. 852. *Mentd.* R. *v.* Fauntleroy (1824), 2 Bing. 413; Preece *v.* Corrie (1828), 5 Bing. 24; Doe *d.* Courtall *v.* Thomas (1829), 9 B. & C. 288; Pollock *v.* Stacey (1847), 9 Q. B. 1033; Charles *v.* Alton (1854), 2 C. L. R. 1764.

652. —.]—The ct. will construe a settlement according to the intent of the parties, though the literal expression be otherwise.—WOODCOCK *v.* DORSET (DUKE) (1792), 3 Bro. C. C. 569; 29 E. R. 704, L. C.

Annotations.—*Consd.* Bulmer *v.* Jay (1830), 4 Sim. 48; Jeyes *v.* Savage (1875), 10 Ch. App. 555. *Refd.* Hope *v.* Clifden (1801), 6 Ves. 499; Powis *v.* Burdet (1804), 9 Ves. 428; Schenck *v.* Leigh (1804), 9 Ves. 300; Howgrave *v.* Cartier (1814), 3 Ves. & B. 79; Spencer *v.* Spencer (1836), 5 L. J. Ch. 310; Whatford *v.* Moore (1837), 3 My. & Cr. 270; Woodhouse *v.* Woodhouse (1841), 5 Jur. 404; Bythesca *v.* Bythesca (1854), 23 L. J. Ch. 1004; Jopp *v.* Wood (1860), 28 Beav. 53; Currie *v.* Larkins (1864), 4 De G. J. & Sm. 245; *Re* Watson's Trusts (1870), 39 L. J. Ch. 770; Day *v.* Radcliffe (1876), 3 Ch. D. 654; *Re* Ball, Slattery *v.* Ball (1887), 36 Ch. D. 508; *Re* Hamlet, Stephen *v.* Cunningham (1888), 38 Ch. D. 183. *Mentd.* Driver *v.* Frank (1814), 3 M. & S. 25; Maitland *v.* Chalie (1822), 6 Madd. 243; Fry *v.* Sherborne (1829), 3 Sim. 243; Evans *v.* Scott (1847), 1 H. L. Cas. 43; Jeffery *v.* Jeffery (1849), 17 Sim. 26; Baillie *v.* Jackson (1853), 1 Sm. & G. 175; Jackson *v.* Dover (1864), 4 New Rep. 136; Whitman *v.* Aitken (1866), L. R. 2 Eq. 414; *Re* Orlebar's Settlement, Trusts (1875), L. R. 20 Eq. 711; Trehanne *v.* Layton (1875), L. R. 10 Q. B. 459.

653. —.]—(1) In the construction of agreements & covenants the intention of the parties is principally to be attended to (BULLER, J.).

(2) We do not do justice to the parties unless we look to the whole deed, & infer from that their real intention (BULLER, J.).

(3) It is certainly true that the words of a covenant are to be taken most strongly against the covenantor, but that must be qualified by the observation that a due regard must be paid to the intention of the parties as collected from the whole context of the instrument (LORD ELDON, C.J.).—BROWNING *v.* WRIGHT (1799), 2 Bos. & P. 13; 126 E. R. 1128.

Annotations.—*As to* (1) *Consd.* Foord *v.* Wilson (1818), 8 Taunt. 543. *Refd.* Howell *v.* Richards (1809), 11 East, 633; Barton *v.* Fitzgerald (1812), 15 East, 530; Milner *v.* Horton (1824), M'Cle. 647. *As to* (3) *Consd.* Hesse *v.* Stevenson (1803), 3 Bos. & P. 565; Sicklemore *v.* Thistleton (1817), 6 M. & S. 9. *Refd.* Nind *v.* Marshall (1819), 1 Brod. & Bing. 319; Seward *v.* Anstey (1825), 10 Moore, C. P. 55; Smith *v.* Compton (1832), 3 B. & Ad. 189; Teulon *v.* Curtis (1832), You. 610; Stannard *v.* Forbes (1837), 6 Ad. & El. 572; Young *v.* Raincock (1849), 7 C. B. 310. *Generally, Refd.* Farrall *v.* Hilditch (1859), 28 L. J. C. P. 221. *Mentd.* Budd *v.* Fairmaner (1831), 8 Bing. 48; Thackeray *v.* Wood (1864), 5 B. & S. 325; David *v.* Sabin, [1893] 1 Ch. 523.

654. —.]—The rule to be collected from all the cases is, that the intention of the parties, as declared by the words of the instrument, must govern the construction (LORD ELLENBOROUGH,

C.J.).—POOLE *v.* BENTLEY (1810), 12 East, 168; 104 E. R. 86.

Annotations.—*Consd.* Pinero *v.* Judson (1829), 6 Bing. 206. *Refd.* Doe *d.* Pearson *v.* Ries (1832), 8 Bing. 178; Warman *v.* Faithfull (1834), 5 B. & Ad. 1042; Chapman *v.* Bluck (1838), 4 Bing N. C. 187; Doe *d.* Morgan *v.* Powell (1844), 7 Man. & G. 980; Stratton *v.* Pettit (1855), 16 C. B. 420. *Mentd.* Tempest *v.* Rawling (1810), 13 East, 18; Doe *d.* Walker *v.* Groves (1812), 15 East, 244.

655. —.]—SEDDON *v.* SENATE, No. 628, ante.

656. —.]—Whether an instrument shall be a lease or only an agreement for a lease, depends on the intention of the parties, as it is to be collected from the instrument.—MORGAN *d.* DOWDING *v.* BISSELL (1810), 3 Taunt. 65; 128 E. R. 27.

Annotations.—*Consd.* Curling *v.* Mills (1843), 6 Man. & G. 173; Stratton *v.* Pettit (1855), 16 C. B. 420. *Refd.* Christie *v.* Lewis (1821), 2 Brod. & Bing. 410; Dunk *v.* Hunter (1822), 5 B. & Ad. 322; Chapman *v.* Bluck (1838), 4 Bing N. C. 187; Doe *d.* Phillip *v.* Benjamin (1839), 9 Ad. & El. 644; Jones *v.* Reynolds (1841), 1 Q. B. 506; Doe *d.* Morgan *v.* Powell (1844), 7 Man. & G. 980. *Mentd.* Alderman *v.* Neate (1839), 4 M. & W. 713.

657. —.]—Where clearly expressed.]—HOWGRAVE *v.* CARTIER (1814), 3 Ves. & B. 79; Coop. G. 66; 35 E. R. 409.

Annotations.—*Consd.* Hotchkiss *v.* Humfrey (1817), 2 Madd. 65; Perfect *v.* Curzon (1820), 5 Madd. 442; Whatford *v.* Moore (1837), 3 My. & Cr. 270; Farrer *v.* Barker (1852), 9 Hare, 737; Day *v.* Robinson (1876), 3 Ch. D. 654; *Re* Roberts, Percival *v.* Roberts, [1903] 2 Ch. 200. *Refd.* Poulett *v.* Poulett (1821), 6 Madd. 167; Fitzgerald *v.* Field (1826), 1 Russ. 416; Torres *v.* Franco (1830), 1 Russ. & M. 649; Woodhouse *v.* Woodhouse (1841), 5 Jur. 404; Bouverie *v.* Bouverie (1847), 2 Ph. 349; Baillie *v.* Jackson (1853), 1 Sm. & G. 175; *Re* Morse's Settlement (1855), 21 Beav. 174; Swallow *v.* Bins (1855), 1 K. & J. 417; Remnant *v.* Hood (1859), 27 Beav. 74; *Re* Wollaston's Settlement (1860), 27 Beav. 642; Dalton *v.* Hill (1862), 6 L. T. 446; Currie *v.* Larkins (1863), 9 L. T. 638; Jackson *v.* Dover (1864), 2 Hem. & M. 209; Dixon *v.* Barkshire (1865), 34 Beav. 537; Jeyes *v.* Savage (1875), 10 Ch. App. 555; Wakefield *v.* Maffet (1885), 10 App. Cas. 422; *Re* Hamlet, Stephen *v.* Cunningham (1888), 39 Ch. D. 426; *Re* Poultny, Poultny *v.* Poultny, [1912] 1 Ch. 245. *Mentd.* Clutterbuck *v.* Edwards (1832), 2 Russ. & M. 577; Rammell *v.* Gilloy (1845), 15 L. J. Ch. 35; Bythesca *v.* Bythesca (1854), 23 L. J. Ch. 1004.

658. —.]—Lease for years by indenture rendering rent, & lessee covenants with lessor that he will pay the rent, & will not assign without leave of lessor, provided that if the rent be in arrear, or if all or any of the covenants hereinafter contained on the part of lessee shall be broken, it shall be lawful for lessor to re-enter; & there were no covenants on the part of lessee after the proviso, but only a covenant by lessor that lessee paying, etc., & performing all & every the covenants hereinafter contained on his part to be performed, etc., should quietly enjoy:—*Held*: lessor could not re-enter for breach of the covenant not to assign, for the proviso is restrained by the word hereinafter to subsequent covenants, & though there were none such, yet the ct. could not reject the word.

If we could clearly see the intention of the parties we ought to adopt that construction which would best give effect to the intention (BAYLEY, J.).—DOE *d.* SPENCER *v.* GODWIN (1815), 4 M. & S. 265; 105 E. R. 833.

Annotations.—*Refd.* Doe *d.* Abdy *v.* Stevens (1832), 3 B. & Ad. 299; Strickland *v.* Maxwell (1834), 4 Tyr. 346. 659. —.]—COLMOORE *v.* TYNDALL (1828), 2 Y. & J. 605; 148 E. R. 1060, Ex. Ch.

Annotations.—*Apld.* Beaumont *v.* Salisbury (1854), 19 Beav. 198. *Refd.* Lewis *v.* Rees (1850), 3 K. & J. 132.

660. —.]—It is a good rule of construction that deeds should be construed so as to give effect to the intention of the parties (ABBOTT, C.J.).—EVANS *v.* VAUGHAN (1825), 4 B. & C. 261; 6 Dow. & Ry. K. B. 349; 3 L. J. O. S. K. B. 213; 107 E. R. 1056.

Annotation.—*Mentd.* Carpenter *v.* Parker (1857), 3 C. B. N. S. 206.

661. —.]—Our office is to ascertain the in-

tent of the parties, &, if not contrary to law, to carry their intent into execution (BEST, C.J.).—*CRISDEE v. BOLTON* (1827), 3 C. & P. 240.

Annotation:—*Mentd.* *Saintier v. Ferguson* (1849), 7 C. B. 716.

662. —.]—The question in this & other cases of construction of written documents is, not what was the intention of the parties, but what is the meaning of the words they have used (DENMAN, C.J.).—*RICKMAN v. CARSTAIRS* (1833), 5 B. & Ad. 651; 2 Nev. & M. K. B. 562; 3 L. J. K. B. 28; 110 E. R. 931.

Annotations:—*Refd.* *Beacon Life & Fire Assce. v. Gibb* (1862), 1 Moo. P. C. C. N. S. 73. *Mentd.* *Tobin v. Harford* (1864), 4 New Rep. 373; *Joyce v. Realm Insee.* (1872), L. R. 7 Q. B. 580; *Wells, Fargo v. Pacific Insee.* (1872), 2 Asp. M. L. C. 111.

663. — *Dependent or independent covenants.*—]

—The rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention & meaning of the parties as it appears on the instrument, & by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way (TINDAL, C.J.).—*STAVERS v. CURLING* (1838), 3 Bing. N. C. 355; 2 Hodg. 237; 3 Scott, 740; 6 L. J. C. P. 41; 132 E. R. 447.

Annotations:—*Consd.* *Fishmongers' Co. v. Robertson* (1813), 5 Man. & G. 131; *Seeger v. Duthie* (1860), 8 C. B. N. S. 45; *Kidner v. Stimpson* (1918), 35 T. L. R. 63. *Refd.* *Sibthorp v. Brunel* (1849), 3 Exch. 826; *Newson v. Smythies* (1858), 28 L. J. Ex. 97; *Bradford v. Williams* (1872), 41 L. J. Ex. 164. *Mentd.* *Oliver v. Fleiden* (1849), 18 L. J. Ex. 353; *Grey v. Friar* (1854), 4 H. L. Cas. 565; *Schmidt v. Boyd* (1866), 15 L. T. 455; *Richardson v. Stanton*, *Stanton v. Richardson* (1872), 41 L. J. C. P. 180; *Bastin v. Bidwell* (1881), 18 Ch. D. 238; *Parkin v. South Hetton Coal Co.* (1907), 97 L. T. 98.

See, further, CONTRACT, Vol. XII., p. 414, Nos. 3310 et seq.

664. —.]—The ct., when it can do so consistently with the instrument executed by the parties, will do that which is the highest equity, namely, make an equality between parties who stand in the same relation; but it cannot do that contrary to the plain meaning of a deed (LORD LANGDALE, M.R.).—*HULME v. CHITTY* (1846), 9 Beav. 437; 7 L. T. O. S. 278; 10 Jur. 323; 50 E. R. 411.

665. — *Intention expressed.*—]—In *assumpsit* by the payee of two promissory notes for £200 & £140 against the maker, deft. pleaded in bar that, after the notes became due, it was mutually agreed, by pltf., deft. & A., that A. should pay to pltf. £25 *per annum* by quarterly payments, &, as long as A. so paid, the right of action on the notes should be suspended; & that A. had hitherto made the quarterly payments:—*Held*: the plea offered no answer, inasmuch as, if pltf. were barred of his action on the notes for any period, his right of action would by law be extinguished altogether, which appeared not to be the intention of the agreement; & that therefore the agreement must be construed as giving deft. merely a right of action for breach thereof if pltf. sued while the payments were continued.

In adjudicating upon the construction & effect in law of this agreement, the common & universal principle ought to be applied: namely, that it ought to receive that construction which its language will admit, & which will best effectuate the intention of the parties, to be collected from the whole of the agreement, & that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent (PARKE, B.).

—*FORD v. BEECH* (1848), 11 Q. B. 852; 17 L. J. Q. B. 114; 11 L. T. O. S. 45; 12 Jur. 310; 116 E. R. 693, Ex. Ch.; *reusg.* (1846), 11 Q. B. 842; *subsequent proceedings, sub nom. BEECH v. FORD*, 7 Hare, 208, L. C.

Annotations:—*Consd.* *Baker v. Ingall*, [1912] 3 K. B. 106. *Refd.* *Coddington v. Paleologo* (1867), L. R. 2 Exch. 193; *Newington v. Levy* (1870), L. R. 6 C. P. 180; *Glamorgan Coal Co. v. Glamorganshire Standing Joint Committee*, *Powell Duffryn Steam Coal Co. v. Same*, [1915] 1 K. B. 471; *Re Sutro & Hellbut*, Symons, [1917] 2 K. B. 348. *Mentd.* *Roberts v. Campbell* (1847), 10 L. T. O. S. 183; *Gibbons v. Vouillon* (1849), 8 C. B. 483; *Webb v. Spicer* (1849), 13 Q. B. 894; *Moss v. Hall* (1850), 5 Exch. 46; *Overton v. Harvey* (1850), 9 C. B. 324; *Belshaw v. Bush* (1851), 11 C. B. 191; *Orme v. Galloway* (1854), 9 Exch. 544; *Bottomley v. Nuttall* (1858), 5 C. B. N. S. 122; *Foley v. Fletcher* (1858), 28 L. J. Ex. 100; *Frazer v. Jordan* (1858), 8 E. & B. 303; *Rayner v. Fussey* (1859), 28 L. J. Ex. 132; *Crowe v. Lysaght* (1861), 4 L. T. 744; *Owens v. Pizey* (1862), 7 L. T. 350; *Walker v. Nevill* (1864), 3 H. & C. 403; *Hay v. Jones* (1865), 34 L. J. C. P. 306; *Slater v. Jones*, *Capes v. Ball* (1873), 42 L. J. Ex. 122.

666. — —.]—A. being seised in fee of a moiety of certain lands, & B. being seised for life of the other moiety, they, in 1805, by indenture, reciting that they were entitled thereto as tenants in common, & that they had agreed to grant a perpetual lease thereof to C., his heirs, etc., granted, demised, etc., the same to C., "his heirs, exors., administrators, & assigns, for ever," to hold from a day then past unto & to the use of C., "his heirs, exors., administrators, & assigns for ever"; yielding & paying therefor yearly & every year to A. & B., their heirs, etc., the clear yearly rent or sum of £120, half-yearly, etc. The deed contained all the covenants usually found in an ordinary lease:—*Held*: in the absence of proof, that, at the date of the deed, the premises were in the occupation of tenants, so that a reversion only could pass, & the expressed intention of the parties precluding the ct. from presuming that there had been livery of seisin, the deed could not operate as a conveyance of the fee, subject to a rent-charge, but created only a tenancy from year to year.—*DOE d. ROBERTSON v. GARDINER* (1852), 12 C. B. 319; 21 L. J. C. P. 222; 19 L. T. O. S. 168, 204; 138 E. R. 927.

Annotation:—*Mentd.* *Hardon v. Hesketh* (1859), 4 H. & N. 175.

667. — —.]—This court deals with a deed according to the clear intention of the parties appearing in the four corners of the deed itself. If the court sees an intention clearly & distinctly established by it, it has no difficulty in carrying that into effect (ROMILLY, M.R.).—*BEAUMONT v. SALISBURY (MARQUIS)* (1854), 19 Beav. 198; 3 Eq. Rep. 369; 24 L. J. Ch. 94; 24 L. T. O. S. 166; 1 Jur. N. S. 458; 52 E. R. 325.

Annotation:—*Refd.* *Lewis v. Rees* (1856), 3 K. & J. 132.

668. — —.]—Defts., as sureties for a railway co., by deed covenanted to pay to plfs. as trustees for the Railway Clearing Committee, under the Railway Clearing Act, 1850, such balance & sums as, from time to time should be settled & adjusted by the secretary of such committee as due from the co., pursuant to the Act, or should be settled or determined by such secretary as the amount to be from time to time contributed to the funds of the clearing system by the co.; or should, in case of difference respecting the accounts of the clearing system, be decided by such committee to be the balance or sum payable by the co. to the committee; or should in any way become a debt due by the co. to the committee pursuant to the Act; or should by such secretary be demanded of the co. by a written demand in the form given in the schedule to the said Act; & reciting that it was of paramount importance that the adjustment

sect. 8.—Rules of construction: Sub-sect. 3, A. & B.]

if such accounts by the clearing system should not be disputed, & and should be indisputable, it was, by the deed, further declared & agreed that the sureties were not to be at liberty to dispute the amount which should be so settled & adjusted by such secretary, as due from the co. to such committee, or which should be settled & determined by such secretary, as the amount to be contributed to the funds of the clearing system by the co.; & which should be decided by the clearing committee to be the balance or sum payable by the co.; or the amount which should as aforesaid be demanded by the secretary; & every such amount should be payable & forthwith paid by the said sureties, notwithstanding any error or alleged error in law, in principle or in fact, & no plea or defence should be admissible, or evidence be necessary or required, in any action or proceedings under the said deed which should be admissible or required against the said co. under the said Act:—*Held*: construing the words of the covenant according to their obvious & ordinarily reasonable meaning, the demand of the secretary, made in accordance with terms of the covenant, was alone sufficient to entitle plffs. to sue defts. for the amount so demanded, it being the manifest intention of the parties that such demand should be conclusive in the matter.—*BENSON v. DUNN* (1870), 23 L. T. 848.

669. —Where intention doubtful.]—Where the intention of the parties to a contract is sufficiently apparent, effect must be given to it in that sense, though some violence be thereby done to its words. Where the intention is doubtful, the safest course is to take the words in their ordinary sense (*CRESSWELL, J.*).—*WILSON v. BEVAN* (1849), 7 C. B. 673; 18 L. J. C. P. 244; 13 L. T. O. S. 119; 137 E. R. 266.

670. ——In construing a written contract, the ct. will if possible so read it as to effectuate the intention of the parties, rather than defeat it.—*STRATTON v. PETTIT* (1855), 16 C. B. 420; 24 L. J. C. P. 182; 25 L. T. O. S. 216; 1 Jur. N. S. 662; 3 W. R. 548; 3 C. L. R. 995; 139 E. R. 822.

Annotations:—*Mentd.* Davis v. Jones (1856), 17 C. B. 625; Parker v. Taswell (1858), 6 W. R. 608; Bond v. Rosling (1861), 1 B. & S. 371; Rollason v. Leon (1861), 7 H. & N. 73; Tiley v. Mollett (1864), 18 C. B. N. S. 298; Stranks v. St. John (1867), L. R. 2 C. P. 376.

671. ——It is a general principle that when parties enter into an agreement & the understanding is, that it is to be reduced into writing, or if it is already in a written form, that it is to be signed before it is acted upon, or is to take effect, it is not binding upon them until it is so written or signed.—*BOYD v. HIND* (1857), 1 H. & N. 938; 26 L. J. Ex. 164; 28 L. T. O. S. 358; 3 Jur. N. S. 566; 5 W. R. 361; 156 E. R. 1481, Ex. Ch.

Annotations:—*Mentd.* Slater v. Jones (1873), L. R. 8 Exch. 186; Lewis v. Leonard (1880), 5 Ex. D. 165; West Yorkshire Darracq Agency v. Coleridge, [1911] 2 K. B. 326.

672. ——In Nov. 1817, a married woman suffered a recovery of real estate belonging to her, the uses being declared to be as the husband & wife should jointly appoint, with remainder to husband for life, remainder to wife for life, & an ultimate remainder to the wife in fee. Two days afterwards the husband & wife jointly appointed to A. & B. upon such trusts as the husband should appoint, & in default, upon trusts similar to the uses mentioned. In Mar. 1818, the husband appointed, & A. & B. conveyed the estate to C. upon trust to sell, & to pay a sum advanced to the

husband, & to pay the residue to the husband, his exors., administrators or assigns, & to convey the unsold estate to the husband, his heirs or assigns, or as he or they should direct:—*Held*: the deeds of 1817 & 1818 could not be regarded as one transaction; & the deed of 1818 was not merely a mtge., but the ulterior uses of the deed of 1817 were completely changed thereby.

The question was whether the deed of Mar. 1818, operated only to charge this estate by way of mtge., or to alter the limitations of the estate. That depended on the intention of the parties, which was to be collected from the deed. The intention here evidently was not only to create a charge, but also to alter the ultimate limitations (*TURNER, L.J.*).—*HEATHER v. O'NEIL* (1858), 2 De G. & J. 399; 27 L. J. Ch. 512; 31 L. T. O. S. 125; 4 Jur. N. S. 957; 6 W. R. 484; 44 E. R. 1044, L. C. & L. J.J.

Annotations:—*Refd.* Atkinson v. Smith (1858), 3 De G. & J. 186; Jones v. Davies (1878), 8 Ch. D. 205; Re Byron's Settlement, Williams v. Mitchell, [1891] 3 Ch. 474.

673. ——The question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in the deed; a most important distinction in all cases of construction, the disregard of which often leads to erroneous conclusions (*LORD WENSLEYDALE*).—*MONYPENNY v. MONYPENNY* (1861), 9 H. L. Cas. 114; 31 L. J. Ch. 269; 11 E. R. 671, II. L.; *affg.* (1859), 3 De G. & J. 572, L. C.

Annotations:—*Refd.* Piggett v. Stratton (1859), 1 De G. F. & J. 33. *Mentd.* Ford v. Tynte (1865), 34 L. J. Ch. 455, n.; Nicholls v. Bulwer (1870), L. R. 6 C. P. 281; Minchin v. Minchin (1871), 19 W. R. 993.

674. —Whether collateral matters can be considered.]—Every deed must be construed, according to that which, looking at the document itself, appears to be the intention of the parties. It is true that in construing a deed the ct. cannot look at collateral matters, but the intention of the deed as appearing upon the face of it must be regarded (*MARTIN, B.*).—*SOUTH EASTERN RY. CO. v. WARTON* (1861), 6 H. & N. 520; 31 L. J. Ex. 515; 158 E. R. 214.

675. —Though terms unreasonable & oppressive.]—The language of a contract, where it admits of it, must receive such a construction as is consistent with reason & justice, but where it appears, from the whole tenor of the agreement, that the parties thereto intended, the one to insist upon, & the other to submit to, conditions, however unreasonable & oppressive, the ct. will in such case give effect to them.—*STADHARD v. LEE* (1863), 3 B. & S. 364; 1 New Rep. 433; 32 L. J. Q. B. 75; 7 L. T. 850; 11 W. R. 361; 122 E. R. 138; *sub nom.* STANNARD v. LEE, 9 Jur. N. S. 908.

Annotations:—*Refd.* Batterbury v. Vyse (1863), 2 H. & C. 42; Foster & Dicksee v. Hastings Corpn. (1903), 87 L. T. 736; Diggle v. Ogston Motor Co. (1915), 84 L. J. K. B. 2165.

676. ——In construing covenants, the fulfilment of the evident intention and meaning of the parties to them must be looked at, not confining oneself within the narrow limits of a literal interpretation, but taking a more liberal & extended view, & contemplating at once the whole scope & object of the deed in which they are contained (*HUDDLESTON, B.*).—*WIGSELL v. SCHOOL FOR THE INDIGENT BLIND CORPN.* (1880), 43 L. T. 218.

Annotation:—*Mentd.* Joyner v. Weeks, [1891] 2 Q. B. 31.

677. —Priority of deeds executed on same day.]—The question in this case is merely one of intention. The two agreements between these parties were entered into on the same day; the agreements, therefore, being cotemporaneous must

be taken to form but one agreement (SIR J. CROSS).—*Re MOORE, Ex p. EDWARDS* (1836), 1 Deac. 611, Ct. of R.

Annotation.—*Mentd. Re Carter & Justins, Ex p. Sheffield Union Banking Co.* (1865), 13 L. T. 477.

678. ———.]—When two deeds relating to the same subject-matter are executed on the same day the ct. will inquire which of them was executed first.

But if there is anything in the deeds themselves to show an intention either that they shall take effect *pari passu*, or that one should take effect in priority to the other, the ct. will presume that they were executed in such an order as to give effect to the manifest intention.—*GARTSIDE v. SILKSTONE & DODSWORTH COAL & IRON CO.* (1882), 21 Ch. D. 702; 47 L. T. 76; 31 W. R. 36; *sub nom. GARTSIDE v. SILKSTONE & DODSWORTH COLLIERIES CO., HOLDEN v. SILKSTONE & DODSWORTH COLLIERIES CO.*, 51 L. J. Ch. 828.

Annotation.—*Consd. James v. Boythorpe Colliery Co.* (1890), 2 Mcg. 55.

679. ———.]—An estate was devised to uses to secure certain annuities, & subject thereto in strict settlement, with power for trustees to sell at the request of the tenant for life under the will. The estate was disentailed and resettled, the existing life estate being postponed to certain charges & the powers of the will being expressed to be kept alive:—*Held*: the trustees for sale & the tenant for life could make a good title.

On the other hand, it is said the deed ought to be construed according to the manifest intention of the parties. I am of opinion that the latter contention is the right one (PEARSON, J.).—*Re WRIGHT'S TRUSTEES & MARSHALL* (1884), 28 Ch. D. 93; 54 L. J. Ch. 60; 51 L. T. 781; 33 W. R. 301.

Annotations.—*Reid. Re Constable's S. E.*, [1919] 1 Ch. 178; *Re Meeking, Meeking v. Meeking*, [1922] 2 Ch. 523. *Mentd. Re Du Cane & Nettlefold's Contract*, [1898] 2 Ch. 96; *Re Cornwallis-West & Munro's Contract*, [1903] 2 Ch. 150.

680. ———.]—The partners in a business, by a deed reciting the inability of the firm to pay their creditors, assigned the business & property of the firm to trustees upon certain trusts for the benefit of the creditors of the firm. The deed contained no provision in the event of there being a surplus:—*Held*: upon the natural & true construction of the deed there was an absolute disposal of all the proceeds to be realised for the benefit of the creditors, & that no resulting trust for the benefit of the assignors could be implied.

One must take the language of the instrument itself in its ordinary & natural meaning, & having endeavoured so far as one can to construe it in that ordinary & natural meaning it does not matter that it appears not to carry out the view that one would in the first instance have imagined the parties intended it to carry out (LORD HALSBURY, C.).

I am not entitled to put into the instrument something which I do not find there, in order to satisfy an intention which is only reasonable if I presume what the parties' intentions were. I must find out their intentions by the instrument they have executed; & if I cannot find a suggested intention by the terms of the instrument which they have executed I must assume that their intentions were only such as their deed discloses (LORD HALSBURY, C.).—*SMITH v. COOKE, STOREY*

v. COOKE, [1891] A. C. 297; 60 L. J. Ch. 607; 65 L. T. 1; 40 W. R. 67, H. L.; *reversg. S. C. sub nom. COOKE v. SMITH* (1890), 45 Ch. D. 38, C. A.

Annotations.—*Reid. Cunnack v. Edwards*, [1896] 2 Ch. 679. *Mentd. Re Printers & Transferers' Amalgamated Trades Protection Soc.* (1899), 47 W. R. 619.

681. ———.]—The cts. have never considered a possible claim by the Crown as affecting the construction of a document *inter partes*. The cts. do not decide questions of construction so as to swell the receipts of the Exchequer, but so as to give effect to the true intent expressed in the document before them (FARWELL, L.J.).—*Re GRIMTHORPE (LORD), BECKETT v. GRIMTHORPE (LORD)*, [1908] 2 Ch. 675; 78 L. J. Ch. 20; 99 L. T. 679; 25 T. L. R. 15, C. A.

Annotations.—*Reid. O'Grady v. Wilmot*, [1916] 2 A. C. 231; *Re Ffennell's Settlement, Re Ffennell's Estate, Wright v. Holton*, [1918] 1 Ch. 91; *Re Sturt, De Bunsen v. Harding*, [1922] 1 Ch. 416. *Mentd. Re Hopkinson, Dyson v. Hopkinson*, [1922] 1 Ch. 65.

682. ———.]—Now, in ascertaining the proper law of a contract, that which we have to seek is the intention of the contracting parties. To this intention, in the absence of express declaration on their part, we must be guided by applying to the language of the contract itself sound ideas of business convenience & sense, & by justly appraising the inferences to be drawn from the nature of the transaction, & the place & circumstances of its machinery & of its contemplated performance (KENNEDY, L.J.).—*BRITISH SOUTH AFRICA CO. v. DE BEERS CONSOLIDATED MINES, LTD.*, [1910] 2 Ch. 502; 80 L. J. Ch. 65; 103 L. T. 4; 26 T. L. R. 591; 54 Sol. Jo. 679, C. A.; *reversd. on other grounds, sub nom. DE BEERS CONSOLIDATED MINES, LTD. v. BRITISH SOUTH AFRICA CO.*, [1912] A. C. 52, H. L.

Annotations.—*Reid. Re MacKenzie, MacKenzie v. Edwards-Moss*, [1911] 1 Ch. 578. *Mentd. Kreglinger v. New Patagonia Meat & Cold Storage Co.*, [1914] A. C. 25; *Re Smith, Lawrence v. Kitson* (1916), 2 Ch. 206; *Jenkins v. Pharmaceutical Soc. of Great Britain*, [1921] 1 Ch. 392.

In accordance with law.]—See Sub-sect. 5, *post*.

B. Ascertainment of Intention.

683. At what time intention operates—*Making of instrument*.]—Every grant shall be expounded as the intent was at the time of the grant (WRAY, C.J.).—*MILDMAY v. STANDISH* (1584), as reported in Cro. Eliz. 34; 78 E. R. 300.

Annotations.—*Mentd. Paget's Case* (1591), 1 And. 259; *Bodell's Case* (1607), 7 Co. Rep. 40 a; *Cross v. Fausten-ditch* (1608), Cro. Jac. 180; *Colt & Glover v. Coventry & Lichfield, Bp.* (1612), Hob. 140; *Harpur's Case* (1615), 11 Co. Rep. 23 a; *Hewel v. Sambay* (1615), 1 Brownl. 179; *Miller v. Manwaring* (1634), Cro. Car. 397; *Foster v. Foster* (1661), 1 Kob. 225; *Bate v. Amherst* (1663), T. Raym. 82; *Gardner v. Sheldon* (1671), Vaugh. 259; *Smith v. Ashton* (1675), 1 Cas. in Ch. 263; *Italclyffe's Case* (1720), 1 Stra. 267; *Goodtitle v. Pettot* (1733), Kel. W. 107; *Sargent v. Reed* (1745), 2 Stra. 1228; *Doe d. Milburn v. Salkeld* (1755), Willes, 673; *Itow v. Roach* (1813), 1 M. & S. 304; *Clifford v. Turrell* (1845), 14 L. J. Ch. 390; *Peover v. Hassel* (1861), 1 John. & H. 341; *Poole v. Whitcomb* (1862), 12 C. B. N. S. 770; *British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. Co.*, [1922] 2 K. B. 260.

684. ———.]—The question is, what was the intention of the parties at the time of making the contract (POLLOCK, C.B.).—*MORGAN v. BIRMINGHAM CORPN.* (1857), 28 L. T. O. S. 272; 21 J. P. 166; 5 W. R. 291.

685. ———.]—*COOPER v. IPSWICH CORPN.* (1909), 73 J. P. Jo. 312.

PART III. SECT. 3, SUB-SECT. 3.—B.

683.1. At what time intention operates—*Making of instrument*.]—Pltf. owned part of lot 1, & agreed orally in 1859, to buy from M. two acres more adjoining on the north, of which he went into possession. In 1860 M. gave to deft. a bond to convey to him thirty acres

of the lot, more or less, describing it as "all that part of the said lot lying north of the land owned by" pltf. He afterwards conveyed the two acres to pltf., who then brought ejectment. M. swore upon the trial that these two acres were not intended to be included in the bond to deft., but were looked upon as part of pltf.'s land referred to

in it, & that deft. had without them his full thirty acres:—*Held*: pltf. must recover, for the bond, in the circumstances, should be construed as referring to all the land in pltf.'s visible possession as owner, thus excluding the two acres.—*DUSENBURY v. PALMATIER* (1862), 21 U. C. R. 462.—CAN.

Sect. 3.—Rules of construction: Sub-sect. 3, B.]

686. How intention ascertained—From words used.]—The intent of an indenture can only be understood by the words.—*KIDDER v. WEST* (1684), 3 Lev. 167; 83 E. R. 632.

Annotation:—Mentd. R. v. Cotton (1751), Park. 112.

687. ———.]—The intention of the settler, I mean the natural intention, regarding it as the case of father & child, must direct me, & these cases authorise me to struggle with language; for it is struggling with language; & it does not follow, that because cases are put, in which I could not struggle effectually, that I cannot prevail in the case, that has happened; if the words will bear me out in that according to the rules & authorities (LORD ELDON, C.).—*HOPE v. CLIFDEN* (LORD) (1801), 6 Ves. 499; 31 E. R. 1164, L. C.

Annotations:—Refd. Powis v. Burdett (1804), 9 Ves. 428; *Poulett v. Poulett* (1821), 6 Madd. 167; *Clutterbuck v. Edwards* (1832), 2 Russ. & M. 577; *Evans v. Scott* (1847), 1 H. L. Cas. 43; *Jeyes v. Savage* (1875), 10 Ch. App. 558, n. *Mentd. King v. Hake* (1804), 9 Ves. 438; *Schenck v. Leigh* (1804), 9 Ves. 300; *Driver d. Frank v. Frank* (1814), 3 M. & S. 25; *Howgrave v. Cartier* (1814), Coop. G. 66; *Fry v. Sherborne* (1829), 3 Sim. 243; *Whitford v. Moore* (1837), 3 My. & Cr. 270; *Re Yates's Trust* (1851), 21 L. J. Ch. 281; *Bythessa v. Bythessa* (1854), 23 L. J. Ch. 1004; *Currie v. Larkins* (1864), 4 De G. J. & Sm. 245; *Eastwood v. Lockwood* (1867), L. R. 3 Eq. 487.

688. ———.]—The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, & where external circumstances do not create any doubt or difficulty as to the proper appln. of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; & that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible (TINDAL C.J.).

This rule thus explained implies that it is not allowable in the case supposed to adduce any evidence, however strong, to prove an unexpressed intention varying from that which the words used import. This may be open no doubt to the remark, that, although we profess to be exploring the intention of the writer, we may be led in many cases to decide contrary to what can scarcely be doubted to have been the intention, rejecting evidence which may be most satisfactory in the particular instance to prove it. The answer is, that interpreters have to deal with the written expression of the writer's intention, & cts. of Law to carry into effect what he has written, not what it may be surmised, on however probable grounds, that he intended only to have written (COLERIDGE, J.).

All instruments in writing are to be construed by the ct. & the meaning of the terms employed is to be ascertained & fixed by reference to the whole instrument, but to nothing beyond it, unless specially referred to in the instrument itself (ERSKINE, J.).

In all cases, even where the words are in them-

686 I. How intention ascertained—From words used.]—In the absence of evidence of any special purpose as the basis of an agreement, the terms of the contract in writing govern the rights of the parties.—*WEBSTER v. SNIDER* (1911), 45 S. C. R. 296; 20 W. L. R. 239.—CAN.

686 II. ———.]—The question whether covenants are dependent or independent, or whether a certain act

is or is not a condition precedent, is entirely one of construction & to be determined in each case by educing the intention of the parties from the language they have used.—*YOUNG v. MANGALAPILLY RAMAIA* (1866), 3 Mad. 125.—IND.

686 III. ———.]—*VASONJI MORARJI v. CHANDA BIBI* (1915), I. L. R. 37 All. 369.—IND.

686 IV. ———.]—*Heid*: there was

selfs plain & intelligible, & even where they have a strict legal meaning, it is always allowable, in order to enable the ct. to apply the instrument to its proper object, to receive evidence of the circumstances by which testator or founder was surrounded at the date of the execution of the instrument in question, for the purpose of ascertaining what was the intention evidenced by the expressions used; to ascertain what the party has said; not to give effect to any intention which he has failed to express (ERSKINE, J.).

For the purpose of applying the instrument to the facts, & determining what passes by it, & take an interest under it, a second description of evidence is admissible, viz. every material fact that will enable the ct. to identify the person or thing mentioned in the instrument. No extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the ct. being to declare the meaning of what is written in the instrument, not of what was intended to have been written. The excepted cases in which such evidence is admissible, if indeed there be more than one excepted case (that is, where there are two subjects, or two objects, both described in the instrument, & each equally agreeing with it), having no bearing whatever on the present question (PARKE, B.).

Two kinds of evidence are always admissible to explain a written instrument, first, where it is written in a foreign tongue or where technical words or peculiar terms of art or science are used which at the time the instrument was written had acquired any appropriate meaning, secondly to identify the person & thing mentioned (PARKE, B.). *SHORE v. WILSON* (1842), 9 Cl. & Fin. 355; 11 Sim 615, n.; 4 State Tr. N. S. App. 1370; 5 Scott, N. R. 958; 7 Jur. 787, n.; 8 E. R. 450, II. L.; *subsequent proceedings, sub nom. A.-G. v. SHORE* (1843), 11 Sim. 592; *sub nom. A.-G. v. WILSON* (1848), 16 Sim. 210.

Annotations:—Consd. Neale v. Neale (1898), 79 L. T. 629; *G. W. Ry. & Mid. Ry. v. Bristol Corpn.* (1918), 87 L. J. Ch. 414. *Refd. Drummond v. A.-G.* (1849), 2 H. L. Cas. 837; *A.-G. v. Clapham* (1855), 4 De G. M. & G. 591; *Re Rayner, Rayner v. Rayner*, [1904] 1 Ch. 176. *Mentd. Re Scarborough Charity Petns.* (1837), 1 Jur. 36; *A.-G. v. Wilson* (1848), 16 Sim. 210; *A.-G. v. Murdoch* (1849), 7 Hare, 445; *A.-G. v. Lawes* (1849), 14 Jur. 77; *A.-G. v. Sherborne Grammar School* (1854), 18 Beav. 256; *A.-G. v. Calvert* (1857), 23 Beav. 248; *Natal, Bp. v. Gladstone* (1866), L. R. 3 Eq. 1; *A.-G. v. Bunce* (1868), L. R. 6 Eq. 563; *A.-G. v. St. John's Hospital, Bath* (1876), 2 Ch. D. 554; *Re Perry Almshouses, Re Ross's Charity*, [1899] 1 Ch. 21; *Re Johnson, Greenwood v. Greenwood & Robinson* (1903), 89 L. T. 520; *Re Church Patronage Trust, Laurie v. A.-G.*, [1904] 2 Ch. 643; *Camden v. I. R. Comrs.*, [1914] 1 K. B. 641; *Bowman v. Secular Soc.*, [1917] A. C. 406.

689. ———.]—The thing which the ct. has to ascertain is, what is the real meaning of the words of the contract, & the contract is always to be construed most strictly against the contracting party (ROMILLY, M.R.).—*MOORHOUSE v. COLVIN* (1851), 15 Beav. 341; 21 L. J. Ch. 177; 18 L. T. O. S. 296; 51 E. R. 570; *affd.* (1852), 21 L. J. Ch. 782, L. JJ.

Annotation:—Mentd. Lord v. Colvin (1860), 3 L. T. 228.

sufficient evidence on the face of the instrument to show that it was the intention of the settlor to dispose of his whole estate.—*Re CROSS'S TRUSTS, CROSS v. CROSS*, [1915] 1 L. R. 304.—IR.

686 v. ———.]—A contract must be interpreted according to its effect of its terms rather than according to its nominal description by the parties.—*MEINTJES v. HARMSEN* (1887), 2 S. A. 143.—S. AF.

690. ———.]—(1) A deed must be construed & taken to mean that which its terms express, & that it is the intention of the parties as expressed which must be the construction (POLLOCK, C.B.).

(2) An exception must be to the person or persons who convey the legal title, & to him or them alone (POLLOCK, C.B.).—DENISON v. HOLLIDAY (1857), 1 H. & N. 631; 156 E. R. 1354; *sub nom.* DENNISON v. HALLIDAY, 28 L. T. O. S. 307; 5 W. R. 357; *affd. sub nom.* DENISON v. HOLIDAY (1858), 3 H. & N. 670, Ex. Ch.

691. ———.]—The governing principle for the construction of contracts is to give effect to the intention of the parties expressed in the words of their contract (ERLE, C.J.).—AUBERT v. GRAY (1862), 3 B. & S. 169; 32 L. J. Q. B. 50; 7 L. T. 469; 9 Jur. N. S. 714; 11 W. R. 27; 1 Mar. L. C. 264; 122 E. R. 65, Ex. Ch.

Annotations.—*Mentd.* Rodocanochi v. Elliott (1874), 31 L. T. 239; Robinson Gold Mining Co. v. Alliance Insee., [1901] 2 K. B. 919; Janson v. Driefontein Consolidated Gold Mines, [1902] A. C. 484.

692. ———.]—The quantity of land, claimed by deft. under a conveyance to him, exactly corresponding with the quantity designated by measurement in the conveyance:—*Held*: the probability, arising from the relative position of part of this land to neighbouring land, that it had been conveyed by mistake, did not enable pltf. to show, under the words "be the same more or less," that a smaller quantity was the land conveyed.—DODD v. BURCHELL (1862), 1 H. & C. 113; 31 L. J. Ex. 304; 8 Jur. N. S. 1180; 158 E. R. 822.

Annotation.—*Mentd.* Hall v. Lund (1863), 1 H. & C. 676.

693. ———.]—In mercantile contracts, & indeed in all contracts where the meaning of the language is to be determined by the ct., the governing principle must be to ascertain the intention of the parties through the words they have used. This principle is one of universal appln. (*per* CUR.).—McCONNEL v. MURPHY (1873), L. R. 5 P. C. 203; 28 L. T. 713; 21 W. R. 609, P. C.

694. ———.]—In construing instruments you must have regard, not to the presumed intention of the parties, but to the meaning of the words which they have used (BRETT, L.J.).—*Re* MEREDITH, *Ex p.* CHICK (1879), 11 Ch. D. 731; 41 L. T. 246, C. A.

Annotation.—*Mentd.* Lawrence v. Adams (1896), 75 L. T. 410.

695. ———.]—One must consider the meaning of the words used, not what one may guess to be the intention of the parties (JESSEL, M.R.).—SMITH v. LUCAS (1881), 18 Ch. D. 531; 45 L. T. 460; 30 W. R. 451.

Annotations.—*Mentd.* Wilder v. Pigott (1882), 22 Ch. D. 263; Cahill v. Cahill (1883), 8 App. Cas. 420; *Re* Wheatley, Smith v. Spence (1884), 27 Ch. D. 606; Burnaby v. Equitable Reversionary Interest Soc. (1885), 28 Ch. D. 416; *Re* Quicade's Trusts (1885), 54 L. J. Ch. 786; *Re* Vardon's Trusts (1885), 31 Ch. D. 275; Cooke v. Cooke (1887), 38 Ch. D. 202; Duncan v. Dixon (1890), 44 Ch. D. 211; Haywood v. Tidy (1890), 63 L. T. 679; Carter v. Silber, Carter v. Hasluck, [1892] 2 Ch. 278; Greenhill v. North British & Mercantile Insee., [1893] 3 Ch. 474; Clements v. L. & N. W. Ry., [1894] 2 Q. B. 482; *Re* Hodson, Williams v. Knight, [1894] 2 Ch. 421; Harle v. Jarman, [1895] 2 Ch. 419; Viditz v. O'Hagan, [1899] 3 Ch. 569; Pullan v. Koe, [1913] 1 Ch. 9; *Re* Lind, Industrials Finance Syndicate v. Lind, [1915] 2 Ch. 345.

696. ———.]—SWINBURNE v. MILBURN, No. 631, *ante*.

697. ———.]—Ascertaining what the parties meant by the words they used is the real function of a ct. in construing an instrument (LORD HALSBURY, C.).

Two rules of construction now firmly established as part of our law may be considered as limiting J.—VOL. XVII.

those words. One is that words, however general, may be limited with respect to the subject matter in relation to which they are used. The other is that general words may be restricted to the same genus as the specific words that precede them (LORD HALSBURY, C.).

Where the same words have for many years received a judicial construction it is not unreasonable to suppose that parties have contracted upon the belief that their words will be understood in what I will call the accepted sense (LORD HALSBURY, C.).—THAMES & MERSEY MARINE INSURANCE Co. v. HAMILTON, FRASER & Co. (1887), 12 App. Cas. 484; 56 L. J. Q. B. 626; 57 L. T. 695; 36 W. R. 337; 3 T. L. R. 764; 6 Asp. M. L. C. 200, H. L.; *revg.* S. C. *sub nom.* HAMILTON v. THAMES & MERSEY MARINE INSURANCE Co. (1886), 17 Q. B. D. 195, C. A.

Annotations.—*Re*ld. Thorman v. Dowgate S.S. Co., [1910] 1 K. B. 410; Samuel v. Dumas (1922), 92 L. J. K. B. 465. *Mentd.* Hamilton, Fraser v. Pandorf (1887), 57 L. J. Q. B. 24; The Bedouin, [1894] P. 1; Ballantyne v. Mackinnon, [1896] 2 Q. B. 455; Lund v. Thames & Mersey Marine Insee. (1901), 17 T. L. R. 566; Blackburn v. Liverpool, Brazil & River Plate Steam Navigation Co., [1902] 1 K. B. 290; Jackson v. Mumford (1902), 8 Com. Cas. 61; Oceanic S.S. Co. v. Faber (1906), 95 L. T. 607; Knutsford S.S. v. Tillmanns, [1908] A. C. 406; Hutchins v. Royal Exchange Assce. Corp., [1911] 2 K. B. 398; I. R. Comrs. v. Smyth, [1914] 3 K. B. 406; Stott (Baltic) Steamers v. Marten, [1916] 1 A. C. 304; Akt. Frank v. Namaqua Copper Co. (1920), 90 L. J. K. B. 36; Magnhild S.S. v. McIntyre, [1920] 3 K. B. 321; Ambatielos v. Anton Jurgens Margarine Works, [1922] 2 K. B. 185.

698. ———.]—*Re* JODRELL, JODRELL v. SEALE, No. 623, *ante*.

699. ———.]—Natural & ordinary meaning.]—The ct. must construe the contract according to the intention of the parties & they must seek for that intention in the language they have employed giving to it its natural & ordinary meaning if there is nothing in the context to point to a different meaning (LORD RUSSELL OF KILLOWEN, C.J.).—*Re* SAMUEL (M.) & Co., LONDON, & SOCIÉTÉ COMMERCIALE ET INDUSTRIELLE DE NAPTHE CASPIENNE ET DE LA MER NOIR, *Re* ARBITRATION ACT, 1889, SEC. 7 (1895), 12 T. L. R. 41, D. C.

700. ———.]—A separation deed like other kinds of deeds, is subject to this incident, that it is to be construed according to what is contained within the four corners of it. It is not safe to say, as a rule, that this or that particular event will put an end to a separation deed. In each case the words of the deed itself must be looked at (WILLIAMS, L.J.).—ROWELL v. ROWELL, [1900] 1 Q. B. 9; 69 L. J. Q. B. 55; 81 L. T. 429, C. A.; *subsequent proceedings* (1903), 89 L. T. 288, C. A.

Annotations.—*Mentd.* Macan v. Macan (1900), 70 L. J. Q. B. 90; Cramp v. Cramp & Freeman, [1920] P. 158.

701. ———.]—Contract by letters.]—The question we have to determine is what is the real business meaning of the contract which has been made by the parties? It is a contract made, not in the formal method of a contract reduced to writing by a lawyer, but made in the business-like communications of the parties with each other in letters. When I look at the letters I cannot entertain the least doubt that what they really meant was what they said (LORD HALSBURY, C.).—ELLIOTT v. CRUTCHLEY, [1906] A. C. 7; 75 L. J. K. B. 147; 94 L. T. 5; 54 W. R. 349; 22 T. L. R. 83, H. L.

Annotation.—*Mentd.* French Marine v. Compagnie Napolitaine D'Eclairage et de Chauffage par le Gaz, [1921] 2 A. C. 494.

702. ———.]—Whether evidence admissible.]—The general rule of construction is, that the ct., in construing the deeds of parties, look much more to the intent to be collected from the whole deed, than from the language of any particular portion

Sect. 3.—Rules of construction: Sub-sect. 3, B.; sub-sect. 4.]

of it. The intent must be collected from the deed itself, & not from evidence *aliunde*; & the cts. consider themselves authorised & bound, where they can collect the intent from the language of the deed, if all the parts of the deed will admit of it, to construe that deed rather according to the general intent than according to any particular phraseology contained in it.

I have thus stated what the cases were, & have called your Lordships' attention to the circumstances, that in construing a grant, on the face of which the intention of the parties is clearly shown, namely, that a particular individual should grant; & where the tenor of the grant itself assists in showing that intention, but where the name of the grantor is not repeated, the ct. will supply that name from the other parts of the deed (LORD TRURO, C.).—MILL v. HILL (1852), 3 H. L. Cas. 828; 10 E. R. 330, H. L.

703. ————.]—The only legitimate rule of construction is to ascertain the meaning from the language used by the instrument. I have always endeavoured to ascertain the meaning of instruments, from the words used in them, coupled with such facts as are admissible in evidence to aid their explanation (PARKE, B.).—GREAT NORTHERN RY. Co. v. HARRISON (1852), 12 C. B. 576; 22 L. J. C. P. 49; 19 L. T. O. S. 259; 16 Jur. 565; 138 E. R. 1032.

Annotations:—Mentd. McIntyre v. Deloher (1863), 14 C. B. N. S. 654; Clarke v. Watson (1865), 18 C. B. N. S. 278.

704. ————.]—CARR v. MONTEFIORE, No. 627, ante.

705. ———— & surrounding circumstances.]—The intention of the parties with respect to the nature of the contract must be collected as well from the words used at the time of entering into it, as from all the circumstances connected therewith.—R. v. COMBE (INHABITANTS) (1828), 8 B. & C. 82; 2 Man. & Ry. K. B. 30; 1 Man. & Ry. M. C. 283; 6 L. J. O. S. M. C. 105; 108 E. R. 973.

Annotations:—Reid. R. v. Tipton (1829), 9 B. & C. 888. Mentd. R. v. Edingale (1830), 10 B. & C. 739.

706. ————.]—A firm of shipbuilders agreed to lengthen & repair an iron steamship. The specification forming part of the contract contained a stipulation in fourteen words deleted,

705 i. ———— & surrounding circumstances.]—In construing a guarantee the ct. may always look at the surrounding circumstances in order to find the intention of the parties.—JONES v. MASON (1892), 13 N. S. W. L. R. 157; 8 N. S. W. W. N. 142.—AUS.

705 ii. ————.]—Where a contract is evidenced by spoken words, conduct, & writings, all the circumstances may be looked at for the purpose of making out the contract.—ROXBURGH v. CROSSBY & CO., [1918] V. L. R. 118.—AUS.

705 iii. ————.]—A guarantee should be construed as all other contracts, not strictly as against either side, but by collecting the real intention of the parties from the instrument & the surrounding circumstances, taking the words in their ordinary sense, unless by the known usage of trade they have acquired a peculiar meaning.—KATNER v. WINSTANLEY (1869), 20 C. P. 101.—CAN.

705 iv. ————.]—The words of a deed, coupled with the surrounding circumstances, show the intention of the parties.—DOE d. DONOHUE v. MCGARRIGLE (1873), 1 Pug. 254.—CAN.

705 v. ————.]—The intention of all grants must be construed from the language used with reference to surrounding circumstances.—RE WARD & VICTORIA WATER WORKS (1874), 1 B. C. R., Pt. 1, 114.—CAN.

705 vi. ————.]—The designation "legal advisers" being ambiguous, may be interpreted to mean "sols." or "attorneys" by reference to the circumstances of the parties at the time of the appointment & the acts of the parties subsequently; & was so interpreted in this case.—DRAKE & JACKSON v. VICTORIA CORPN. (1884), 1 B. C. R., Pt. 1, 165.—CAN.

705 vii. ————.]—To determine whether covenants or agreements are dependent or independent, they are to be construed according to the intent & meaning of the parties, to be collected from the instrument, & to the circumstances legally admissible in evidence with reference to which it is to be construed.—RE CANADIAN NIAGARA POWER Co. (1899), 30 O. R. 185.—CAN.

705 viii. ————.]—Where the language of an instrument is ambiguous or obscure, the intention of the parties should be ascertained by consideration

signed A. and J. I., D. G.:—**Held:** neither the letters of the parties before the contract was signed, nor the initialed deleted words in the contract, could be considered for the purpose of interpreting the intention of the parties.

I think you may while taking the words of the agreement, look at the "surrounding circumstances," & see what was the intention (LORD BLACKBURN).—INGLIS v. BUTTERY (1878), 3 App. Cas. 552, H. L.

Annotations:—Reid. Pearson v. Pearson (1884), 51 L. T. 311; G. W. Ry. & Mid. Ry. v. Bristol Corpn. (1918), 87 L. J. Ch. 414; Bristol Tramways, etc., Carriage Co. v. Flat Motors, [1910] 2 K. B. 831. Mentd. Campbell v. Campbell (1880), 5 App. Cas. 787.

707. ————.]—RIVER WEAR COMRS. v. ADAMSON, No. 622, ante.

—From whole instrument.]—See Sub-sect. 4, post.

708. ———— Not by technical meaning.]—To pronounce on the meaning of a detached part of, or extract from an instrument, without referring to, & comparing it with the other parts of the same instrument, if relating to the same subject, is contrary to every principle of correct interpretation, applied to any written instrument upon any subject, & it is particularly reprobated by all the authorities respecting the construction of legal instruments (PLUMER, M.R.).

The real intention of the framer of the deed, the written declaration of whose mind it is always considered to be, is the end & object, to the discovery & effectuating of which all rules of construction, properly so called, are uniformly directed. When technical words or phrases are made use of, the strong presumption is, that the party intended to use them according to their correct technical meaning, but this is not conclusive evidence that this was his real meaning. If the technical meaning is found, in the particular case, to be an erroneous guide to the real one, leading to a meaning contrary to what the party intended to convey by it, it ceases to answer its purpose. The paramount regard to be had to the meaning & intention of the grantor in preference to technical meaning, is the settled rule of construction (PLUMER, M.R.).—CHOLMONDELEY (MARQUIS) v. CLINTON (LORD) (1820), 2 Jac. & W. 1; 37 E. R. 527; *affd.* (1821), 4 Bli. 1, H. L.

Annotations:—Mentd. Dillon v. Parker (1822), Jac. 505; Bennett v. Colley (1832), 5 Sim. 181; Ashton v. Milne (1833), 6 Sim. 369; Doe d. Pilkington v. Spratt (1833), 5 B. & Ad. 731; Leith v. Irvine (1833), 1 My. & K. 277;

of the circumstances attending the execution of the agreement.—DESERRES v. BRAULT (1906), 26 C. L. T. 848; 37 S. C. R. 613.—CAN.

705 ix. ————.]—The intention of the parties which is the test, must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances.—JHANDA SINGH v. WAHID-UD-DIN (1916), I. L. R. 38 All. 570.—IND.

705 x. ————.]—In construing an agreement the ct. will give the instrument that construction which will best effectuate the intention of the contracting parties. This intention must be gathered from the terms of the instrument itself fairly considered with reference to the circumstances in which it was executed.—DAY v. DOOLEY (1869), 5 Nfld. L. R. 283.—NFLD.

q. ———— Cannot be expressed in subsequent document.]—A deed purporting to be a declaration of intention, as expressed in a prior delivered deed, is not allowed to affect the proper legal construction of the previous deed.—FLORENCE v. FLORENCE (1832), 10 Sh. (Ct. of Sess.) 326.—SCOT.

Parrott v. Palmer (1834), 3 My. & K. 632; Grenfell v. Girdlestone (1837), 2 Y. & C. Ex. 662; Sturgis v. Chamneys (1839), 5 My. & Cr. 97; Davies v. Quarterman (1840), 4 Y. & C. Ex. 257; Anderson v. Wallis (1842), 12 L. J. Ch. 291; Boidell v. Goughly (1842), 12 L. J. Ch. 187; Sayer v. Wagstaff (1843), 2 Y. & C. Ch. Cas. 230; Farr v. Sheriffe, Dykes v. Farr (1844), 4 Haro. 512; Fulham v. McCarthy (1848), 1 H. L. Cas. 703; Christ's Hospital v. Grainger (1849), 1 H. & Tw. 533; A.-G. v. Murdoch (1852), 1 De G. M. & G. 86; Stone v. Godfrey (1854), 5 De G. M. & G. 76; Cottrell v. Hughes (1855), 3 C. L. R. 496; Penny v. Allen (1857), 7 De G. M. & G. 409; Penny v. Allen (1857), 29 L. T. O. S. 41; Robertson v. Norris (1857), 30 L. T. O. S. 253; Robertson v. Norris (1858), 1 Giff. 421; Wing v. Angrave (1860), 8 H. L. Cas. 183; Marshall v. Smith (1865), 5 Giff. 37; Pearce v. Morris (1869), 5 Ch. App. 227; Warner v. Jacob (1882), 20 Ch. D. 220; Charles v. Jones (1887), 35 W. R. 845; Magnus v. Queensland National Bank (1887), 36 Ch. D. 25; Farrar v. Farrars (1888), 40 Ch. D. 395; Bolton v. Salmon, [1891] 2 Ch. 48; Soar v. Ashwell, [1893] 2 Q. B. 390; Turner v. Walsh, [1909] 2 K. B. 484.

709. — From recitals & provisions.]—A deed executed may be construed according to the intent of the parties, to be collected from the recitals & provisions of the deed.—LESTER v. GARLAND (1832), 5 Sim. 205; Mont. 471; 1 L. J. Ch. 185; 58 E. R. 314.

*Annotations:—*Mentd. Fraser v. Thompson (1859), 1 Giff. 49; Whitmore v. Mason (1861), 2 John. & H. 204; Mackintosh v. Pogose, [1895] 1 Ch. 505.

710. — Whether from obliteration on face of instrument.]—*Semle:* an obliteration on the face of a written instrument may be looked at for the purpose of construing the instrument.—STRICKLAND v. MAXWELL (1834), 2 Cr. & M. 539; 4 Tyr. 340; 3 L. J. Ex. 161; 149 E. R. 875.

711. — Whether from alteration in draft.]—If it were necessary to determine whether or not we could look at the alteration in the draft, as a key to the meaning of the parties, I must confess I should have felt considerable doubt (JERVIS, C.J.).—CUMBERLAND v. BOWES (1854), 15 C. B. 348; 24 L. T. O. S. 169; 3 W. R. 138; 3 C. L. R. 149; 139 E. R. 458; *sub nom.* CUMBERLAND v. GLAMIS (LADY), 24 L. J. C. P. 46; 1 Jur. N. S. 236. *Annotation:—*Mentd. Jenkins v. Betham (1854), 3 C. L. R. 373.

712. — By reference to marginal memorandum.]—LONDON MUSIC HALL, LTD. v. AUSTIN (1908), *Times*, Dec. 16.

SUB-SECT. 4.—AGREEMENT CONSTRUED AS A WHOLE.

713. Intention ascertained from construction of

PART III. SECT. 3, SUB-SECT. 4.

718i. Intention ascertained from construction of instrument as a whole.]—RYAN v. FERGUSON (1909), 8 C. L. R. 731.—AUS.

718 ii. —.]—WILLIAMSON, LTD. v. DURNO, LTD. (1915), 15 N. S. W. L. R. 442.—AUS.

718 iii. —.]—CUMMING v. HILL (1842), 6 O. S. 303.—CAN.

718 iv. —.]—The condition of a deed must be construed as a whole, & any apparent repugnance may be reconciled by giving it effect according to the intent apparent on the whole instrument.—NICHOLLS v. MADILL (1849), 6 U. C. R. 415.—CAN.

718 v. —.]—THORNHILL v. JONES (1854), 12 U. C. R. 231.—CAN.

718 vi. —.]—MCCAMMON v. BEAUFRE (1866), 25 U. C. R. 419.—CAN.

718 vii. —.]—Full effect would be given to the whole instrument, & the real intent of the parties carried out.—MILLER v. STITT (1867), 17 C. P. 559.—CAN.

718 viii. —.]—HERRICK v. SIXBY (1867), 17 L. C. R. 146.—CAN.

16 ix. —.]—LINK v. HUNTER (1868), 27 U. C. R. 187.—CAN.

instrument as a whole—Rule applicable to all documents.]—*Re* JODRELL, JODRELL v. SEALE, No. 623, ante.

714. —.]—CRUMPE v. CRUMPE, No. 625, ante.

715. —.]—THROCKMERTON v. TRACY, No. 634, ante.

716. —.]—(1) Every deed ought to be construed according to the intention of the parties, & the intents ought to be adjudged of the several parts of the deed, as a general issue out of the evidence; & intent ought to be picked out of every part, & not out of one word only (HOBERT, C.J.).

(2) Every express covenant must be taken most beneficially for the covenantee (HUTTON, J.).—TRENCHARD v. HOSKINS (1624), Win. 91; 124 E. R. 76; *subsequent proceedings* (1628), Litt. 203.

*Annotations:—*As to (1) *Apld.* Howell v. Richards (1809), 11 East, 633; Sicklemore v. Thistleton (1817), 6 M. & S. 9. *Refd.* Swift v. Heirs (1639), March, 31; Gainsford v. Griffith (1667), 2 Keb. 201; Browning v. Wright (1799), 2 Bos. & P. 13.

717. —.]—FERRERS v. NEWTON (1666), 1 Sid. 312; 82 F. R. 1126.

718. —.]—GAINSFORD v. GRIFFITH (1667), 2 Keb. 76, 201, 213; 1 Saund. 51, 58; 84 E. R. 49, 125, 133; *sub nom.* GAINSFORD v. GRIFFITH, 1 Sid. 328.

*Annotations:—*Consd. Nind v. Marshall (1819), 1 Brod. & Bing. 319. *Refd.* Crayford v. Crayford (1828), Cro. Car. 106; Scot v. Schwartz (1739), 2 Com. 677; Browning v. Wright (1799), 2 Bos. & P. 13; Barton v. Fitzgerald (1812), 15 East, 530; Foord v. Wilson (1818), 2 Moore, C. P. 592; Line v. Stephenson (1838), 4 Bing. N. C. 678. *Mentd.* Hankin v. Broomhead (1804), 3 Bos. & P. 607; Webb v. James (1841), 11 L. J. Ex. 38; Branscombe v. Scarbrough (1844), 6 Q. B. 13; Betts v. Burch (1859), 28 L. J. Ex. 267; Osborne v. Kales (1) (1862), 2 Moo. P. C. C. N. S. 100; Preston v. Dania (1872), 42 L. J. Ex. 33.

719. —.]—BROWNING v. WRIGHT, No. 653, ante.

720. —.]—The assignor in a deed of assignment of a lease, after reciting the original lease granted to another for the term of ten years, which by mesne assignments had vested in him, & that pltf. had contracted for the absolute purchase of the premises, assigned the same to pltf., for & during all the rest, etc., of the term of ten years in as ample a manner as the assignor might have held the same, subject to the payment of rent & performance of covenants, & then covenanted that it was a good & subsisting lease, valid in law, in & for the premises thereby assigned, &

716 x. —.]—RUSTIN v. FAIRCHILD CO. (1907), 27 C. L. T. 666; 39 S. C. R. 274.—CAN.

716 xi. —.]—HAMILTON v. PENNER (1914), 29 W. L. R. 552; 7 W. W. R. 242; 20 D. L. R. 429.—CAN.

716 xii. —.]—CHONG JAN v. QUONG WO ON (1922), 68 D. L. R. 65.—CAN.

716 xiii. —.]—Where a party agrees to sell & another to purchase any land or thing, then, in the absence of terms exhibiting different intention the purchaser impliedly covenants to pay, but the whole document must be construed & may show that such implication is not to be drawn.—GRIEVE McCLOREY, LTD. v. DOME LUMBER CO., LTD., [1922] 2 W. W. R. 1282 66 D. L. R. 43.—CAN.

716 xiv. —.]—It is necessary to read the whole of an instrument in order to gather the intention.—KALIDAS MULLICK v. KANHAYA LAL PUNDIT (1884), 1 L. R. 11 Cal. 121; 1 L. R. 11 Ind. App. 218.—IND.

716 xv. —.]—An instrument must be taken as a whole, & that the true construction to be put on it should be that which, being reasonable, would also give effect to all parts of it.—RAE BARELI DEPUTY COMR. v. RAMPAL

SINGH (1884), 1 L. R. 11 Cal. 237; 1 L. R. 12 Ind. App. 1.—IND.

716 xvi. —.]—A mtgee. is concluded by recitals in his own deeds showing the sum due, that the estate is redeemable, or the like, but such recitals must be taken altogether.—CAREW v. JOHNSTON (1805), 2 Sch. & Lef. 280, 295.—IR.

716 xvii. —.]—The rule in construing a deed is, to collect the intention from the entire of the instrument, & not from any detached part of it.—CRONE v. ODELL (1811), 1 Ball. & B. 480.—IR.

716 xviii. —.]—LAPP v. FULLER, [1825] Batt. 27.—IR.

716 xix. —.]—Construction is to be the result of the deed taken together.—PLUCK v. DUGGES (1828), 2 Hud. & B. 1.—IR.

716 xx. —.]—A contract must be construed as a whole, & if the later portion qualifies the preceding portion full effect must be given to such qualification.—HAYNE & CO. v. KAF-FRARIAN STEAM MILL CO., LTD. (1914), App. D. 363.—S. AF.

r. — Words repeated will be given same meaning — If intention clear.]—Where a deed of settlement first

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not forfeited, etc., or otherwise determined, or become void or voidable:—*Held*: the generality of this covenant for title, which was supported by the recital of the bargain for an absolute term of ten years, was not restrained by other covenants which went only to provide for or against the acts of the assignor himself, or those who claimed under him.

It is a true rule of construction that the sense & meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*; every part of it may be brought into action in order to collect from the whole one uniform & consistent sense, if that may be done. We can only look, however, to the sense & meaning of the parties as they are to be collected from the deed itself. It begins by reciting that the premises were demised for the term of ten years, & that by assignment in the following year they had become vested in this assignor for the remainder of the said term of ten years. This recital is fairly to be brought forward in order to construe every covenant in the deed; & when I find such a recital of an absolute term without any qualification, it is a considerable help to the construction of a subsequent covenant, where he covenants in absolute terms that it is a good & subsisting lease, valid in law for the premises thereby assigned, & not forfeited, etc., or otherwise determined, or become void or voidable (LORD ELLENBOROUGH, C.J.).

By the known rule of law the words of a covenant are to be taken more strongly against the covenantor. I admit, however, that they may be restrained by other words in the deed, if we can see a clear intention to restrain them from the other parts of the deed (BAYLEY, J.).—BARTON v. FITZGERALD (1812), 15 East, 530; 104 E. R. 944.

Annotations:—*Reid*, Foord v. Wilson (1818), 8 Taunt. 543; *Magnhild* S.S. v. McIntyre, [1920] 3 K. B. 321. *Mentd*. Nind v. Marshall (1819), 1 Brod. & Bing. 319; Line v. Stephenson (1838), 4 Bing. N. C. 678.

721. —.]—Covenants ought to be construed with due regard to the intention of the parties as it is to be collected from the whole context of the instrument (LORD ELLENBOROUGH, C.J.).—SICKLEMORE v. THISTLETON (1817), 6 M. & S. 9; 105 E. R. 1146.

Annotations:—*Mentd*. *Re* Colnaghi, *Ex p.* Marks (1838), 3 Deac. 133; *Hoggett* v. Exley (1840), 6 Bing. N. C. 207; *Macintosh* v. Midland Counties Ry. (1845), 14 M. & W. 548; *Jowett* v. Spencer (1846), 15 M. & W. 662; *Re Brown's Estate*, *Brown* v. *Brown*, [1893] 2 Ch. 300; *Bradford Old Bank* v. *Sutcliffe*, [1918] 2 K. B. 833.

722. — Court will not pronounce on meaning of detached part.]—CHOLMONDELEY (MARQUIS) v. CLINTON (LORD), No. 708, *ante*.

723. —.]—In the construction of a deed, regard must be had to all its parts, & if a deed operate two ways, the one consistent with the intent of the party, & the other repugnant to it, the ct. will put such a construction on it as to give effect to such intent, which is to be derived from the whole of the instrument.—SOLLY v. FORBES (1820), 2 Brod. & Bing. 38; 4 Moore, C. P. 448; 129 E. R. 871.

Annotations:—*Consd*. *Warwick* v. *Richardson* (1844), 14 Sim. 281; *Thompson* v. *Lack* (1846), 3 C. B. 540. *Apld*. *Ford* v. *Beech* (1848), 11 Q. B. 852; *Squire* v. *Ford* (1851), 9 Hare, 47; *Price* v. *Barker* (1855), 4 E. & B. 760; *Currey*

v. *Armitage* (1858), 6 W. R. 516; *Green* v. *Wynn* (1868), L. R. 7 Eq. 28. *Consd*. *Bateson* v. *Gosling* (1871), L. R. 7 C. P. 9. *Reid*. *Twopenny* v. *Young* (1824), 3 B. & C. 208; *Morley* v. *Frear* (1830), 4 Moo. & P. 305; *Watters* v. *Smith* (1831), 2 B. & Ad. 889; *Cocks* v. *Nash* (1832), 9 Bing. 341; *Simons* v. *Johnson* (1832), 3 B. & Ad. 175; *Upton* v. *Upton* (1832), 1 Dowl. 400; *Kearsley* v. *Cole* (1846), 16 M. & W. 128; *Owen* v. *Homan* (1851), 3 Mac. & G. 378; *Pomfret* v. *Perring* (1854), 18 Beav. 618; *Willis*, *Merry* & *Smith* v. *De Castro* (1858), 4 C. B. N. S. 216. *Mentd*. *Re* *Barrow* & *Geddes*, *Ex p.* *Christy* (1832), 2 Deac. & Ch. 155; *Ansell* v. *Baker* (1850), 15 Q. B. 20; *Hooper* v. *Marshall* (1869), 39 L. J. C. P. 14; *Re* *E. W. A.* (1901), 85 L. T. 31.

724. —.]—I am willing to admit that, if this deed upon the clause in question contains any latent ambiguity raised by extrinsic evidence, parol evidence or extrinsic evidence may be admitted to explain it, or to render it unambiguous. But I have never heard the general rule contradicted, that parol or extrinsic evidence cannot be admitted to contradict, vary, or add to the terms of a deed (PARK, J.).

The settlor has used the indefinite words, “a power of re-entry.” By showing, as I do, that there are many such powers, I show that there is an ambiguity in those words, either latent or patent; & may I not refer to the existing state of the property at the time these words were used, to see what was the intention of the settlor, & in what sense she used those words? This is the first time I have ever known it doubted, whether the estate, & interest, & powers of the settlor over the estate he was settling was admissible in proof. I am not offering declarations of what the party said she meant. I am not construing a legal instrument by the acts of the parties, or by their understanding upon it, but, by showing the circumstances & situation of the party, & the estates & interest she had at the time, I am enabling the House to judge what, in legal construction, was her meaning. I am not aware that there is any legal authority to exclude the evidence of such circumstances & situation (BAYLEY, J.).

I concede that, generally speaking, you must construe instruments by what is to be found within their four corners. That principle cannot apply here, for, when you are considering the question, whether a lease is conformable to a power in another instrument, you must look into that instrument which contains the power; & if you must look into that instrument which contains the power, then, in order to get at the true construction of the power itself, you must look at every part of that instrument; & if the instrument which contains the power be referred to by the instrument which is the execution of the power, & the instrument which contains the power, also refers you to other instruments, for its explanation, then you must look at those instruments, & by this chain they become part of the documents on which your decision, as to the execution of the power, must be founded (LORD ELDON, C.).—SMITH v. DOE d. JERSEY (1821), 2 Brod. & Bing. 473; 3 Bli. 290; 7 Price, 379; 5 Moore, C. P. 332; 129 E. R. 1048; *reussg.* S. C. *sub nom.* DOE d. JERSEY v. SMITH (1819), 1 Brod. & Bing. 97, Ex. Ch.

Annotations:—*Apld*. *Doe* d. *Shrewsbury* v. *Wilson* (1822), 5 B. & Ad. 363; *Rutland* v. *Wythe* (1843), 10 Cl. & Fin. 419. *Reid*. *Colpoys* v. *Colpoys* (1822), Jac. 451; *Boys* v. *Williams* (1831), 2 Russ. & M. 689; *Doe* d. *Harries* v.

provided for the half-yearly payment of a rentcharge on certain specified days, the first gale commencing on the day following its execution; & in a subsequent part secured the payment of a jointure rentcharge on the same days as those appointed for the payment of the rentcharge, the first payment thereof to be made on such of

the same days as should first occur after the decease of the settlor:—*Held*: the meaning of the word “payment” in the succeeding portion of the deed was controlled by that of the word “payment” in the preceding part; & inasmuch as it was plain that the first payment of the rentcharge was to be a full half-yearly gale, so, notwith-

standing the fact that the settlor died within six months before the first of the specified days for payment of the jointure rentcharge occurred, the widow was entitled to a full six months’ payment of the jointure rentcharge, & Apportionment Act did not apply.—*Re* GABBETT’S ESTATE (1897), 31 L. T. 178.—IR.

Morse (1833), 3 L. J. Ex. 70; *Bulteel v. Abinger* (1842), 6 Jur. 410; *Eno v. Eno* (1847), 6 Hare, 171; *Re Grainger, Dawson v. Higgins*, [1900] 2 Ch. 756. *Mentd.* Doe d. Howell v. Thomas (1840), 1 Man. & G. 335; *Morris v. Rhydydefel Colliery Co.* (1858), 3 H. & N. 473; *Heels v. Blain* (1864), 18 C. B. N. S. 90.

725. —[.]—This is a question of intention only, to be collected from the words of the deed taken all together & considered with reference to the object of the deed (DALLAS, C.J.).—*BARFORD v. STUCKEY* (1823), 1 Bing. 225; 8 Moore, C. P. 88; 1 L. J. O. S. C. P. 73; 130 E. R. 91; *on appeal* (1824), 3 B. & C. 308.

726. — Court will not confine itself to force of particular expression.—In the construction of all instruments it is the duty of the ct. not to confine itself to the force of a particular expression, but to collect the intention from the whole instrument taken together. But a ct. is not authorised to deviate from the force of a particular expression, unless it finds, in other parts of the instrument, expressions which manifest that the author of the instrument could not have the intention which the literal force of a particular expression would impute to him. However capricious may be the intention which is clearly & unequivocally expressed, every ct. is bound by it, unless it be plainly controlled by other parts of the instrument (LEACH, V.-C.).—*HUME v. RUNDELL* (1824), 2 Sim. & St. 174; 57 E. R. 311.

727. — To determine nature of instrument.—Whether an instrument be a lease or an agreement for a lease, must depend upon the whole of the instrument, the words "agree to let" not being conclusive for an agreement.—*STANFORTH v. FOX* (1831), 7 Bing. 590; 5 Moo. & P. 589; 9 L. J. O. S. C. P. 175; 131 E. R. 228.

Annotations :—*Reid.* Doe d. Pearson v. Riles (1832), 8 Bing. 178; Doe d. Phillip v. Benjamin (1839), 9 Ad. & El. 644; Doe d. Wood v. Clarke (1845), 7 Q. B. 211.

728. — [.]—An instrument will operate as a lease, or an agreement for a lease, according to the intention to be collected from the whole instrument.—*PERRING v. BROOK* (1835), 7 C. & P. 360; 1 Mood. & R. 510, N. P.

Annotation :—*Mentd.* Curling v. Mills (1843), 6 Man. & G. 173.

729. — Court will not go beyond instrument—Unless specially referred to.—*SHORE v. WILSON*, No. 688, *ante*.

730. — [.]—*FORD v. BEECH*, No. 685, *ante*.

731. — To determine real meaning of words of power.—In all cases, in order to determine what is the real meaning of the words of the power itself, it must be competent for the ct. to look to the whole instrument in which it is found (ALDERSON, B.).—*SHEEHY v. MUSKERRY* (LORD) (1848), 1 H. L. Cas. 576; 9 E. R. 885, H. L.

Annotations :—*Reid.* Mostyn v. Lancaster, Taylor v. Mostyn (1883), 23 Ch. D. 583. *Mentd.* Edwards v. Millbank (1859), 4 Drew. 606; *Jegon v. Vivian* (1865), L. R. 1 C. P. 9; *King v. Bird*, [1909] 1 K. B. 837.

732. — Not from order of covenants or precise terms.—It has been truly said, in some of the cases, that the construction of a deed does not depend on the order of the covenants, or upon the precise terms of them; but that regard must be had to the object & the whole scope of the instrument (WILDE, C.J.).—*RICHARDS v. BLUCK* (1848), C. B. 437; 6 Dow. & L. 325; 18 L. J. C. P. 15; 12 L. T. O. S. 126; 12 Jur. 963; 136 E. R. 1319.

Annotations :—*Mentd.* Dauby v. Lamb (1861) 11 C. B. N. S. 423; *Waylett v. Windham* (1864), 3 New Rep. 441.

733. — [.]—The terms of a grant are to be construed as favourably as possible for the grantee. Nor will it be denied that the whole of the instrument must be looked at together, when we are endeavouring to arrive at the intention of the parties (WILDE, C.J.).—*Re STROUD* (1849), 8 C. B.

502; 19 L. J. C. P. 117; 137 E. R. 604; *sub nom.* STROUD v. EAST & WEST-INDIA DOCK, & BIRMINGHAM JUNCTION RY. CO., 14 L. T. O. S. 291.

734. — [.]—All parts should be construed together, receiving as much effect as possible (LORD DENMAN, C.J.).—*SHERLOCK v. SPIERS* (1849), 13 L. T. O. S. 424.

735. — [.]—*MILL v. HILL*, No. 702, *ante*.

736. — [.]—We are to look at the whole instrument & the object of the parties, & see what is the intention to be collected from the whole of the language with reference to those (CROMPTON, J.).—*TURNER v. EVANS* (1853), 2 E. & B. 512; 21 L. T. O. S. 153; 17 Jur. 1073; 1 C. L. R. 563; 118 E. R. 880.

Annotations :—*Consd.* Hadsley v. Dayer-Smith, [1914] A. C. 979. *Mentd.* Mitchell v. Hender (1854), 2 W. R. 411; *Clark v. Watkins* (1863), 8 L. T. 8; *Allen v. Taylor* (1870), 19 W. R. 35; *Woodbridge v. Bellamy*, [1911] 1 Ch. 326.

737. — [.]—The ordinary import of language of a letter giving full authority to deal with the property of another ought not to be cut down or restricted by merely ambiguous or uncertain expressions in other parts of the document.—*PABIENTE v. LUBBOCK* (1850), 8 De G. M. & G. 5; 44 E. R. 290, L. JJ.

738. — [.]—It is clear that an absolute release in terms followed by a clause saving remedies against certain parties cannot be treated as a release if the effect of so doing is to prevent the operation of the saving clause; the whole must be taken together, & effect given to the intention of the parties (LORD CAMPBELL, C.J.).—*CURREY v. ARMITAGE* (1858), 6 W. R. 516.

Annotation :—*Mentd.* Willis v. De Castro (1858), 4 C. B. N. S. 216.

739. — [.]—I take the canon of construction to be that where the description of the premises assigned is clear & unambiguous, effect must be given to it by the ct. even though convinced from other parts of the deed, that it was not what the parties meant to say (LORD BLACKBURN).—*LEE v. ALEXANDER* (1883), 8 App. Cas. 853, H. L.

Annotation :—*Consd.* Orr v. Mitchell, [1893] A. C. 238.

740. — [.]—The clearest words of condition must yield to the prominent intention of the parties as gathered from the whole instrument (BYLES, J.).—*LONDON GAS-LIGHT CO. v. CHELSEA VESTRY* (1860), 8 C. B. N. S. 215; 2 L. T. 217; 8 W. R. 416; 141 E. R. 1148.

741. — [.]—I apprehend it is a sovereign rule in the construction of all written documents, to give effect to the intention of the parties as expressed in the instrument itself, & to give effect if possible to every word or, at all events, to every provision (BYLES, J.).—*HAYNE v. CUMMINGS* (1864), 16 C. B. N. S. 421; 4 New Rep. 61; 10 L. T. 341; 10 Jur. N. S. 773; 143 E. R. 1191.

Annotation :—*Reid.* Magnhild S.S. v. McIntyre, [1920] 3 K. B. 321.

742. — [.]—The rule has always been this: that you may suspend your right to proceed against the principal debtor, & yet proceed against the surety; & that even if you put into your deed words which, standing alone, amount to a release, the ct. will not give that effect to them, but will take the whole of the deed together, & effectuate that which was the real intention of the parties (SIR G. M. GIFFARD, V.-C.).—*GREEN v. WYNN* (1868), L. R. 7 Eq. 28; 38 L. J. Ch. 76; 19 L. T. 553; 17 W. R. 72; *affd.* (1869), 4 Ch App. 204, L. C.

Annotations :—*Mentd.* Bateson v. Gosling (1871), L. R. 7 C. P. 9; *Forbes v. Jackson* (1882), 19 Ch. D. 615; *Re Whitehouse*, *Whitehouse v. Edwards* (1887), 37 Ch. D. 683.

743. — [.]—Upon the question whether the execution of a deed is an act of bkpcy., one part of it cannot be separated from the rest.—*Re DOUGLAS*, *Ex p. SNOWBALL* (1872), 7 Ch. App. 534; 41

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L. J. Bcy. 49; 26 L. T. 894; 20 W. R. 786, L. JJ.

Annotations:—Mentd. Vane v. Vane (1873), 28 L. T. 320; Elliott v. Turquand (1881), 7 App. Cas. 79; Re Boocock, [1916] 1 K. B. 816.

744. — One part not construed to contradict another.]—One general rule as to the construction of any instrument is that one should give words their ordinary meaning in the English language, & should neither add to nor take anything away from such words unless one be obliged to do so, & another rule is that unless obliged, one should not construe an instrument in such a way that one part would contradict the other part (BRETT, M.R.).—*Re BEDSON'S TRUSTS* (1885), 28 Ch. D. 523; 54 L. J. Ch. 644; 52 L. T. 554; 33 W. R. 386, C. A.

Annotation:—Mentd. Blackman v. Fysh, [1892] 3 Ch. 209.

745. ——]—CHAPMAN v. GUEST (1887), 3 T. L. R. 438.

746. ——]—By a marriage settlement the annual income of the trust fund was given to the husband " & his assigns " for his life or until he should make, or attempt to make, any assignment of the income, or any part thereof, or to charge or incur, or attempt to charge or incur, the same, or until he should be found or declared a bkpt., or should take the benefit of any Act of Parliament for the benefit of insolvent debtors, or until he should make any assignment of his effects for the benefit of his creditors. The settlement contained limitations over, & a direction that upon the husband's death, or sooner determination of his estate, payment should be made to those entitled in remainder. The husband mortgaged his life interest & judgments had been signed against him for costs incurred in certain litigation & charging orders made against his life interest in certain consolidated stock comprised in the trusts of the settlement. It was contended that the effect of the addition of the word " assigns " was that the husband's life interest was absolute, & the forfeiture clause void:—*Held*: the result of giving so wide a meaning to the word " assigns " would be to render nugatory the rest of the proviso, which was aimed against alienation. The charging orders were not within the clause & it was possible to give effect to the clause against alienation & at the same time to give effect to the word " assigns."—*Re KELLY'S SETTLEMENT, WEST v. TURNER* (1888), 59 L. T. 494.

747. ——]—By an agreement in writing W., a trader, who was insolvent, assigned all his machinery, stock & book-debts to B., his largest creditor. B. agreed to carry on the business as before in W.'s name, to engage W. as manager at a weekly salary, to discharge the existing & future trade liabilities of W., & to find funds for carrying on the business. All profits made were to be placed to the credit of W., & as soon as the losses were made up B. was to resell the business to W. without any further responsibility on the part of B., or any consideration on the part of W. B., having become bkpt. & W. having become bkpt., a question arose as to the ownership of the business:—*Held*: under the agreement, B. & W. took a joint interest in the business.

The whole question depends upon what is the true construction of this agreement taken as a whole. We must construe this agreement upon its own wording, & look only at the meaning of what the parties to this agreement have said.

This is a business document, & we must construe it as such (LORD ESHER, M.R.).—*Re WHITELEY, Ex p. SMITH & Co.* (1892), 67 L. T. 69, C. A.

748. — Several clauses.]—A deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; & the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible (LORD WATSON).—CHAMBER COLLIERY CO., LTD. v. TWYEROU (1893), [1915] 1 Ch. 268, n.

Annotations:—Apld. N. E. Ry. v. Hastings, [1900] A. C. 260. *Mentd.* New Sharlston Collieries Co. v. Westmoreland, [1904] 2 Ch. 443, n.; Beard v. Molra Colliery Co., [1915] 1 Ch. 257; Davies v. Powell Duffryn Steam Coal Co., [1917] 1 Ch. 488; Consett Industrial & Provident Soc. v. Consett Iron Co., [1922] 2 Ch. 135.

749. ——]—We must find out what is the meaning of the contract, between the parties, whether it be by deed or a simple contract, by looking at the whole of the instrument (LORD HALSBURY, C.).—NEW SHARLSTON COLLIERY CO., LTD. v. WESTMORELAND (EARL) (1900), [1904] 2 Ch. 443, n.; 73 L. J. Ch. 338, n.; 82 L. T. 725, H. L.; *affg.* S. C. *sub nom.* WESTMORELAND (EARL) v. NEW SHARLSTON COLLIERY CO., LTD. (1899), 80 L. T. 846, C. A.

Annotations:—Mentd. Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305; Beard v. Molra Colliery Co., [1915] 1 Ch. 257; Davies v. Powell Duffryn Steam Coal Co., [1917] 1 Ch. 488; Thomson v. St. Catharine's College, Cambridge, & Mappin's Messrs' Old Brewery, St. Catharine's College, Cambridge v. Hosse (1918), 118 L. T. 758; Wellton v. Butterley Co., [1920] 1 Ch. 130; Consett Industrial & Provident Soc. v. Consett Iron Co., [1922] 2 Ch. 135.

Effect of context on ordinary meaning of words.]
—See Sub-sect. 8, A., *post*.

750. Every word & part to be given effect to—If possible.]—Effect must be given to every word in a deed, if it may be done, without rejecting any.—SHELLEY'S CASE, WOLFE v. SHELLEY (1581), 1 Co. Rep. 93 b; Moore, K. B. 136; 76 E. R. 206.

Annotations:—Reid. Beck's Case (1630), Litt. 314; Doe d. Gallini v. Gallini (1833), 5 B. & Ad. 621; Holmes v. Prescott (1864), 11 L. T. 38. *Mentd.* Bedford's Case (undated), 2 Ard. 197; Lincoln College's Case (1595), 3 Co. Rep. 58; Bingham's Case, Stroud d. Albert v. Horsey (1600), 2 Co. Rep. 91 a; Finch's Case (1606), 6 Co. Rep. 63 a; Lillington's Case (1607), 7 Co. Rep. 38 a; Stafford's Case (1609), 8 Co. Rep. 73 a; Counden v. Clerke (1613), Hob. 29; Portington's Case (1613), 10 Co. Rep. 35 b; Yong v. Radford (1613), Hob. 3; Blamford v. Blamford (1615), 3 Bulst. 98; Butler v. Finchor (1615), 2 Bulst. 302; Gough v. Howarde (1615), 3 Bulst. 121; Dymmock's Case (1616), Cro. Jac. 408; Haverill v. Hare (1616), 3 Bulst. 250; Egerton's Case (1619), Cro. Jac. 525; Hemming v. Brabason (1620), O. Bridge. 1; Harrison v. Bowden (1661), 1 Sid. 29; Holland v. Fisher (1662), O. Bridge. 181; Payne v. Barker (1662), O. Bridge. 18; Petty v. Goddard (1662), O. Bridge. 35; Harwood v. Phillips (1663), O. Bridge. 464; Davies v. Kempe (1664), Cart. 2; Ellis v. Jackson (1664), 1 Sid. 229; Geary v. Bearcroft (1666), Cart. 57; Marsh v. Lee (1670), 2 Vent. 337; Smith v. Wheeler (1670), 1 Mod. Rep. 38; Pibus v. Mitford (1674), 1 Vent. 372; Coulthman v. Senhouse (1678), T. Jo. 105; Leigh v. Leigh (1691), 2 Lut. 1539; Luddington v. Kimo (1697), 1 Ld. Raym. 203; Scattergood v. Edge (1699), 12 Mod. Rep. 278; Withers v. Harris (1702), 2 Ld. Raym. 806; Woodward's Case (1702), 7 Mod. Rep. 2; Anon. (1703), 6 Mod. Rep. 86; Falmouth v. Storde (1707), 11 Mod. Rep. 138; Abbot v. Burton (1708), 11 Mod. Rep. 181; Brown v. Barkham (1717), 1 Stra. 35; Goodright v. Wright (1717), 1 Stra. 25; Marks v. Marks (1718), 10 Mod. Rep. 419; Ratcliffe's Case (1720), 1 Stra. 267; Thornby v. Fleetwood (1720), 1 Stra. 318; Dawes v. Ferrars (1722), Prec. Ch. 589; Shaw v. Weigh (1725), Fortes. Rep. 58; Goodright v. Pully (1726), 2 Eq. Cas. Abr. 315; Papillion v. Voice (1728), Kel. W. 27; Dubber v. Trollope (1734), Amb. 453; Fuller v. Johnson (1735), Lee temp. Hard. 158; Chauncey v. Needham (1737), Andr. 53; Minshull v. Minshull (1737), 1 Atk. 411; Hopkins (alias Dare) v. Hopkins (1738), 1 Atk. 581; Newcoman v. Bethlem Hospital (1741), Amb. 785; Trodd v. Downs (1742), 2 Atk. 305; Witham v. Lewis (1744), 1 Wils. 48; Bagshaw v. Spencer (1748), 1 Ves. Sen. 142; Lethleulier

v. Tracy (1754), 1 Keny. 56; Sayer v. Masterman (1757), Wilm. 386; Wright v. Pearson (1758), Amb. 358; Austen v. Taylor (1759), 1 Eden, 361; Vaughan d. Atkins v. Atkins (1771), 5 Burr. 2784; Alpess v. Watkins (1800), 8 Term Rep. 516; Goodtitle d. Sweet v. Herring (1801), 1 East, 264; Hawkins v. Kemp (1803), 3 East, 410; Poole v. Poole (1804), 3 Bos. & P. 630; Curtis v. Price (1805), 12 Ves. 39; Tewkesbury, Bailiffs v. Diston (1805), 2 Smith, K. B. 508; Doe d. Lindsey v. Colyear (1809), 11 East, 548; Lyon v. Mitchell (1816), 1 Madd. 467; Cholmondeley v. Clinton (1820), 2 Jac. & W. 1; Heneage v. Andover (1822), 10 Price, 230; Doe d. Jones v. Jones (1823), 1 B. & C. 238; Doe d. Bagnall v. Harvey (1825), 7 Dow. & Ry. K. B. 78; Doe d. Winter v. Perratt (1826), 5 B. & C. 48; Doe d. Jones v. Williams (1833), 2 Nev. & M. K. B. 602; Hood v. Pimm (1836), Tyr. & Gr. 1118; Lees v. Mosley (1836), 5 L. J. Ex. Eq. 78; Scarborough v. Doe d. Savile (1836), 3 Ad. & El. 897; Dumasday v. Hughes (1837), 4 Scott, 209; Douglas v. Congreve (1838), 8 L. J. Ch. 63; Jackson v. Noble (1838), 2 Jur. 251; Doe d. Nicholson v. Welford (1840), 12 Ad. & El. 61; Holloway v. Clarkson (1842), 6 Jur. 923; Harrison v. Harrison (1844), 7 Man. & G. 938; Harvey v. Towell (1847), 7 Hare, 231; Monypenny v. Dering (1847), 16 M. & W. 418; Doe d. Cannon v. Rucastle (1849), 8 C. B. 876; Monypenny v. Dering (1850), 7 Hare, 568; Toller v. Attwood (1850), 15 Q. B. 929; Holliday v. Overton (1852), 15 Beav. 480; James v. Wynford (1852), 1 Sm. & G. 40; East v. Twyford (1853), 4 H. L. Cas. 517; Kavanagh v. Morland (1853), Kay, 16; Kenworthy v. Ward (1853), 11 Hare, 196; Edwards v. R. (1854), 9 Exch. 628; Voller v. Carter (1854), 24 L. J. Q. B. 56; Wright v. Vernon (1854), 2 Drew. 439; Re Wynch's Trusts (1854), 23 L. J. Ch. 930; Coape v. Arnold, Arnold v. Coape (1856), 4 De G. M. & G. 574; Crofts v. Middleton (1855), 2 K. & J. 194; Parker v. Clark (1855), 3 Sm. & G. 161; Woodhouse v. Herriek (1855), 1 K. & J. 352; Chamberlayne v. Chamberlayne (1856), 25 L. J. Q. B. 187; Haddelsey v. Adams (1856), 22 Beav. 266; Grimsen v. Downing (1857), 4 Drew. 125; Lewis v. Hopkins (1857), 5 W. R. 243; Roddy v. Fitzgerald (1858), 6 H. L. Cas. 823; Towns v. Wentworth (1858), 11 Moo. P. C. C. 526; Wright v. Mills (1859), 4 H. & N. 488; Johnson v. Rutherford (1861), 3 L. T. 649; Jordan v. Adams (1861), 9 C. B. N. S. 483; Mills v. Soward (1861), 1 J. & H. 733; Spence v. Spence (1862), 12 C. B. N. S. 199; Thorpe v. Thorpe (1862), 1 H. & C. 326; Davenport v. Davenport (1863), 1 Hem. & M. 775; Snell v. Finch (1863), 13 C. B. N. S. 651; Greaves v. Simpson (1864), 33 L. J. Ch. 641; Seymour v. Vernon (1864), 33 L. J. Ch. 690; Collier v. McBean (1865), 6 New Rep. 192; Phillips v. James (1865), 13 W. R. 543; Clarke v. Clemmans, Selway v. Clemmans (1866), 36 L. J. Ch. 171; Fuller v. Chamier (1866), L. R. 2 Eq. 682; Re Jeaffreson's Trusts (1866), L. R. 2 Eq. 276; Powell v. Boggs (1866), 14 W. R. 670; Bradley v. Cartwright (1867), L. R. 2 C. P. 611; Denman v. Jones (1867), 16 L. T. 787; Avern v. Lloyd (1868), L. R. 5 Eq. 383; Herriek v. Franklin (1868), L. R. 6 Eq. 593; Minton v. Kirwood (1868), 37 L. J. Ch. 606; Bailly v. De Crespiigny (1869), L. R. 4 Q. B. 180; Beloeley v. Carter (1869), 4 Ch. App. 230; Sackville-West v. Holmesdale (1870), L. R. 4 H. L. 543; Brookman v. Smith (1871), L. R. 6 Exch. 291; Cooper v. Kynoch (1872), 41 L. J. Ch. 296; Grier v. Grier (1872), L. R. 5 H. L. 688; Webb v. Sadler (1873), 28 L. T. 388; Underhill v. Roden (1876), 45 L. J. Ch. 266; Allen v. Bewsey (1877), 37 L. T. 688; Hampton v. Holman (1877), 46 L. J. Ch. 248; Re White & Hindle's Contract (1877), 7 Ch. D. 201; Comfort v. Brown (1878), 10 Ch. D. 146; Smith v. Butcher (1878), 10 Ch. D. 113; Clarke v. Bradlaugh (1881), 46 L. T. 49; Marshall v. Gingell (1882), 21 Ch. D. 790; Morgan v. Thomas (1882), 9 Q. B. D. 643; Studd v. Cook (1883), 8 App. Cas. 577; Bowen v. Lewis (1884), 9 App. Cas. 890; McGibbon v. Abbott (1885), 10 App. Cas. 653; Re Parry & Dagg (1885), 31 Ch. D. 130; Richardson v. Harrison (1885), 16 Q. B. D. 85; Re Kirk & Randall & East & West India Dock Co. (1886), 2 T. L. R. 692; Pedder v. Hunt (1887), 18 Q. B. D. 565; Re Score, Tolman v. Score (1887), 57 L. T. 40; Re Bird & Barnard's Contract (1888), 59 L. T. 166; Re Allsop & Joy's Contract (1889), 61 L. T. 213; Evans v. Evans, [1892] 2 Ch. 173; Re Barrett (1894), 39 Sol. Jo. 9; Van Grutten v. Foxwell, Foxwell v. Van Grutten, [1897] A. C. 658; Foxwell v. Van Grutten (1900), 82 L. T. 272; Re Watson & Morrison's Contract, Watson v. Kerr (1900), 44 Sol. Jo. 529; Milman v. Lane, [1901] 2 K. B. 745; Re Youmans' Will, [1901] 1 Ch. 729; Pelham Clinton v. Newcastle, [1902] 1 Ch. 34; Re Buckton, Buckton v. Buckton, [1907] 2 Ch. 408; Re Nash, Cook v. Frederick, [1909] 2 Ch. 450; Re Davison's Settlement, Cattermole, Davison v. Munby, [1913] 2 Ch. 498; Re Simcoe, Vowler-Simcoe v. Vowler, [1913] 1 Ch.

552; Lightfoot v. Maybery, [1914] A. C. 788; Re Lawrence, Lawrence v. Lawrence, [1915] 1 Ch. 129; Silcocks v. Silcocks, [1916] 2 Ch. 161; Re Elton, Elton v. Elton, [1917] 2 Ch. 413; Re Hobbs, Hobbs v. Hobbs, [1917] 1 Ch. 569; Re Hussey & Green's Contract, Re Hussey, Hussey v. Simper, [1921] 1 Ch. 560.

751. ———.]—THURMAN v. COOPER (1619), Poph. 138; 2 Roll. Rep. 19; 79 E. R. 1239; *sub nom.* TURNMAN v. COOPER, Cro. Jac. 478.

Annotation:—Mentd. Brice v. Smith (1737), Willes, 1.

752. ———.]—BECK'S CASE, No. 645, *ante*.

753. ———.]—But surely it is a rule both in law & equity, so to construe the whole deed or will, as that every clause should have its effect (PARKER, L.C.).—BUTLER v. DUNCOMB (1718), as reported in 1 P. Wms. 448; 24 E. R. 460, L. C.

Annotations:—Mentd. Resbury v. Newland (1722), 2 P. Wms. 93; Mills v. Banks (1724), 3 P. Wms. 1; Bromie v. Berkley (1728), 2 P. Wms. 484; King v. Withers (1735), Cas. temp. Talb. 117; Bradley v. Powell (1736), Cas. temp. Talb. 193; Stanley v. Stanley (1737), West temp. Hard. 136; Hall v. Carter (1742), 9 Mod. Rep. 347; Stevens v. Dethick (1743), 3 Atk. 39; Teynham v. Webb (1751), 2 Ves. Sen. 198; Worsley v. Granville (1751), 2 Ves. Sen. 331; Loder v. Loder (1754), 2 Ves. Sen. 530; Churchman v. Harvey (1757), Amb. 824; Godwin v. Munday (1783), 1 Bro. C. C. 191; Clinton v. Seymour (1799), 4 Ves. 440; Coddington v. Foley (1801), 6 Ves. 364; Scarsbrick v. Skelmersdale (1840), 4 Y. & C. Ex. 78; Wilbraham v. Scarsbrick (1847), 1 H. L. Cas. 187; Re Greaves' S. E., Jones v. Greaves, [1900] 2 Ch. 683.

754. ———.]—SHERLOCK v. SPIERS, No. 734, *ante*.

755. ———.]—HAYNE v. CUMMINGS, No. 741, *ante*.

756. ———.]—The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, & not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another & more express clause in the same deed (SIR JOHN ROMILLY, M.R.).—Re STRAND MUSIC HALL CO., LTD., *Ex p.* EUROPEAN & AMERICAN FINANCE CO., LTD. (1865), 35 Beav. 153; 55 E. R. 853; *affd.*, 3 De G. J. & Sm. 147, L. J.J.

Annotations:—Mentd. Ross v. Army & Navy Hotel Co. (1886), 34 Ch. D. 43; Re Queensland Land & Coal Co., Davis v. Martin, [1894] 3 Ch. 181; Brown, Shipley v. I. R. Comrs. (1895), 64 L. J. M. C. 241; Re Johnston Foreign Patents Co., Re Johnston Die Press Co., Re Johnston Engraving Co., J. P. Trust v. The Companies (1904), 91 L. T. 124; Re Tasker, Hoare v. Tasker, [1905] 2 Ch. 587; Re Perth Electric Tramways, Lyons v. Tramways Syndicate & Perth Electric Tramways, [1906] 2 Ch. 216; Re Fireproof Doors, Umney v. Fireproof Doors, [1916] 2 Ch. 142.

757. ———.]—If consistent with manifest intention.]—It is a sound construction of both deeds & wills, that every word ought to stand if consistent with the manifest intention.—KING v. BURCHALL (1759), 4 Term Rep. 296, n.; Amb. 379; 1 Eden, 424; cited in 2 Burr. at p. 1103; 100 E. R. 1028.

Annotations:—Mentd. Jacobs v. Amyatt (1794), 4 Bro. C. C. 542; Jones v. Morgan (1783), 1 Bro. C. C. 206; Goodright v. Herring (1785), 4 Doug. K. B. 298; Denn d. Webb v. Puckey (1793), 5 Term Rep. 299; Woodhouse v. Herriek (1855), 1 K. & J. 352; Vernon v. Wright (1858), 28 L. J. Ch. 198; Marshall v. Grime (1860), 28 Beav. 375; Morgan v. Thomas (1882), 8 Q. B. D. 575.

Ut res magis valeat quam pereat.]—See Sub-sect. 18, *post*.

SUB-SECT. 5.—CONSTRUCTION IN ACCORDANCE WITH LAW.

758. General rule.]—BALDWIN v. MARTON, BALDWIN'S CASE, No. 636, *ante*.

PART III. SECT. 3, SUB-SECT. 5.

758 i. General rule.]—Contracts are to be construed legally, & not strained one way or another.—ANNEAR v. RAILWAYS COMRS. (1883), 1 Q. L. J. 162.—AUS.

758 ii. ———.]—MITCHELL v. SMELLIE

(1870), 20 C. P. 389.—CAN.

758 iii. ———.]—Equity in construing the effect of a contract, never departs from what appears on the face of the instrument to be the intention of the parties, unless contrary to some principle of law.—PENTLAND v. STOKES

(1812), 2 Ball & B. 68.—IR.

758 iv. ———.]—GATCHELL v. GEORGHEAN (1857), 6 L. Ch. R. 312.—IR.

758 v. ———.]—The rights of parties to a contract are to be judged by that law by which they may justly be presumed to have bound themselves.—RAM

Sect. 3.—Rules of construction: Sub-sects. 5, 6, 7 & 8, A]

759. —.]—*CLEERE'S CASE*, No. 637, *ante*.
 760. —.]—*BERRY v. PERRY*, No. 643, *ante*.
 761. —.]—*BECK'S CASE*, No. 645, *ante*.
 762. —.]—The intent of the parties shall not be implied against the direct rules of law (*ROLL, C.J.*)—*WATS v. DIX* (1649), *Sty.* 188, 204; 82 E. R. 631, 647.
Annotations:—*Mentd.* *Crossing v. Skidmore* (1671), 2 Keb. 784; *Tutthill v. Roberts* (1673), *Freem. K. B.* 344; *Baker v. Lade* (1689), 3 Lev. 291.
 763. —.]—*PARKHURST v. SMITH*, No. 650, *ante*.
 764. —.]—*GOODTITLE d. EDWARDS v. BAILEY*, No. 638, *ante*.
 765. —.]—*GIBSON v. MINET*, No. 639, *ante*.
 766. —.]—*CRISDEE v. BOLTON*, No. 661, *ante*.
 767. —.]—*HILBERS v. PARKINSON*, No. 640, *ante*.

According to intention.]—See Sub-sect. 3, *ante*.

SUB-SECT. 6.—CONSTRUCTION WITH REFERENCE TO LAW AT DATE OF EXECUTION.

768. General rule.]—By an agreement between the N. Local Board & the C. Local Board, it was agreed that the N. Board should make a sewer & allow the sewers of the C. district to drain into it, but the sewage of any other districts or places was not to be permitted by the C. Board to pass into their sewers so as to discharge into the sewer to be made by the N. Board. Under Acts of Parliament then in existence, the owner of premises beyond the limits of a district had power to make a sewer to communicate with the sewers of the district, & by an Act subsequently passed similar powers were given:—*Held*: the agreement must be taken to have been made subject to the provisions of the law then existing, under which the owners of premises beyond the C. district had similar powers.—*NEWINGTON LOCAL BOARD v. COTTINGHAM LOCAL BOARD* (1879), 12 Ch. D. 725; 48 L. J. Ch. 226; 40 L. T. 58.

Annotation:—*Reid.* *New Windsor Corp'n. v. Stovell* (1884), 27 Ch. D. 665.

769. Assumption that law will not be altered.]—In the absence of clear expressions to the contrary, parties must be considered as contracting upon

the assumption that the law will remain as it is at the time of entering into the contract.—*BERWICK-UPON-TWEED CORPN. v. OSWALD* (1854), 3 E. & B. 653; 1 Jur. N. S. 395; 118 E. R. 1286; *sub nom.* *OSWALD v. BERWICK-UPON-TWEED CORPN.*, 23 L. J. Q. B. 321; 23 L. T. O. S. 272; 18 J. P. 566; 2 W. R. 707; 2 C. L. R. 909, Ex. Ch.; *on appeal* (1856), 5 H. L. Cas. 856, H. L.

Annotations:—*Reid.* *Vansittart v. Taylor* (1855), 4 E. & B. 910; *Pybus v. Gibb* (1856), 6 E. & B. 902; *Clifton Dartmouth Hardness Corp'n. v. Silly* (1857), 7 E. & B. 97; *Baily v. De Crespigny* (1869), L. R. 4 Q. B. 180. *Mentd.* *Spence v. Healey* (1853), 8 Exch. 668; *Hughes v. Lumley* (1854), 4 E. & B. 358; *North Western Ry. Co. v. Whinray* (1854), 10 Exch. 77; *Kitson v. Julian* (1855), 4 E. & B. 854; *Badger v. Finch* (1857), 29 L. T. O. S. 88; *Cambridge Corp'n. v. Dennis* (1858), E. B. & E. 660; *Collins v. Collins* (1884), 9 App. Cas. 205.

SUB-SECT. 7.—EFFECT OF CONSTRUCTION OF ONE DOCUMENT ON CONSTRUCTION OF ANOTHER.

770. General rule.]—*Seem*: on points of construction precedents may not be cited as authorities, unless they explain the meaning of technical terms or lay down general principles.—*ROBINSON v. EVANS* (1873), 43 L. J. Ch. 82; 29 L. T. 715; 22 W. R. 199.

Annotations:—*Reid.* *Re Best's Settlement. Trusts* (1874), L. R. 18 Eq. 686. *Mentd.* *Wing v. Wing* (1876), 34 L. T. 941.

771. —.]—*DIDCOTT v. FRIESNER* (1895), 11 T. L. R. 187, C. A.

772. Second document will not act as defeasance.]—One deed not to be construed as a defeasance of another without necessity.—*CLAYTON v. KYNASTON* (1098), 2 Salk 573; 1 Ld. Raym. 419; 12 Mod. Rep. 221; 91 E. R. 483.

Annotations:—*Reid.* *Phillips v. Knightly* (1730), FitzG. 53; *Dean v. Newhall* (1799), 8 Term Rep. 168; *Hutton v. Eyre* (1815), 1 Marsh. 603; *Lancaster v. Harrison* (1830), 6 Bing. 726; *Morley v. Frear* (1830), 6 Bing. 547; *Lowndes v. Stamford* (1852), 18 Q. B. 425; *Willis v. De Castro* (1858), 4 C. B. N. S. 216; *Lodger v. Stanton* (1862), 2 John. & H. 687.

SUB-SECT. 8.—MEANING OF WORDS.

A. General Rules.

773. Words construed in their ordinary meaning.]—ANON. (1549), Benl. 6; 73 E. R. 935.

Annotations:—*Reid.* *Bowman v. Milbanke* (1664), 1 Sid. 191. *Mentd.* *Blackmore's Case* (1610), 8 Co. Rep. 156 a.

NARAIN SINGH v. CHOTA NAGPUR BANKING ASSOCN. (1916); 1 L. R. 43 Cal. 332.—IND.

758 vi. —.]—A deed of arrangement & release in the English form, between members of a Hindoo family respecting joint estate, claimed by a childless Hindoo widow of one of the co-heirs, in her character of heiress & legal personal representative of her deceased husband, declared that she was entitled to the sum therein expressed, as the share of her deceased husband, "for her sole absolute use & benefit":—*Held*: these words are not to receive the same interpretation as a ct. of equity in England would put upon them, but a deed must be construed with reference to the situation of the parties & the rights of the widow by the Hindoo law.—*SREEMUTTY RABUTTY DOSSEE v. SIBCHUNDER MULLICK* (1854), 6 Moo. Ind. App. 1.—IND.

a. —.]—*Onus of proof.*—The onus is on the party who contends that a contract is governed by special & not by general rules of law.—*TEJ CHUND v. SREERAKANTH GHOSE* (1844), 3 Moo. Ind. App. 261.—IND.

PART III. SECT. 3, SUB-SECT. 7.

770 i. *General rule.*—There is danger in deciding one case relating to a deed

by the construction placed in another suit on another & a different deed.—*BHAGWANT SINGH v. DARYAO SINGH* (1889), 1 L. R. 11 All. 416.—IND.

770 ii. —.]—The construction placed on an earlier document cannot be used in construing a later document executed by the same person, when the later document does not embody or refer to the earlier document, & when further they do not form parts of the same transaction & are not even contemporaneous. Nor can the decision on the earlier document afford a precedent for the interpretation of the later document, when the language of the two documents is found to be entirely dissimilar.—*HAIDAR HUSAIN KHAN v. FACHFUR MIRZA* (1906), L. R. 32 Ind. App. 135.—IND.

PART III. SECT. 3, SUB-SECT. 8.—A.

i. *General rule.*—In construing all written instruments, the grammatical & ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or to some repugnance or to some inconsistency with the rest of the instrument, in which case the grammatical & ordinary sense may be modified, so as to avoid that absurdity, repugnance or inconsistency, but no farther.—*WARBURTON v. LOVELAND d. IVIE* (1828), 1 Hud. &

B. 623.—IR.

773 i. *Words construed in their ordinary meaning.*—Where a deed contained a proviso that the agreement might be terminated by any of the parties on giving a year's notice of his intention so to do:—*Held*: "on" had the same effect as "by."—*ROBBINS v. ROBBINS* (1878), 4 V. L. R. 128.—AUS.

773 ii. —.]—A lessee covenanted to erect alterations upon the premises, & to execute such alterations "forthwith":—*Held*: the word "forthwith" in this covenant could not be extended to include a period of 21 months after the date of the lease.—*MEASURES v. MCFADYEN* (1910), 11 C. L. R. 723.—AUS.

773 iii. —.]—*ASH v. SOMERS* (1862), 22 U. C. R. 191.—CAN.

773 iv. —.]—*GREER v. JOHNSTON* (1871), 32 U. C. R. 77.—CAN.

773 v. —.]—*CAMERON v. WELLINGTON, GREY & BRUCE RY. CO.* (1881), 28 Gr. 327.—CAN.

773 vi. —.]—*DINWOODIE v. SMITH* (1875), 25 C. P. 361.—CAN.

773 vii. —.]—If in a conveyance of land the description is not certain enough to identify the locus it is to be construed according to the language of the instrument, though it may result

774. —.]—HEWET v. PAINTER (1612), 1 Bulst. 174; 80 E. R. 864.

775. —.]—LONDON v. SOUTHWELL (CHAPTER) (1618), Hob. 303; 80 E. R. 447.

Annotations.—*Reid.* Barret v. Clubb (1776), 2 Wm. Bl. 1052; Mirehouse v. Rennell (1832), 3 Bing. 490; Crompton v. Jarratt (1885), 30 Ch. D. 298. *Mentl.* R. v. Rochester Bp. & Clark (1875), 2 Mod. Rep. 1.

776. —.]—On a covenant to pay such a sum of money "within one month next following," the month shall be reckoned a lunar month of 28 days, & not a calendar month.

Words & phrases of speech are to be expounded & construed as they are generally understood (*per* CUR.).—BARKSDALE v. MORGAN (1693), 4 Mod. Rep. 185; 87 E. R. 338.

777. —.]—HAMLEY v. HENDON (1699), 12 Mod. Rep. 327; 88 E. R. 1355.

778. —.]—Words are to be construed by the ct. as they are generally understood.—GARDINER v. ATWATER (1756), Say. 265; 96 E. R. 875.

779. —.]—Where A. & B. entered into a written agreement, the one to purchase, & the other to sell all the salt made at the salt-works of B. for fourteen years, but it was provided that bkpcy. or insolvency on the part of A. should terminate the contract:—*Held*: the word insolvency was used in its natural & not in its artificial sense, & the contract was put an end to by A. being unable to pay his debts, although he had not taken the benefit of Insolvent Debtors Act,

1826 (c. 57).—PARKER v. GOSSAGE (1835), 2 Cr. M. & R. 617; 1 Gale, 288; Tyr. & Cr. 105; 5 L. J. Ex. 4; 150 E. R. 262.

Annotations.—*Reid.* Biddlecombe v. Bond (1835), 4 Ad. & El. 332; Doe d. Gatehouse v. Rees (1838), 4 Bing. N. C. 384; R. v. Saddlers' Co. (1863), 10 H. L. Cas. 404; London & Counties Assets Co. v. Brighton Grand Concert Hall & Picture Palace, [1915] 2 K. B. 493.

780. —.]—The expression "becoming insolvent" means a general inability to pay debts, & does not signify taking the benefit of Insolvent Debtors Act, 1826 (c. 57), unless the context so restrains it.—BIDDLECOMBE v. BOND (1835), 4 Ad. & El. 332; 1 Har. & W. 612; 5 Nev. & M. K. B. 621; 5 L. J. K. B. 47; 111 E. R. 811.

Annotations.—*Reid.* Doe d. Gatehouse v. Rees (1838), 4 N. C. 384; R. v. Saddlers' Co. (1863), 10 H. L. Cas. 404.

781. —.]—The words of a deed are to be construed like those of any other writing according to the ordinary use & application of them (LORD ABINGER, C.B.).—BAIN v. COOPER (1842), 9 M. & W. 701; 11 L. J. Ex. 325; 152 E. R. 296.

782. —.]—In construing instruments the words are to be construed according to their strict & primary acceptance, unless from the context of the instrument, & the intention of the parties to be collected from it, they appear to be used in a different sense, or unless in their strict sense they are incapable of being carried into effect; subject, however, to this, that the meaning of a particular word may be shown by parole

in the grantor assuming to convey more than his title warranted.—BARTHEL v. SCOTTON (1895), 24 S. C. R. 367.—CAN.

773 viii. —.]—BAKER v. McLELLAND (1895), 24 S. C. R. 416.—CAN.

773 ix. —.]—The words used in a deed must be construed in their plain natural sense.—QUEBEC CITY v. NORTH SHORE RY. CO. (1897), 27 S. C. R. 102; *affd.* 31 Can. Gaz. 11, P.C.—CAN.

773 x. —.]—CUNNINGHAM v. CURTIS (1897), 5 B. C. R. 472.—CAN.

773 xi. —.]—A deed relied upon by defts. contained the words "together with the land in front of the said lot to high water mark":—*Held*: the words "in front of" were to be read in their ordinary sense.—McINTYRE v. MCKINNON (1898), 31 N. S. R. 54.—CAN.

773 xii. —.]—R. v. POIRIER (1899), 30 S. C. R. 36.—CAN.

773 xiii. —.]—A mill was operated by water power taken from the surplus water of the G. canal, under a lease from the Crown. The lease provided that in case of a temporary stoppage of the supply caused by repairs or alterations in the canal, the lessee would not be entitled to compensation unless the same continued for 6 months, & then only to an abatement of rent:—*Held*: that a stoppage of the supply for two whole seasons, necessarily & *bona fide* caused by alterations in the canal, was a temporary stoppage under this provision.—BEACH v. R. (1905), 26 C. L. T. 246; 37 S. C. R. 259.—CAN.

773 xiv. —.]—Pltf. claimed land under a deed from O. of one full half of the farm lot on which he resided, & also one full half or moiety of all the woods, etc., thereunto in any wise belonging or appertaining. The land was a wood lot situated about two miles from the farm lot & separated from it by lands of other proprietors, & upon which O. was shown to have cut from time to time, but as to which there was no general user as part & parcel of the farm, there being another wood lot connected with the farm which was generally used for that purpose:—*Held*: in order to pass under the words used the land must be

an integral part of the farm itself.—OGILVIE v. GRANT (1906), 41 N. S. R. 1; 2 E. L. R. 196.—CAN.

773 xv. —.]—By agreement through correspondence, plfts. were to tender for a triangular piece of land offered for sale by the O. Govt. containing 19 acres & convey half to defts., who would not tender. The division was to be made according to a plan of the block of land with a line drawn through the centre from east to west, defts. to have the northern half. Plfts. acquired the land but the Govt. reserved from the grant two acres in the northern half:—*Held*: Defts. were entitled to one half of the land actually acquired by plfts., & not only to the balance of the northern half as marked on the plan.—GRAND TRUNK RY. CO. v. CANADIAN PACIFIC RY. CO. (1907), 39 S. C. R. 220.—CAN.

773 xvi. —.]—In order to ascertain the scope & effect of a covenant, the language used must be read in the ordinary & popular & not in the legal or technical sense.—*Re* ROBERTSON & DEFOE (1911), 25 O. L. R. 286; 20 O. W. R. 712; 3 O. W. N. 431.—CAN.

773 xvii. —.]—SAUERMAN v. E. M. F. Co. (1913), 24 O. W. R. 637; 4 O. W. N. 1137; 12 D. L. R. 191.—CAN.

773 xviii. —.]—Plfts. agreed with defts. to "do excavating of all materials, excepting rock," under defts. building, at a named price for all materials removed. In the course of the work, pltf. encountered large boulders & removed them:—*Held*: "rock" should, in the circumstances of the case, be considered as having its usual meaning, including, according to the dictionaries, a large stone or boulder.—MILLS v. CONTINENTAL BAG & PAPER CO. (1918), 44 O. L. R. 71; 45 D. L. R. 389.—CAN.

773 xix. —.]—*Re* MCCARTY (1920), 59 D. L. R. 369.—CAN.

773 xx. —.]—Effect must be given to operative words in their ordinary meaning.—LAND MORTGAGE BANK OF INDIA v. ABUL KASIM KHAN (1898), 1 L. R. 26 Calc. 395.—IND.

773 xxi. —.]—BIRAJ NOPANI v. PURA SUNDARY DASEE (1914), 1 L. R.

42 Calc. 56.—IND.

773 xxii. —.]—The words "bogs & turf-mosses," in their primary meaning, & when uncontrolled by the context, signify a particular description of land, & a grant thereof will pass the soil & freehold in such descriptions of land.—BOYLE v. OLIPHANTS (1841), 4 I. Eq. R. 241; Long & T. 320.—IR.

773 xxiii. —.]—CROMMELIN v. DONREGAL (MARQUIS) (1847), 11 I. L. L. 423.—IR.

773 xxiv. —.]—The word "insolvent" in a decree or deed, is to be construed in the ordinary sense of a person who is unable to pay his debts, & not in the technical sense of one discharged as an insolvent debtor.—CAULFIELD v. MAGUIRE, [1856] 5 I. Ch. R. 78.—IR.

773 xxv. —.]—In the construction of deeds, a meaning must be given to every word, as far as possible, & its proper meaning.—McNEILL v. CROMMELIN (1858), 8 I. C. L. R. 61; 10 Ir. Jur. 297.—IR.

773 xxvi. —.]—The word "vest" *prima facie* means "come into possession"; not accrue in point of interest.—RICHARDSON v. ROBERTSON (1862), 14 Ir. Jur. 269.—IR.

773 xxvii. —.]—DUNSCOMB & Co. v. BECK (1827), 1 Nfld. L. R. 468.—NFLD.

773 xxviii. —.]—The words "the fee-simple of land" mean the whole fee-simple interest.—GRAY v. PARKER (1887), 6 N. Z. L. R. 226.—N.Z.

773 xxix. —.]—BIRRELL v. DRYER (1884), 9 A. C. 345; 11 I. (Ct. of Sess.) 41; 21 Sc. L. R. 590.—SCOT.

a. — *In absence of ambiguity.*—A party to a contract will not be allowed to escape from its consequences by setting up that he understands an unambiguous expression in a different sense than its ordinary one.—HEALMAN v. DAVID (1914), 29 W. L. R. 628; 7 W. W. R. 180; 20 D. L. R. 949.—CAN.

b. — *Though such construction not in accordance with intention of parties—If result not inequitable.*—DUMOULIN v. BURFOOT (1893), 22 S. C. R. 120.—CAN.

c. — *Reid v. Hesketh* (1905), 25 N. Z. L. R. 814.—N.Z.

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evidence, to be different in some particular place, trade or business, from its proper & ordinary signification.—*MALLAN v. MAY* (1844), 13 M. & W. 511; 14 L. J. Ex. 48; 4 L. T. O. S. 174; 9 Jur. 19; 168 E. R. 213.

Annotations.—*Consol. Cave v. Horsell*, [1912] 3 K. B. 533. *Reid. Simpson v. Margitson* (1847), 11 Q. B. 23; *Horwood v. Griffith* (1853), 3 W. R. 71; *Wallace v. A.-G.* (1864), 33 Beav. 384; *Bruner v. Moore*, [1904] 1 Ch. 305. *Mentd. Dendy v. Henderson* (1855), 24 L. J. Ex. 324.

783. —.]—*MORGAN v. RUTSON* (1848), 16 Sim. 234; 17 L. J. Ch. 419; 11 L. T. O. S. 238; 12 Jur. 813; 60 E. R. 863.

784. —.]—In construing agreements the ct. is bound to put on them the meaning which is the plain, clear & obvious result of the language used (*POLLOCK, C.B.*).—*TIELENS v. HOOPER* (1850), 5 Exch. 830; 20 L. J. Ex. 78; 155 E. R. 863; *sub nom. TIELENS v. HOOPER*, 16 L. T. O. S. 237.

785. —.]—No authority can justify a construction opposed to the natural import of the words.—*REID v. KENRICK* (1855), 3 Eq. Rep. 1031; 24 L. J. Ch. 503; 25 L. T. O. S. 193; 1 Jur. N. S. 897; 3 W. R. 530.

Annotations.—*Reid. Re D'Estampes' Settlement, D'Estampes v. Crowe* (1884), 53 L. J. Ch. 1117. *Mentd. Carter v. Carter* (1869), L. R. 8 Eq. 551; *Dickinson v. Dillwyn* (1869), L. R. 8 Eq. 546.

786. —.]—The rule of construction, & the rule which, in modern times particularly, the cts. have always been anxiously inclined to follow, has been to adhere as rigidly as possible to the express words that are found, whether in wills or in deeds, & to give to those words their natural ordinary meaning, unless, by so doing, it appears from the context, that you are using them in a different sense from that in which the testator or the maker of the deed intended to use them, or, unless by so using them, you would be doing something which would manifestly lead to an inconsistency, which could not have been the intention of the party making the instrument (*LORD CRANWORTH, C.*).

In construing wills, & indeed statutes & all written instruments, the grammatical & ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical & ordinary sense of the words may be modified, so as to avoid that absurdity & inconsistency, but no farther (*LORD WENSLEYDALE*).—*GREY v. PEARSON* (1857), 6 H. L. Cas. 61; 26 L. J. Ch. 473; 29 L. T. O. S. 67; 3 Jur. N. S. 823; 5 W. R. 454; 10 E. R. 1216 H. L.; *affg. S. C. sub nom. PEARSON v. RUTTER* (1853), 3 De G. M. & C. 398, L. C.

Annotations.—*Consol. Abbott v. Middleton, Rickotts v. Carpenter* (1858), 7 H. L. Cas. 68; *Baker v. Baker* (1858), 6 H. L. Cas. 616; *Theilsson v. Rendlesham* (1859), 7 H. L. Cas. 429; *Allgood v. Blake* (1873), L. R. 8 Exch. 160; *Caledonian Ry. v. N. B. Ry.* (1881), 6 App. Cas. 114; *Faber v. Latham, Gye, Third Party* (1897), 77 L. T. 168; *Cave v. Horsell*, [1912] 3 K. B. 533; *Bodega v. Martin*, [1915] 2 Ch. 385. *Reid. Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823; *Slingsby v. Grainger* (1859), 7 H. L. Cas. 273; *Secombe v. Edwards* (1860), 28 Beav. 440; *Seeger v. Duthie* (1860), 6 Jur. N. S. 1095; *Coates v. Hart* (1863), 32 Beav. 349; *Re Sanders' Trusts* (1866), L. R. 1 Eq. 675; *Day v. Day* (1870), 18 W. R. 417; *Sutton v. Ennis* (1870), 18 W. R. 882; *Reed v. Braithwaite* (1871), L. R. 11 Eq. 514; *Surtees v. Surtees* (1871), L. R. 12 Eq. 400; *Robinson v. Evans* (1873), 43 L. J. Ch. 83; *Waring v. Currey* (1873), 22 W. R. 150; *Lowther v. Bentinck* (1874), L. R. 19 Eq. 166; *Sweeting v. Pridoux* (1876), 45 L. J. Ch. 378; *Taylor v. St. Helens Corp'n* (1877), 6 Ch. D. 264; *Edwards v. West* (1878), 38 L. T. 481; *Leach v. Jay* (1878), 39 L. T. 242; *Re Levy, Ex p. Walton* (1881), 17 Ch. D. 746; *Rhodes v. Rhodes* (1882), 7 App. Cas. 192; *Spencer v. Metropolitan Board of Works* (1883), 32 Ch. D. 142; *Re Martin, Smith v. Martin* (1885), 54 L. J. Ch. 1071; *Mills v. Dunham*, [1891] 1 Ch. 576; *Rogers v. Maddocks* (1892), 62 L. J. Ch. 219; *The Suvio*, [1908] P. 292; *Vacher v. London Soc. of Compositors*, [1913] A. C. 107; *R. v. Halliday*, [1917]

A. C. 260; *Whitmore v. King* (1918), 87 L. J. Ch. 647; *Scott v. Northumberland & Durham Miners' Permanent Relief Fund Friendly & Approved Soc.*, [1920] 1 K. B. 174; *Victoria City v. Vancouver Island, Bp.*, [1921] 2 A. C. 384.

787. —.]—It is a mere question of the construction of the covenant, which is to be determined by considering the ordinary & natural meaning of the words (*WILDE, B.*).—*LEGH v. LILLIE* (1860), as reported in 6 H. & N. 165; 158 E. R. 69; *sub nom. LEIGH v. LILLIE*, 30 L. J. Ex. 25.

788. —.]—It is an established rule of construction, that clear words of general import are not to be cut down on mere implication arising from the use of subsequent words (*STUART, V.-C.*).—*CUNNINGHAM v. BUTLER* (1861), 3 Giff. 37; 4 L. T. 234; 7 Jur. N. S. 461; 66 E. R. 313.

789. —.]—It is an ordinary rule of construction & of good sense that you construe words according to the company in which you find them (*WILLES, J.*).—*HUGHES v. PALMER* (1865), as reported in 19 C. B. N. S. 393; 34 L. J. C. P. 279; 13 W. R. 974; 144 E. R. 839.

Annotation.—*Mentd. New Zealand Shipping Co. v. Soc. des Ateliers et Chantiers de France*, [1919] A. C. 1.

790. —.]—The meaning of a word in a contract is its ordinary, popular meaning, & the ct. is as good a judge of that meaning as any learned authority (*BLACKBURN, J.*).—*GILL v. MANCHESTER, SHEFFIELD, & LINCOLNSHIRE RY. CO.* (1873), as reported in 28 L. T. 587.

Annotations.—*Mentd. Foulkes v. Met. Dist. Ry.* (1880), 5 C. P. D. 157; *White v. S. E. Ry.* (1885), 1 T. L. R. 319.

791. —.]—There is always some presumption in favour of the more simple & literal interpretation of the words of a statute or other written instrument (*LORD SELBORNE, C.*).—*CALEDONIAN RY. CO. v. NORTH BRITISH RY. CO.* (1881), 6 App. Cas. 114; 29 W. R. 685, H. L.

Annotations.—*Reid. Re Levy, Ex p. Walton* (1881), 17 Ch. D. 746; *Harding v. Preece* (1882), 9 Q. B. D. 281; *Spencer v. Metropolitan Board of Works* (1882), 32 Ch. D. 142; *N. E. Ry. v. Hastings*, [1900] A. C. 260; *R. v. Halliday*, [1917] A. C. 260. *Mentd. Re Taylor's Estate, Tomlin v. Underhay* (1882), 22 Ch. D. 495; *Re Wood's Estate, Wood v. Ward* (1886), 54 L. T. 932; *Victoria City v. Vancouver Island, Bp.*, [1921] 2 A. C. 384.

792. —.]—A person who had entered into a covenant not to use a house as a public-house, tavern, or beerhouse, opened a grocer's shop there, at which he carried on the sale of beer to be drunk off the premises as an ancillary business to his grocer's business:—*Held*: this was no infringement of the covenant.

The principle upon which words are to be construed in instruments is very plain—where there is a popular & common word used in an instrument, that word must be construed *primâ facie* in its popular & common sense. If it is a word of a technical or legal character it must be construed according to its technical or legal meaning. If it is a word which is of a technical & scientific character, then it must be construed according to that which is its primary meaning, namely, its technical & scientific meaning. But before you can give evidence of the secondary meaning of a word you must satisfy the ct. from the instrument itself or from the circumstances of the case that the word ought to be construed, not in its popular or primary signification but according to its secondary intention (*FRY, J.*).—*HOLT & CO. v. COLLYER* (1881), 16 Ch. D. 718; 50 L. J. Ch. 311; 44 L. T. 214; 45 J. P. 456; 29 W. R. 502.

Annotations.—*Apld. Lovell & Christmas v. Wall* (1910), 103 L. T. 588. *Reid. Formby v. Barker* (1903), 89 L. T. 349.

793. — Nothing being added to or taken away from them.]—*Re BEDSON'S TRUSTS*, No. 744, ante.

794. — Although such construction not in

accordance with intention of parties.]—SMITH v. COOKE, STOREY v. COOKE, No. 680, *ante*.

795. —.]—GAITY THEATRE CO. v. LOFTUS (1893), *Times*, Aug. 11.

796. —.]—The first & most general rule of construction is that the document under consideration is to be construed according to the plain meaning of the words used (RIGBY, L.J.).—DIEDERICHSEN v. FARQUHARSON BROTHERS, [1898] 1 Q. B. 150; 67 L. J. Q. B. 103; 77 L. T. 543; 46 W. R. 162; 14 T. L. R. 59; 42 Sol. Jo. 65; 8 Asp. M. L. C. 333; 3 Com. Cas. 87, C. A.

Annotations.—*Mentd.* East Yorkshire S.S. Co. v. Hancock (1900), 5 Com. Cas. 266; Moel Tryvan Ship Co. v. Kruger, [1906] 2 K. B. 792; The Northumbria (1906), 95 L. T. 618; Hogarth Shipping Co. v. Blyth, Greene, Jourdain, [1917] 2 K. B. 534.

797. —.]—KELLY v. LONDON PAVILION, LTD., KELLY v. NEW TIVOLI, LTD., KELLY v. OXFORD, LTD. (1897), 77 L. T. 215; 13 T. L. R. 584; *affd.* (1898), 14 T. L. R. 234, C. A.

798. —.]—The words of a written instrument must be construed according to their natural meaning, & it appears to me that no amount of acting by the parties can alter or qualify words which are plain & unambiguous (LORD HALSBURY, C.).—NORTH EASTERN RY. v. HASTINGS (LORD), [1900] A. C. 260; 69 L. J. Ch. 516; 82 L. T. 429; 16 T. L. R. 325, H. L.; *affg.* S. C. *sub nom.* HASTINGS (LORD) v. NORTH EASTERN RY., [1899] 1 Ch. 656, C. A.

Annotations.—*Re*ld. Van Diemen's Land Co. v. Table Cape Marine Board, [1906] A. C. 92; Watcham v. East Africa Protectorate, [1919] A. C. 533. *Mentd.* Brown v. Peto, [1900] 2 Q. B. 653; A.-G. v. Tamworth R. D. C. (1901), 85 L. T. 190; Eckersley v. Wigan Coal & Iron Co. (1910), 102 L. T. 264; Hong Kong & China Gas Co. v. Glon (1914), 110 L. T. 859.

799. —.]—If there is property to which words of appointment apply in their primary sense so that effect can be given to the deed in its ordinary signification, the appointment is confined to its primary meaning, & this is especially the case where the ct. is asked to divest an estate already vested.—*Re* THURSBY'S SETTLEMENT, GRANT v. LITTLEDALE, [1910] 2 Ch. 181; 79 L. J. Ch. 538; 102 L. T. 838; 54 Sol. Jo. 581, C. A.

Annotation.—*Mentd.* *Re* Bostock's Settltmt., Norrish v. Bostock (1920), 91 L. J. Ch. 17.

800. —.]—In the construction of deeds ordinary words ought to be given their plain & ordinary meaning (*per Cur.*).—BEARD v. MOIRA COLLIERY CO., LTD., [1915] 1 Ch. 257; 84 L. J. Ch. 155; 112 L. T. 227; 59 Sol. Jo. 103, C. A.

Annotations.—*Re*ld. Davies v. Powell Duffryn Steam Coal Co., [1917] 1 Ch. 488; Consett Industrial & Provident Soc. v. Consett Iron Co., [1922] 2 Ch. 135.

801. —.]—A stipulation in a contract that it shall be void in a certain event is to be construed according to its natural meaning, subject to the principle of law that a party shall not take advantage of his own wrong.—NEW ZEALAND SHIPPING CO., LTD. v. SOCIÉTÉ DES ATELIERS ET CHANTIERS DE FRANCE, [1919] A. C. 1; 87 L. J. K. B. 746; 118 L. T. 731; 34 T. L. R. 400; 62 Sol. Jo. 519; 14 Asp. M. L. C. 291, H. L.; *affg.*, [1917] 2 K. B. 717, C. A.

Annotations.—*Consd.* *Re* Meyrick's Settltmt., Meyrick v.

Meyrick, [1921] 1 Ch. 311. *Re*ld. *Re* Suarez, Suarez v. Suarez, [1918] 1 Ch. 176; Lebaupin v. Crispin, [1920] 2 K. B. 714; Quesnel Forks Gold Mining Co. v. Ward, [1920] A. C. 222.

802. — Unless strong reasons for construing otherwise.]—The safe & proper rule is, that words shall be taken in their natural & usual sense, unless some stronger reason be assigned for giving them another (ALDERSON, B.).—DOE d. BRIDGMAN v. DAVID (1834), 1 Cr. M. & R. 405; 5 Tyr. 125; 145 E. R. 1137; *sub nom.* DOE d. WILLIAMS v. DAVID, 4 L. J. Ex. 10.

Annotations.—*Mentd.* Baylis v. Le Gros (1858), 31 L. T. O. S. 215; Stevens v. Copp (1868), L. R. 4 Exch. 20; Horsey Estate v. Steiger, [1899] 2 Q. B. 79.

803. — In absence of indications to the contrary.]—The ct., in construing a mercantile contract, is bound, in the absence of any averment to the contrary, to construe all words in their ordinary, & none in any technical sense.—LEEMING v. SNAITH (1851), 16 Q. B. 275; 20 L. J. Q. B. 164; 16 L. T. O. S. 362; 15 Jur. 988; 117 E. R. 884.

Annotations.—*Re*ld. McConnel v. Murphy (1873), L. R. 5 P. C. 203; Morris v. Levison (1876), 1 C. P. D. 155.

804. —.]—Doubtless there are cases in which when in the instrument itself, whether a will or a contract or a statute, evidences may be discovered of the general intention of the framer & of the general meaning, or what has been called the governing sense, in which the words or the provisions are to be understood (LORD HALSBURY, C.).

If there is nothing to modify, nothing to alter, nothing to qualify the language which the instrument contains it must be construed in the ordinary & natural meaning of the words & sentences (LORD HALSBURY, C.).—ST. JOHN, HAMPTSTEAD VESTRY v. COTTON (1886), 12 App. Cas. 1; 56 L. J. Q. B. 225; 56 L. T. 1; 51 J. P. 340; 35 W. R. 505; 3 T. L. R. 161, H. L.

805. —.]—*Re* SAMUEL (M.) & Co. LONDON & SOCIÉTÉ COMMERCIALE ET INDUSTRIELLE DE NAPHE CASPIENNE ET DE LA MER NOIR, *Re* ARBITRATION ACT, 1889, SEC. 7, No. 609, *ante*.

806. —.]—Where there is nothing to show that parties have used language in any other than its strict & ordinary sense & where the words interpreted in that sense are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words shall be interpreted in that strict & primary sense & in no other, although they may be capable of some popular or secondary interpretation & although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered (SARGANT, J.).—ENLAYDE, LTD. v. ROBERTS, [1917] 1 Ch. 109; 86 L. J. Ch. 149; 115 L. T. 901; 33 T. L. R. 52; 61 Sol. Jo. 86.

Annotation.—*Consd.* Upjohn v. Hitchens, Upjohn v. Ford, [1918] 1 K. B. 171.

807. —.]—By an agreement between A. & B., it was stipulated that A. should for a certain term receive half the profits arising from the sales of an article called Russian Black manufactured

802 i. — Unless strong reason for construing otherwise.]—If a clause in a deed be distinct & express, however absurd it may be, it must prevail, & its consequences will not justify the ct. in swerving from its clear obvious meaning. But if a rational exposition can be given, consistent with a fair interpretation of the language, the ct. would then relinquish its most valuable powers, if it did not abandon a construction, which, although more consonant with the literal interpretation, leads to a capricious & irrational

result.—LAIRD v. TOBIN (1830), 1 Mol. 543.—IR.

803 i. — In absence of indications to the contrary.]—Words in a deed are to be understood in their natural & usual meaning, unless there be a clear indication of intention that in a particular case they are to have a more or less extended signification.—LIS

panying words.]—The terms "Due north" & "Due south" in the description of a deed, if not controlled by accompanying words, mean north & south by the magnet, & not by the meridian.—ARCHIBALD v. MORRISON (1868), 7 N. S. R. 272.—CAN.

d. Recurring words.—Same construction.]—The same word recurring in any instrument should, if possible, be construed to have the same meaning.—FOSTER v. WYBRANTS (1876), 11 I. R. Eq. 40.—IR.

d. — If not controlled by accom-

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by him from the produce of certain quarries of B.:—*Held*: A. was not entitled to claim anything in respect of Russian Black not sold as such, but used by B., in the proportion of about one third, mixed with cement manufactured & sold by him.—*FULLWOOD v. AKERMAN* (1862), 11 C. B. N. S. 737; 142 E. R. 985.

808. — In absence of ambiguity.]—SHORE v. WILSON, No. 688, ante.

809. — —.]—It is the safest & best mode of construction to give to words free from ambiguity their plain & ordinary meaning (LORD CHELMSFORD).—BUCHANAN v. ANDREW (1873), L. R. 2 Sc. & Div. 286, H. L.

Annotations:—*Refd.* Bell v. Love (1883), 10 Q. B. D. 547; Dixon v. White (1883), 8 App. Cas. 833; Bell v. Dudley, [1896] 1 Ch. 182; Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305. *Mentd.* N. B. Ry. v. Budhill Coal & Sandstone Co., [1910] A. C. 116; Howley Park Coal & Cannel Co. v. L. & N. W. Ry., [1913] A. C. 11; Welldon v. Butterley Co., [1920] 1 Ch. 130; Davies v. Powell Duffryn Steam Coal Co. (No. 2) (1921), 91 L. J. Ch. 40.

810. — —.]—A time policy of marine insurance on A.'s ship, from May 29, 1878, to May, 28, 1879, contained the words "warranted no St. Lawrence between Oct. 1, & Apr. 1." The vessel was lost on the voyage home. The underwriters refused A.'s claim for a total loss on the ground of breach of warranty, inasmuch as the vessel had navigated in the Gulf of St. Lawrence during the prescribed period. A contended that the above words referred exclusively to the River St. Lawrence. Admittedly no general custom of merchants could be proved, but the facts established that the great river which discharges the waters of the North American lakes, & the gulf into which it flows, both bear the name of "St. Lawrence," that the navigation of both, though of the gulf in a less degree than of the river, was within the prohibited period dangerous:—*Held*: the evidence disclosed no ambiguity or uncertainty sufficient to prevent the application of the ordinary rules of construction, & according to those rules the whole St. Lawrence navigation, both gulf & river was within the fair & natural meaning of those negative words, & therefore prohibited during the months in question.—*BIRRELL v. DRYER* (1884), 9 App. Cas. 345; 51 L. T. 130; 5 Asp. M. L. C. 207, H. L.

811. — —.]—In construing words in an agreement capable of bearing two meanings, we must consider the circumstances which existed at the time when the agreement was made.—ARMSTRONG v. SOUTH LONDON TRAMWAYS CO., LTD. (1890), 64 L. T. 96; 55 J. P. 340; 7 T. L. R. 128, C. A.

812. — —.]—NORTH EASTERN RY. v. HASTINGS (LORD), No. 798, ante.

813. — —.]—CROYDON RURAL DISTRICT COUNCIL v. SUTTON DISTRICT WATER CO., EWART, THIRD PARTY (1908), 72 J. P. 217; 6 L. G. R. 574, C. A.

814. — —.]—ANGELL v. WORSLEY (1849), 12 L. T. O. S. 428.

815. — Expressly stated by parties.]—Although I do not think that any additional force is given to the expression "net profits" by the addition of such a phrase as "available for distribution" or of such a provision as we find in this agreement, that the certificate of the auditor is to be conclusive as to the amount of the net profits, the addition of such a phrase & the inclusion of such a stipulation demonstrate that the expression is intended to be used in its primary sense & in my opinion

that is the sense in which it is used in this agreement (EVE, J.).—**PATENT CASTINGS SYNDICATE, LTD. v. ETHERINGTON**, [1919] 2 Ch. 254; 88 L. J. Ch. 398; 35 T. L. R. 528, C. A.

Annotation:—*Refd.* Vulcan Motor & Engineering Co. v. Hampson [1921] 3 K. B. 597.

816. Court will take judicial notice of local meaning.]—STAFFORD v. MACDONNOGH (1621), Palm. 100; 81 E. R. 997; *sub nom.* MACDUNCOH v. STAFFORD, 2 Roll. Rep. 166, 189; 81 E. R. 727.

Annotation:—*Refd.* Kildare v. Fisher (1717), 1 Stra. 71.

817. Etymology an unsafe guide.]—Etymology is a very unsafe guide to meaning (WICKENS, V.-C.).—HEXT v. GILL (1872), 7 Ch. App. 705, n.; 41 L. J. Ch. 293; 26 L. T. 502; 20 W. R. 520; *on appeal*, 7 Ch. App. 699, L. J.J.

Annotations:—*Refd.* Glasgow, Lord Provost & Mags. v. Farie (1888), 13 App. Cas. 657. *Mentd.* Aspdon v. Seddon (1874), 10 Ch. App. 396, n.; Eardley v. Granville (1876), 24 W. R. 528; Hall v. Byron (1876), 4 Ch. D. 667; A.-G. v. Tomline (1877), 5 Ch. D. 750; A.-G. for Isle of Man v. Mylchreest (1879), 4 App. Cas. 294; Newington L. B. v. Cottingham L. B. (1879), 12 Ch. D. 725; Gill v. Dickinson (1880), 5 Q. B. D. 159; Hedley v. Bates (1880), 49 L. J. Ch. 170; Davis v. Treharne (1881), 6 App. Cas. 460; Loosemore v. Tiverton & North Devon Ry. (1882), 22 Ch. D. 25; Mid. Ry. v. Haunchwood Brick & Tile Co. (1882), 20 Ch. D. 552; Pountney v. Clayton (1883), 11 Q. B. D. 820; Tucker v. Linger (1883), 8 App. Cas. 508; Love v. Bell (1884), 9 App. Cas. 286; Robinson v. Milne (1884), 53 L. J. Ch. 1070; Elwes v. Brigg Gas Co. (1886), 33 Ch. D. 562; A.-G. v. Welsh Granite Co. (1887), 35 W. R. 617; Shafto v. Bolekow, Vaughan (1887), 34 Ch. D. 725; Consett Waterworks Co. v. Kiltson (1889), [1922] 2 Ch. 187, n.; Jersey v. Neath Poor Law Union Grdms. (1889), 22 Q. B. D. 555; Phillips v. Thomas (1890), 62 L. T. 793; Westmoreland v. New Sharlston Colliery Co. (1898), 79 L. T. 716; Re Constable & Cranswick (1899), 80 L. T. 164; Johnstone v. Crompton, [1899] 2 Ch. 190; G. W. Ry. v. Blades, [1901] 2 Ch. 624; Greville v. Hemingway (1902), 87 L. T. 443; Re Todd, Birleston & N. E. Ry., [1903] 1 K. B. 603; Leckhampton Quarries Co. v. Ballinger & Cheltenham R. D. C. (1904), 68 J. P. 464; Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-op. Co., [1906] A. C. 305; G. W. Ry. v. Carpalla United China Clay Co. & Clifden (1908), 99 L. T. 869; Butterley Co. v. New Hucknall Colliery Co., [1909] 1 Ch. 37; Skev v. Parsons (1909), 101 L. T. 103; N. B. Ry. v. Budhill Coal & Sandstone Co., [1910] A. C. 116; Dickens v. National Telephone Co., National Telephone Co. v. Hythe Corp'n. (1911), 75 J. P. 557; I. R. Comrs. v. Joicey (No. 2), [1913] 2 K. B. 580; Thornhill v. Weeks, [1913] 1 Ch. 438; Thomson v. St. Catharine's College, Cambridge, etc., [1919] A. C. 468; Westhoughton U.D.C. v. Wigan Coal & Iron Co., [1919] 1 Ch. 159; Welldon v. Butterley Co., [1920] 1 Ch. 136.

818. Will be interfered with as little as possible.]

—You must not capriciously interfere with the ordinary meaning of the words, & further, if you do interfere with the ordinary meaning, you must interfere as little as possible. Of course it is not capricious to interfere in the case put of a settlement because you make that a rational result which would otherwise be altogether absurd & irrational; & it seems to me that that has been the governing principle in all cases (JESSEI, M.R.).—**LUCENA v. LUCENA** (1876), 7 Ch. D. 255; 47 L. J. Ch. 203; 36 L. T. 87; *on appeal*, (1877), 7 Ch. D. 266, C. A.

Annotations:—*Refd.* Re Friend's Settlement, Cole v. Allcot, [1906] 1 Ch. 47. *Mentd.* Re Walker's Estate, Church v. Tyacke (1879), 12 Ch. D. 205; Re Horner's Estate, Pomfret v. Graham (1881), 19 Ch. D. 186; Re Johnson, Hickman v. Williamson (1884), 53 L. J. Ch. 1116; Re Benn, Benn v. Benn (1885), 29 Ch. D. 839; Re Bilham, Buchanan v. Hill, [1901] 2 Ch. 169; Harrison v. Harrison, [1901] 2 Ch. 136.

819. Where judicially construed for a long period—Will be given such meaning.]—THAMES & MERSEY MARINE INSURANCE CO. v. HAMILTON, FRASER & CO., No. 697, ante.

820. — —.]—DOUBLIER v. MACRIGANNIS (1895), 39 Sol. Jo. 762.

821. — —.]—EDWARDES' MENU CO. v. CHUD-LEIGH (1897), 14 T. L. R. 64, C. A.

B. Where Literal Construction not Adopted.

(a) *By Reason of Subject-Matter.*

822. General rule.]—I do not think "person" is a technical word within the meaning of the rule that technical words are to have their technical meaning, but the phrase "the ordinary meaning of words" must necessarily be understood in reference to the subject-matter to which those words are applied (FARWELL, L.J.).—WILLMOTT v. LONDON ROAD CAR CO., LTD., [1910] 2 Ch. 525; 80 L. J. Ch. 1; 103 L. T. 447, C. A.

823. Words acquiring special meaning—Distinct from ordinary meaning—Through usage of trade.]—ROBERTSON v. FRENCH, No. 626, *ante*.

824. ———.]—HUNTER v. LEATHLEY (1830), 10 B. & C. 858; L. & Welsb. 244; 5 Man. & Ry. K. B. 522; 8 L. J. O. S. K. B. 274; 109 E. R. 667; *affd. sub nom.* LEATHLEY v. HUNTER (1831), 7 Bing. 517, Ex. Ch.

Annotations:—Mentd. Gibson v. Overbury (1841), 7 M. & W. 555; Ley v. Barton (1848), 1 Exch. 800; Boyle v. Wiseman (1855), 10 Exch. 647; *Re* Hawkes, Ackerman v. Lockhart, [1898] 2 Ch. 1.

825. ———.]—Words must bear their ordinary primary meaning unless the context of the instrument read as a whole, or surrounding contemporaneous circumstances, show that the secondary meaning expresses the real intention of the parties, or unless the words are used in connection with some place, trade, or the like, in which they have acquired the secondary meaning as their customary meaning *quoad hoc* (FARWELL, J.).—BRUNER v. MOORE, [1904] 1 Ch. 305; 73 L. J. Ch. 377; 89 L. T. 738; 52 W. R. 294; 20 T. L. R. 125; 48 Sol. Jo. 131.

Annotations:—Refd. Morrell v. Studd & Millington, [1913] 2 Ch. 648; Erith Engineering Co. v. Sanford Riley Stoker Co. & Babcock & Wilcox (1920), 37 R. P. C. 217. *Mentd.* Hartley v. Hymans, [1920] 3 K. B. 475.

826. ———.]—An avment of a contract to carry goods from London to Bath, is supported by evidence of a contract to carry from Westminster to Bath; London must be taken in the enlarged & popular, not limited sense.—BECKFORD v. CRUTWELL (1832), 5 C. & P. 242; 1 Mood. & R. 187, N. P.

Annotations:—Refd. Simpson v. Margitson (1847), 11 Q. B. 23; Wallace v. A.-G. (1864), 33 Beav. 384; Bruner v. Moore, [1904] 1 Ch. 305.

827. Words used in a commercial document—Acquire a commercial meaning.]—The first question we have to determine is, what is the ordinary meaning of the words used in the warranty among mercantile men engaged in the business of marine insurance? If the words used are so general as to be capable of two constructions, then you have a right to look at the object with which they were inserted to see the meaning which men engaged in this business would give them (LORD ESHER, M.R.).—HART v. STANDARD MARINE INSURANCE CO., LTD. (1889), 22 Q. B. D. 499; 58 L. J. Q. B. 284; 60 L. T. 649; 37 W. R. 366; 5 T. L. R. 229; 6 Asp. M. L. C. 368, C. A.

Annotation:—Refd. Sanday v. British & Foreign Marine Insce., [1915] 2 K. B. 781.

828. ———.]—Expressions in a document addressed to commercial men should be construed in the sense in which ordinary men of business would understand them.—*Re* LAND SECURITIES CO., *Ex p.* FARQUHAR, [1896] 2 Ch. 320; 65 L. J. Ch. 587; 74 L. T. 400; 44 W. R. 514; 12 T. L. R. 373; 40 Sol. Jo. 500, C. A.

Annotation:—Mentd. National Provident Institution v. Brown, Brown v. National Provident Institution, Provident Mutual Life Assee. Assocn. v. Ogston, Ogston v. Provident Mutual Life Assee. Assocn., [1920] 3 K. B. 35.

829. ———.]—resps. contracted with appts. not to "erect or assist, or be in any way concerned or interested in the erection of or use of freezing works at Bluff," & thereafter contracted with W. first to purchase all frozen meat produced at his works at Bluff, & secondly to purchase his works at the expiration of their contract with appts., together with additional works to be completed by that date:—*Held*: neither of these contracts with W. was a breach of the contract with appts., by the true construction whereof use means the manufacturing use, & does not include the uses contemplated by resps. in either of their purchases.—SOUTHLAND FROZEN MEAT & PRODUCE EXPORT CO., LTD. v. NELSON BROTHERS, LTD., [1898] A. C. 442; 67 L. J. P. C. 82; 78 L. T. 363, P. C.

830. ———.]—CATTERMOUL v. JARED (1909), 53 Sol. Jo. 244.

(b) *By reasons of Context.*

831. General rule.]—The words of a specification are to be construed to their ordinary & proper meaning, unless it be shown by something in the context (which may be explained by evidence) that a different construction ought to be adopted.—ELLIOTT v. TURNER (1845), 2 C. B. 446; 15 L. J. C. P. 49; 6 L. T. O. S. 219; 135 E. R. 1019, Ex. Ch.

Annotations:—Refd. Nickels v. Ross (1849), 8 C. B. 679; *Re* London Corpn. & Tubbs' Contract, [1894] 2 Ch. 524.

832. Context excluding probability of ordinary meaning.]—The word "child" in a deed or will, must be construed in its primary legal sense "legitimate child," if, in any possible event, the word thus construed might have a sensible operation. But the context, or extrinsic circumstances rendering it impossible otherwise to satisfy the word, may let in the secondary sense.—DOVER v. ALEXANDER (1843), 2 Hare, 275; 12 L. J. Ch. 175; 7 Jur. 124; 67 E. R. 114.

Annotations:—Refd. *Re* Saville's Trusts (1866), 14 W. R. 603. *Mentd.* Bell v. Alexander (1847), 6 Hare, 543.

833. ———.]—MALLAN v. MAY, No. 782, *ante*.

834. ———.]—In construing a contract we ought to read the words in their ordinary sense & not depart from it unless it is perfectly clear from the context that a different sense ought to be put on them (POLLOCK, C.B.).—CAINE v. HORSEFALL (1847), 1 Exch. 519; 71 L. J. Ex. 25 154 E. R. 221.

835. ———.]—When it is clear from the context of an instrument in what sense words are used in that instrument, the sound rule of construction is to attribute to them that meaning, even though the words be technical & have technically a different meaning; for it is only so that you can effectuate the intention (COLERIDGE, J.).—GRAHAM v. EWART (1856), 1 H. & N. 550; 26 L. J. Ex. 97; 28 L. T. O. S. 174; 21 J. P. 150; 3 Jur. N. S. 163; 156 E. R. 1320, Ex. Ch.; *affd. sub nom.* EWART v. GRAHAM (1859), 7 H. L. Cas. 331, H. L.

Annotations:—Apld. Musgrave v. Forster (1871), L. R. 6 Q. B. 590. *Refd.* Jeffries v. Evans (1865), 19 C. B. N. S. 246; Leonfield v. Dixon (1867), L. R. 3 Exch. 30; Sowerby v. Smith (1874), L. R. 9 C. P. 524; Rogers v. St. Germans Union (1876), 35 L. T. 332. *Mentd.* Bruce v. Hellwell (1860), 5 H. & N. 609; Blades v. Higgs (1865), 11 H. L. Cas. 621; Hilton & Walkerfield Overseers v. Bowes Overseers (1866), L. R. 1 Q. B. 359; Devonshire v. O'Connor (1890), 24 Q. B. D. 468; Fitzhardinge v. Purcell (1908), 99 L. T. 154.

836. ———.]—The safer & wiser course for a ct. of justice is to follow the plain literal meaning & interpretation of the words used unless it can clearly find in some other part of the instrument a rule for their construction that overrules the obligation

PART III. SECT. 3, SUB-SECT. 3.—B. (b).

832 I. Context excluding probability of ordinary meaning.]—QUINN v. SHIELDS (1877), 11 C. L. 254.—IR.

Sect. 8.—Rules of construction: Sub-sect. 8, B. (b) & (c) & C.]

of abiding by the literal meaning, & enables one to give a more or less extended interpretation of the words (LORD WESTBURY).—*GREAT WESTERN RY. CO. (DIRECTORS, ETC.) v. ROUS* (1870), L. R. 4 H. L. 650; 39 L. J. Ch. 553; 23 L. T. 360; 35 J. P. 516; 19 W. R. 169, H. L.

Annotation.—*Mentd.* *Wright v. Pitt* (1870), L. R. 12 Eq. 408.

837. —[—]—*MUSGRAVE v. FORSTER* (1871), L. R. 6 Q. B. 590; 40 L. J. Q. B. 207; 24 L. T. 614; 35 J. P. 820; 19 W. R. 1141.

Annotation.—*Mentd.* *Musgrave v. Inclosure Comrs.* (1874), L. R. 9 Q. B. 162.

838. —[—]—In construing instruments I have always followed the rule laid down by the House of Lords in *Grey v. Pearson*, No. 786, *ante*, which is to construe the instrument according to its literal import unless there is something in the subject or context which shows that that cannot be the meaning of the words (JESSEL, M.R.).—*LOWTHER v. BENTINCK* (1874), L. R. 19 Eq. 166; 44 L. J. Ch. 197; 31 L. T. 719; 23 W. R. 156.

Annotations.—*Mentd.* *Re Breeds' Will* (1875), 1 Ch. D. 226; *Re Brittlebank, Coates v. Brittlebank* (1881), 30 W. R. 99; *Re Price* (1887), 34 Ch. D. 603; *Re Stanger, Moorsom v. Tate* (1891), 60 L. J. Ch. 326; *Molyneux v. Fletcher*, [1898] 1 Q. B. 648.

839. —[—]—I think that the true rule of construction is to construe the language of the instrument according to its ordinary meaning, giving to technical terms their technical meaning, unless we find a context such as to convince the mind that the ordinary rules of construction which would be applied to the original expressions standing alone ought not to be applied (JESSEL, M.R.).—The maxim that a grant in which there is any obscurity or difficulty must be construed most strongly against the grantor has no application at the present time (JESSEL, M.R.).—*TAYLOR v. ST. HELENS CORPN.* (1877), 6 Ch. D. 264; 46 L. J. Ch. 857; 37 L. T. 253; 25 W. R. 885, C. A.

840. —[—]—*POSTMASTER-GENERAL v. GREAT WESTERN RY.* (1889), 5 T. L. R. 714, H. L.

841. —[—]—Contracts ought to be construed according to the primary & natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement. But there are exceptions to the rule. One of these is to be found in the case where the context affords an interpretation different from the ordinary meaning of the words; & another in the case where their conventional meaning is not the same with their legal sense. In the latter case, the meaning to be attributed to the words of the contract must depend upon the consideration whether, in making it, the parties had or had not the law in their contemplation (LORD WATSON).—*MCOWAN v. BAINE, THE NIOBE*, [1891] A. C. 401; 65 L. T. 502; 7 Asp. M. L. C. 89, H. L.

Annotations.—*Reid.* *Re Margetta & Ocean Accidents & Guarantee Corpn.* [1901] 9 K. B. 792; *Fenwick v. Merchants' Marine Insee.* [1914] 3 K. B. 827; *Glamorgan Coal Co. v. Glamorganshire Standing Joint Committee, Powell Duffryn Steam Coal Co. v. Same*, [1915] 1 K. B. 471. *Mentd.* *The Devonian* (1901), 70 L. J. P. 66; *The Devonshire* (1912), 81 L. J. P. 94; *Bennett S.S. Co. v. Hull Mutual S.S. Protecting Soc.*, [1914] 3 K. B. 57.

842. Ordinary meaning violating intention of parties.]—The word "from" may mean either inclusive or exclusive, according to the context & subject-matter, & the ct. will construe it so as to effectuate the deeds of parties, & not to destroy them.—*PUGH v. LEEDS (DUKE)* (1777), 2 Cowp. 714; 98 E. R. 1323.

Annotations.—*Appld.* *Doe d. Cox v. Day* (1809), 10 East, 427. *Consd.* *English v. Cliff*, [1914] 3 Ch. 376. *Reid.* *R. v. Gamlingay* (1790), 3 Term Rep. 513; *Ex p. Fallon* (1793), 5 Term Rep. 283; *Watson v. Pears* (1809), 2

Camp. 294; *Welch v. Fisher* (1818), 2 Moore, C. P. 378; *Cookell v. Gray* (1822), 6 Moore, C. P. 483; *Ackland v. Lutley* (1839), 9 Ad. & El. 879; *Kerr v. Jeston* (1842), 6 Jur. 1110; *Inaacs v. Royal Insee.* (1870), L. R. 6 Exch. 296; *Slidbotham v. Holland* (1894), 64 L. J. Q. B. 200. *Mentd.* *Re Railway Sleepers Supply Co.* (1885), 39 Ch. D. 204.

843. —[—]—*ROBERTSON v. FRENCH*, No. 626, *ante*.

844. —[—]—*HUME v. RUNDELL*, No. 726, *ante*.

845. —[—]—*GREY v. PEARSON*, No. 786, *ante*.

846. —[—]—Words are to be construed according to their plain ordinary meaning, unless the context shows them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity.—*RHODES v. RHODES* (1882), 7 App. Cas. 192; 51 L. J. P. C. 53; 46 L. T. 463; 30 W. R. 709, P. C.

Annotations.—*Reid.* *Evans v. Ball* (1882), 47 L. T. 165. *Mentd.* *In the goods of Boehm*, [1891] P. 247; *Karunaratne v. Ferdinandus*, [1902] A. C. 405.

(c) If leading to Absurdity, Inconsistency, Inconvenience or Repugnancy.

847. Absurdity.]—In construing a deed, we must adopt the established rule of construction, to read the words in their ordinary & grammatical sense, & to give them effect unless such a construction would lead to some absurdity or inconvenience, or would be plainly repugnant to the intention of the parties, to be collected from other parts of the deed (PARKE, B.).—*BLAND v. CROWLEY* (1851), 6 Exch. 522; 6 Ry. & Can. Cas. 756; 20 L. J. Ex. 218; 17 L. T. O. S. 267; 155 E. R. 650. *Annotations*.—*Reid.* *Preston v. Liverpool, Manchester & Newcastle-on-Tyne Junction Ry.* (1851), 1 Sim. N. S. 586; *Gage v. Newmarket Ry.* (1852), 18 Q. B. 457. *Mentd.* *South Yorkshire Ry. & River Dun Co. v. G. N. Ry.* (1853), 9 Exch. 55.

848. —[—]—*GREY v. PEARSON*, No. 786, *ante*.

849. —[—]—(1) In construing all written instruments, the grammatical & ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or to some repugnance or to some inconsistency with the rest of the instrument, in which case the grammatical or ordinary sense of the words may be modified, so as to avoid that absurdity, repugnance or inconsistency, but no further (LORD WENSLEYDALE).

(2) If technical words are used, by whomsoever they are written, they must be considered as used with their technical meaning (LORD WENSLEYDALE).—*THELLUSSON v. RENDLESHAM* (1859), 7 H. L. Cas. 429; 28 L. J. Ch. 948; 11 E. R. 172; *sub nom.* *THELLUSSON v. ROBERTS, HARE v. ROBERTS, RENDLESHAM v. ROBERTS*, 33 L. T. O. S. 379; 5 Jur. N. S. 1031; 7 W. R. 563, H. L.; *affg.* S. C. *sub nom.* *RENDLESHAM (LORD) v. ROBERTS* (1856), 23 Beav. 321.

Annotations.—*As to* (1) *Consd.* *Rhodes v. Rhodes* (1882), 7 App. Cas. 192. *Appld.* *Re Northern's Estate, Salt v. Pym* (1884), 28 Ch. D. 153. *As to* (2) *Reid.* *Richards v. Davies* (1892), 13 C. B. N. S. 69. *Generally.* *Mentd.* *Di Sora v. Philipps* (1863), 2 New Rep. 553; *R. v. Sunderland JJ.* (1901), 85 L. T. 183.

850. —[—]—*LUCENA v. LUCENA*, No. 818, *ante*.

851. —[—]—*RHODES v. RHODES*, No. 846, *ante*.

852. —[—]—You may depart from the literal meaning of the words, if reading the words literally leads to an absurdity (JESSEL, M.R.).—*WALLIS v. SMITH* (1882), 21 Ch. D. 243; 52 L. J. Ch. 145; 47 L. T. 389; 31 W. R. 214, C. A.

Annotations.—*Mentd.* *General Credit & Discount Co. v. Glegg*, (1883), 22 Ch. D. 549; *Catton v. Bennett* (1884), 51 L. T. 70; *Re Russell, Scott & Wallis* (1885), 54 L. J. Ch. 948; *Law v. Redditch L. B.*, [1892] 1 Q. B. 127; *Barton v. Capewell Continental Patents Co.* (1893), 68 L. T. 857; *Ward v. Monaghan* (1895), 11 T. L. R. 529; *Willson v. Love* [1896] 1 Q. B. 626; *Stegmann v. O'Connor* (1899), 80 L. T. 234; *Pye v. British Automobile Commercial Syndicate*, [1906] 1 K. B. 435; *Dewar v. Mintoft*, [1912] 2 K. B. 373; *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A. C. 79.

853. Inconsistency.—If the provisions are clearly expressed & there is nothing to enable the ct. to put upon them a construction different from that which the words impart, no doubt the words must prevail; but if the provisions & expressions be contradictory, & if there be grounds, appearing upon the face of the instrument, affording proof of the real intention of the parties, then that intention will prevail against the obvious & ordinary meaning of the words. If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expressions they convey their intention. (LORD COTTENHAM, C.).—**LLOYD v. LLOYD** (1837), 2 My. & Cr. 192; **Donnelly**, 187; 6 L. J. Ch. 135; 1 Jur. 69; 40 E. R. 613, L. C.

Annotations:—**Mentd.** **Hobson v. Ferraby** (1846), 2 Coll. 412; **Campbell v. Ingilby** (1856), 21 Beav. 567.

854. —.]—**GREY v. PEARSON**, No. 786, *ante*.

855. —.]—**THELLUSSON v. RENDLESHAM**, No. 849, *ante*.

856. Inconvenience.—**BLAND v. CROWLEY**, No. 847, *ante*.

857. —.]—The golden rule is that words must receive their natural meaning, unless there be something to show that they are senseless or are opposed to the general scope & intent of the instrument, if naturally interpreted, or, unless there be some great reason of convenience why they should be otherwise interpreted than according to their natural meaning. (**BRAMWELL, B.**).—**FOWELL v. FRANTER** (1864), 3 H. & C. 458; 11 L. T. 317; 13 W. R. 145; 159 E. R. 610; *sub nom.* **FOWELL v. FRANTER**, 34 L. J. Ex. 6.

858. —Especially in document ambiguous.]—The argument of inconvenience is a very strong argument where the construction of a document is ambiguous—where it is fairly open to two constructions. Then the argument of inconvenience, like the argument of absurdity, may be used with great force; but when the construction is clear beyond controversy, it is no answer to say that there are some consequences of that construction which will cause inconvenience & were probably not contemplated by the framers of the documents. (**JESSEL, M.R.**).—**Re ALMA SPINNING CO., BOTTOMLEY'S CASE** (1880), 14 Ch. D. 681; 50 L. J. Ch. 167; 43 L. T. 620; 29 W. R. 133.

Annotations:—**Reid.** **York Tram. Co. v. Willows** (1882), 8 Q. B. D. 685; **Faure Electric Accumulator Co. v. Phillipart** (1888), 58 L. T. 525.

859. Repugnancy.—**BLAND v. CROWLEY**, No. 847, *ante*.

860. —.]—**GREY v. PEARSON**, No. 786, *ante*.

861. —.]—**THELLUSSON v. RENDLESHAM**, No. 849, *ante*.

862. —.]—**FOWELL v. FRANTER**, No. 857, *ante*.

C. Technical Words.

863. Technical words given their technical meaning.—**GRAHAM v. EWART**, No. 835, *ante*.

864. —.]—**THELLUSSON v. RENDLESHAM**, No. 849, *ante*.

865. —.]—**TAYLOR v. ST. HELENS CORPN.**, No. 839, *ante*.

866. —.]—**HOLT & CO. v. COLLYER**, No. 792, *ante*.

867. —.]—**WILLMOTT v. LONDON ROAD CAR CO., LTD.**, No. 822, *ante*.

868. — "Seised."—"Seised," being a purely technical word, must be construed according to its technical meaning.—**LEACH v. JAY** (1878), 9 Ch. D. 42; 47 L. J. Ch. 876; 39 L. T. 242; 27 W. R. 99, C. A.

Annotations:—**Consd.** **Basset v. St. Levan** (1894), 71 L. T. 718; **Re Gosselin**, **Gosselin v. Gosselin**, [1906] 1 Ch. 120. **Reid.** **Smith v. Butcher** (1878), 10 Ch. D. 113; **Re Fraser**, **Lowther v. Fraser** (1904), 91 L. T. 48. **Mentd.** **Copestake v. Hoper**, [1907] 1 Ch. 366; **Re Norman**, **Thaokray v. Norman** (1914), 111 L. T. 903.

869. Construed more strictly in deed than in will.—**Technical words of limitation.**—In deeds it is necessary to make choice of apt words of conveyance, but wills are always taken favourable, & the intent of the testator is to be considered.—**MANDY v. MANDY** (1734), Kel. W. 297; **Fitz-G.** 70; 25 E. R. 624; *sub nom.* **MANBY v. MANBY**, 2 Barn. K. B. 202; *sub nom.* **MAUDY v. MAUDY**, **Lee temp. Hard.** 142; *sub nom.* **MAUNDY v. MAUNDY**, 2 Stra. 1020.

Annotation:—**Mentd.** **A.-G. v. Meyrick** (1750), 2 Ves. Sen. 44.

870. —.]—**BARKER v. FREEMAN** (1772), **Lofft**, 31; 98 E. R. 516.

871. —.]—A deed is construed more strictly than a will according to the legal import of the words.—**BAYLEY v. MORRIS** (1799), 4 Ves. 788; 31 E. R. 408.

Annotations:—**Mentd.** **Chambers v. Taylor** (1837), 2 My. & Cr. 376; **Re Davison's Settlement**, **Cattermole Davison v. Munby**, [1913] 2 Ch. 498.

872. —.]—To justify the ct. in restricting a limitation by deed to trustees " & their heirs," without words restricting it to the lives of preceding tenants for life, upon trust to preserve contingent remainders, to an estate *pur autre vie*, it must be shown that the intention of the parties, as manifested by the deed, cannot be carried into effect, unless the limitation be so restricted. Distinction in this respect between deeds & wills. In the latter, a greater latitude is allowed in the construction of legal terms, the testator being supposed *inops consilii*.—**LEWIS v. REES** (1856), 3 K. & J. 132; 26 L. J. Ch. 101; 28 L. T. O. S. 229; 3 Jur. N. S. 12; 5 W. R. 96; 69 E. R. 1052.

Annotation:—**Mentd.** **Cooper v. Kynock** (1872), 7 Ch. App. 398.

873. Precedents may be cited to explain.—**ROBINSON v. EVANS**, No. 770, *ante*.

Of time.—*See* **TIME**.

In conveyance of real property.—**Words of conveyance & limitation.**—*See* **REAL PROPERTY & CHATTELS REAL; SALE OF LAND**.

Admission of Extrinsic evidence to explain.—*See* **Sect. 4, post**.

PART III. SECT. 3, SUB-SECT. 8.—B. (6).

859 i. Repugnancy.—The words of a contract were that "the parties hereto, for themselves, their exors. & administrators & successors respectively, mutually covenant":—**Held:** the words must be interpreted as meaning that the parties covenanted for themselves & their exors. & administrators, only, for the debts. The parties, therefore, did not covenant for their assigns; but the omission of the word "assigns" did not necessarily make the contract unassignable; & the nature of the contract coupled with the absence

of the word "assigns," did not, having regard to the subsequent conduct of the parties & all the circumstances, show an intention that the contract should be performed by the parties only.—**PATERSON v. CANADIAN PACIFIC TIMBER CO.** (1910), 14 W. L. R. 598.—**CAN.**

i. Uncertainty.—An offer was accepted by C., for himself or assigns:—**Held:** to avoid holding the contract void for uncertainty as to the purchaser's identity, the word "or" should be read as "and."—**CLEGG v. VIVIAN (H. H.) & Co.** (1909), 41

S. C. R. 607.—**CAN.**

PART III. SECT. 3, SUB-SECT. 8.—C.

863 i. Technical words have their technical meaning.—By a grant of an island, "with all the contiguous small islands that are joined to, or connected with the said island by a beach or shoal dry at low water," an island that is connected with the principal one by a shoal which is only dry at extraordinary tides, will not pass. "Low water" means low water at ordinary tides.—**Dog d. FRY v. HILL** (1853), 2 All. 587.—**CAN.**

Sect. 3.—Rules of construction: Sub-sects. 9 & 10, A.]

SUB-SECT. 9.—VERBA GENERALIA RESTRINGUNTUR AD HABILITATEM REI VEL APTITUDINEM PERSONÆ.

874. Statement of rule.]—If a deed relates to a particular subject only, general words in it shall be confined to that subject.—*THORPE v. THORPE* (1701), 1 Ld. Raym. 235, 662; *Holt, K. B.* 28; 1 Lut. 245; 12 Mod. Rep. 455; 91 E. R. 1054, 1341.

Annotations:—*Apld.* *Foakes v. Beer* (1884), 9 App. Cas. 605. *Mentd.* *Lock v. Wright* (1722), 8 Mod. Rep. 40; *Russon v. Coleby* (1734), 7 Mod. Rep. 236; *Acherley v. Vernon* (1739), *Willes*, 153; *Johnston v. Wilson* (1741), 7 Mod. Rep. 345; *Terry v. Duntze* (1795), 2 Hy. Bl. 389; *Campbell v. Jones* (1796), 6 Term Rep. 570; *Morton v. Lamb* (1797), 7 Term Rep. 125; *Simons v. Farron* (1834), 1 Bing. N. C. 272; *Smith v. Keating* (1843), 6 C. B. 136; *Manby v. Cremeninil* (1851), 6 Exch. 808.

875. —.]—A demise of premises in Westminster late in the occupation of A. particularly describing them, part of which was a yard, does not pass a cellar situate under that yard which was then in the occupation of B. another tenant of the lessor, & the lessor, in an ejectment brought to recover the cellar, is not estopped by his deed from going into evidence, to show that the cellar was not intended to be demised.

The construction of all deeds must be made with reference to their subject-matter, & it may be necessary to put a different construction on leases made in populous cities from that on those made in the country (*ASHURST, J.*).—*DOE v. FREELAND v. BURT* (1787), 1 Term Rep. 701; 99 E. R. 1330.

Annotations:—*Mentd.* *Whittington v. Corder* (1852), 20 L. T. O. S. 175; *Martyr v. Lawrence* (1864), 2 De G. J. & Sm. 301; *Devonshire v. Pattinson* (1887), 20 Q. B. D. 263; *Thomas v. Owen* (1887), 20 Q. B. D. 225.

876. —.]—In construing words it is proper to consider first what is their meaning in the largest sense which according to the common use of language belongs to them; & if it should appear that that sense is larger than the sense in which they must be understood in the instrument in question, secondly, what is the object for which they are used. They ought not to be extended beyond their ordinary sense in order to comprehend a case within their object, for that would be to give effect to an intention not expressed; nor can they be so restricted as to exclude a case both within their object & within their ordinary sense, without violating the fundamental rule which requires that effect should be given to such intention of the parties as they have used fit words to express (*MAULE, J.*).—*BORRADAILE v. HUNTER* (1843), 5 Man. & G. 639; 5 Scott, N. R. 418; 12 L. J. C. P. 225; 1 L. T. O. S. 170; 7 J. P. 256; 7 Jur. 443; 134 E. R. 715.

Annotations:—*Mentd.* *Dormay v. Borrodalle* (1845), 6

L. T. O. S. 215; *Clift v. Schwabe* (1846), 3 C. B. 437; *Dufaur v. Professional Life Insce.* (1858), 4 Jur. N. S. 841; *White v. British Empire Mutual Life Assoe.* (1868), 38 L. J. Ch. 53; *Taubman v. Pacific Steam Navigation Co.* (1872), 26 L. T. 704.

877. —.]—The rule alike of good sense & grammar & law is, that general words are to be restrained to the subject-matter with which the speaker or writer is dealing (*WILLES, J.*).—*CHORLTON v. LINGS* (1868), L. R. 4 C. P. 374; 1 Hop. & Colt. 1; 38 L. J. C. P. 25; 19 L. T. 534; 32 J. P. 824; 17 W. R. 284.

Annotations:—*Reid.* A. G. v. Liverpool Corp., [1922] 1 Ch. 211. *Mentd.* *Chorlton v. Kesler* (1869), L. R. 4 C. P. 397; *Stowe v. Jolliffe* (No. 2) (1874), 43 L. J. C. P. 265; *Beresford-Hope v. Sandhurst* (1889), 23 Q. B. D. 79; *De Souza v. Cobden* (1891), 65 L. T. 130; *Drax v. Ffooks* (1895), 12 T. L. R. 34; *Nairn v. St. Andrews University*, [1909] A. C. 147; *Re Royal Naval School, Seymour v. Royal Naval School* (1910), 79 L. J. Ch. 366; *Bebb v. Law Soc.* (1913), 83 L. J. Ch. 363; *Rhondda's Claim*, [1922] 2 A. C. 339.

878. Application of rule—Words in a release.]—*CHERBURY (BARON) v. MOUNTAGUE* (1673), Cas. temp. Finch. 117; 23 E. R. 63.

879. —.]—It is a principle long sanctioned in cts. of equity that a release cannot apply or be intended to apply to circumstances of which a party had no knowledge at the time he executed it (*POLLOCK, C.B.*).—*LYALL v. EDWARDS* (1861), 6 H. & N. 337; 30 L. J. Ex. 193; 158 E. R. 139.

Annotations:—*Reid.* *Moore v. Weston* (1871), 25 L. T. 542. *Mentd.* *Re Joint Stock Trust & Finance Corp.* (1912), 56 Sol. Jo. 272.

880. — Covenant to work efficiently—Reference to subject-matter & character of defendant.]—The covenant to work efficiently must be construed with a reference to the subject-matter & the character of debts. The maxim of Lord Bacon applies to this case: *Verba generalia restringuntur ad habilitatem rei vel personam* (*PARKE, B.*).—*WEST LONDON RY. CO. v. LONDON & NORTH WESTERN RY. CO.* (1853), 11 C. B. 327; 7 Ry. & Can. Cas. 477; 22 L. J. C. P. 117; 20 L. T. O. S. 307; 17 Jur. 301; 138 E. R. 499, Ex. Ch.

881. — To enable deed to be held valid—Where otherwise void.]—If the words of the two clauses are to be read by themselves, separated & disjointed from the rest of the deed, they would seem to give the directors such a power as would enure to make the deed void; but having regard to the maxim that "general words may be aptly restrained according to the subject-matter or person to which they relate," it seems to me that we ought to put such a construction upon this deed as to make it valid. Generally speaking, a deed ought to be read as if there were no Act of Parliament affecting it in existence; if, so construing it, it comes within the language of an avoiding statute, it must necessarily be held void

PART III. SECT. 3, SUB-SECT. 9.

874i. Statement of rule.]—In putting a construction upon a deed the ct. will limit the primary significance of the general expressions in it by the purposes for which it was executed, so far as those purposes can be discovered from the deed itself.—*HOUSTON v. BARRY* (1843), 5 I. Eq. R. 394.—*IR.*

878i. Application of rule—Words in a release.]—Where a co. with statutory authority to construct a tramway acquires a strip of land from pltf., who thereupon grants a release for all damages which he might sustain by reason of the construction & operation of the tramway, the general language of the release will be construed so as to restrict it to the matters in regard to which it has been granted with reference to the proper exercise of the

powers of the co. & not so as to apply to injuries occasioned by the co.'s negligence.—*HOUSOME v. VANCOUVER POWER CO.* (1913), 18 B. C. R. 81; 49 S. C. R. 430.—*CAN.*

878 ii. —.]—General words used in a release must be confined to matters of the same nature & forming part of the transaction which the parties had in view.—*NEELANUND SINGH v. HAMIDOODDIN* (1882), 1 L. R. 8 Calo. 576.—*IND.*

8. — Gift.]—*KALIDAS MULLICK v. KANHAYA LAL PUNDIT* (1884), 1 L. R. 11 Calo. 121; L. R. 11 Ind. App. 218.—*IND.*

880 i. — Covenant to work efficiently—Reference to subject-matter & local conditions.]—A covenant to work a coal mine according to the best & most approved manner is to be interpreted with reference to the

subject-matter & local conditions.—*MEREWETHER v. SCOTTISH AUSTRALIAN MINING CO., LTD.* (1907), 4 C. L. R. 953.—*AUS.*

h. — Covenant to indemnify.]—Pltf. chartered a ship of C. for seven years. He then entered into partnership with deft. & one year before the expiration of the charterparty the partnership was dissolved. Upon the dissolution deft. covenanted with pltf. "generally & without exception to save pltf. harmless from the charterparty & from all obligations thereof."—*Held:* in the circumstances of the case, this would mean rather without exception as to the description of claim, than as to time, & debts. would be liable only for money accruing due under it during their co-partnership, & thence to the expiration of the charter.—*JONES v. WALKER* (1851), 9 U. C. R. 136.—*CAN.*

(WILLES, J.).—*MOORE v. RAWLINS* (1859), 6 C. B. N. S. 289; 28 L. J. C. P. 247; 33 L. T. O. S. 205; 23 J. P. 566; 5 Jur. N. S. 941; 141 E. R. 467.

Annotations.—*Mentd. Re East Kongsberg Co., Biggs's Case* (1865), L. R. 1 Eq. 309; *Re Asiatic Banking Corpn., Ex p. Collum* (1869), 39 L. J. Ch. 59; *Crowther v. Thorley* (1883), 48 L. T. 644; *Re Jones, Clegg v. Ellison*, [1898] 3 Ch. 83; *Re Russell Institution, Figgins v. Baghino*, [1898] 2 Ch. 72.

See BONDS, Vol. VII., p. 182, Nos. 200–205.

Recitals governing operative part.—See Sect. 8, *post*.

—*Bonds.*—See BONDS, Vol. VII., pp. 183, 184, Nos. 212–224.

—*Bills of sale.*—See BILLS OF SALE, Vol. VII., pp. 74, 75, Nos. 427–430.

Ejusdem generis rule.—See Sub-sect. 10, *post*.

General meaning of words.]—See Sub-sect. 8, *ante*.

Particular meaning of words.]—See Titles *passim*, & WORDS & PHRASES.

SUB-SECT. 10.—EJUSDEM GENERIS RULE.

A. In General.

882. Object of rule.—The *ejusdem generis* rule is a canon of construction only. The object is to find out the intention of the parties. The instrument, the nature of the transaction, & the language, must all have due regard given to them, & the intention of the parties is to be ascertained by the consideration of their language in accordance with its ordinary & natural meaning (*HAMILTON, J.*).—*THORMAN v. DOWGATE S.S. Co., LTD.*, [1910] 1 K. B. 410; 79 L. J. K. R. 287; 102 L. T. 242; 11 Asp. M. L. C. 481; 15 Com. Cas. 67.

Annotations.—*Reid. France, Fenwick v. Spackman* (1912), 108 L. T. 371; *Jenkins v. Walford* (London) (1917), 87 L. J. K. B. 136; *S.S. Magnhild v. McIntyre*, [1910] 3 K. B. 321. *Mentd. Akt. Frank v. Namaqua Copper Co.* (1920), 90 L. J. K. B. 36.

883. General words following specific enumeration of particular instances.—Confined to instances of same nature.]—One by deed in consideration of love & affection to his name, blood, etc., & for settling the one undivided moieties of his manors, lands, etc., thereafter mentioned grants the said undivided moieties, particularly describing them, together with all other his lands, tenements,

& hereditaments in the kingdom of Ireland: *habendum* the said undivided moieties before granted, together with all other his estate in the kingdom of Ireland, to A. to the several uses thereinafter declared, & for no other use whatsoever; & then declares the uses of the undivided moieties only:—*Held*: the grantor did not intend to pass any lands but the undivided moieties; & supposing the sweeping clause did extend to any other lands, yet no use being declared of them, they descend to the heir at law.

It is very common to put in a sweeping clause; & the use & object of it in general is to guard against any accidental omission; but in such cases it is meant to refer to estates or things of the same nature or description with those that have been already mentioned (*LORD MANSFIELD, C.J.*).—*MOORE v. MAGRATH* (1774), 1 Cowp. 9; 98 E. R. 939.

Annotations.—*Consd. Cholmondey v. Clinton* (1820), 2 Jac. & W. 1; *Crompton v. Jarratt* (1885), 30 Ch. D. 298. *Reid. Pomfret v. Perring* (1854), 18 Beav. 618; *Rooke v. Kensington* (1856), 2 K. & J. 753; *Farrall v. Hilditch* (1859), 5 C. B. N. S. 841; *Barrett v. Wyatt* (1862), 30 Beav. 442; *Young v. Smith* (1865), L. R. 1 Eq. 180; *Jonner v. Jenner* (1866), L. R. 1 Eq. 361; *Francis v. Minton* (1867), L. R. 2 C. P. 543. *Mentd. Doe d. Pell v. Jeyes* (1830), 1 B. & Ad. 593; *Doe d. Howell v. Thomas* (1840), 1 Man. & G. 335; *Neam v. Moorsom* (1866), 36 L. J. Ch. 274.

884. ———.]—It is a general rule of construction that, where a particular class is spoken of & general words follow, the class first mentioned is to be taken as the most comprehensive & the general words treated as referring to matters *ejusdem generis* with such class (*POLLOCK, C.B.*).—*LYNDON v. STANBRIDGE* (1857), 2 H. & N. 45; 26 L. J. Ex. 386; 29 L. T. O. S. 111 21 J. P. 327; 5 W. R. 590; 157 E. R. 19.

Annotations.—*Reid. Re Layard, Layard v. Bossborough* (1916), 85 L. J. Ch. 505. *Mentd. London & Provincial Laundry Co. v. Willesdon L. B.*, [1892] 2 Q. B. 271.

885. ———.]—Where, after a specific enumeration of different subjects, general words are added, the general words are to be confined to subjects *ejusdem generis* (*LORD CAMPBELL, C.*).—*CLIFFORD v. ARUNDELL* (1860), 1 De G. F. & J. 307; 45 E. R. 378, L. C.

886. ———.]—General words following specific words are ordinarily construed as limited to things *ejusdem generis* with those before enumerated (*ERLE, C.J.*).—*HARRISON v. BLACKBURN*

PART III. SECT. 3, SUB-SECT. 10.—A.

883 i. General words following specific enumeration of particular instances.—Confined to instances of same nature.]—A statutory grant of lands, "including all coal, coal oil, ores, stones, clay, marble, slate mines, minerals, & substances whatsoever, thereupon, therein, thereunder," does not include the precious metals.—*RAINBRIDGE v. Esquimalt & Nanaimo Ry. Co.* (1896), 4 B. C. R. 181; *affd.*, [1896] A. C. 561; 65 L. J. P. C. 98; 75 L. T. 111; 12 T. L. R. 597, P. C.—*CAN.*

883 ii. ———.]—By agreement between the city & the co., the former was to have the option of purchasing & acquiring "the works, plant, appliances & property of the co., used for light, heat, & power purposes," at a price to be fixed by arbn. The arbitrators, in fixing the value of the works, plant, appliances, & property, included nothing for the earning power or franchise & rights of the co.—*Held*: they were right, for by the fair interpretation of the agreement "property" must be limited by the preceding words, the rule of *ejusdem generis* applying.—*Re KINGSTON & KINGSTON LIGHT, HEAT, & POWER Co.* (1909), 3 O. L. R. 637; 22 C. L. T. 181; 1 O. W. R. 194; 2 O. W. R. 55;

3 O. W. R. 769; *affd.*, 50 L. R. 348.—*CAN.*

883 iii. ———.]—Defts. had executed agreements authorising plffs. in the event which happened "to take possession of any money or other property" which plffs. might find belonging to defts., & "to sell such goods or property," & take such other proceedings as plffs. might deem best for recovering the amount of the payment made under guarantee bonds issued for defts., & expenses, etc. The agreements also contained the following: "The undersigned agrees to do & execute any deed or thing that the co. may deem to be necessary in order to give the co. the rights & powers herein expressed or intended to be given." The agreements were on printed form prepared by plffs.—*Held*: plffs. were not entitled, under the agreements, to a lien on any real estate of defts. for the amount of their claim, & the words used should not be construed to include land, the rule of *ejusdem generis* being applicable in this case.—*LONDON GUARANTEE & ACCIDENT Co. v. GEORGE* (1906), 3 W. L. R. 236; 16 Man. L. R. 132.—*CAN.*

883 iv. ———.]—*BARNARD-ARGUE-ROTH STEARNS OIL & GAS Co., ALEXANDRA OIL & DEVELOPMENT Co. & CANADA Co. v. FARQUHARSON* (1912),

23 O. W. R. 90; 28 T. L. R. 590; 32 C. L. T. 843; 5 D. L. R. 207; [1912] A. C. 864; 107 L. T. 332.—*CAN.*

883 v. ———.]—Defts. had contracted to sell & deliver to plffs. salmon packed in tins. The contract provided against default in delivery arising from "the packing being interfered with, or stopped, or falling short through the failure of fishing, or through strikes or lock-outs of fishermen or workmen or from any cause not under the control of the sellers." The tins used were defective, & during the resulting delay the run of salmon ceased & the sellers were unable to make delivery.—*Held*: the *ejusdem generis* rule applied.—*CRISPIN & Co. v. EVANS, COLEMAN & EVANS, LTD.*, [1922] 3 W. W. R. 264.—*CAN.*

883 vi. ———.]—*SHAFTESBURY v. WALLACE*, [1897] 1 I. R. 381.—*IR.*

883 vii. ———.]—Where one set of heads in the dispositive clause of a deed is expressed in general terms & concludes with a specific enumeration of separate subjects, it must be presumed that it was intended to carry rights *ejusdem generis* with those previously described & disposed.—*LEE v. ALEXANDER* (1883), 8 App. Cas. 853; 10 R. (Ct. of Sess.) 61; 20 Sc. L. R. 877.—*SCOT.*

Sect. 3.—Rules of construction: Sub-sect. 10, A.]

(1864), 17 O. B. N. S. 678; 5 New Rep. 90; 84 L. J. C. P. 109; 11 L. T. 453; 10 Jur. N. S. 1181; 13 W. R. 185; 144 E. R. 272.

Annotations:—*Reid*, *Mitcalfe v. Westaway* (1864), 34 L. J. C. P. 113; *Debenham v. Digby* (1873), 28 L. T. 170; *Hawke v. Dunn*, [1897] 1 Q. B. 579. *Mentd.* *Wallis v. Hands*, [1893] 2 Ch. 75.

887. ———.]—General words, although introduced for the purpose of sweeping into the assurance everything which has been omitted by mistake, apply *primâ facie* only to things *ejusdem generis* with those specifically enumerated.—*CROMPTON v. JARRATT* (1885), 30 Ch. D. 298; 54 L. J. Ch. 1109; 53 L. T. 603; 33 W. R. 913, O. A.

Annotations:—*Consd.* *Re Durham, Grey v. Durham* (1887), 57 L. T. 164; *Early v. Rathbone* (1888), 57 L. J. Ch. 652; *Re Hodgson, Taylor v. Hodgson*, [1898] 2 Ch. 545. *Reid.* *Southport & West Lancashire Banking Co. v. Thompson* (1887), 58 L. T. 143.

888. ———.]—According to the ordinary rule of construction, general words are to be read *ejusdem generis* with the preceding particular words (*LORD ESHER, M.R.*).—*BADCOCK v. HUNT* (1888), 22 Q. B. D. 145; 58 L. J. Q. B. 134; 60 L. T. 314; 53 J. P. 340; 37 W. R. 205; 5 T. L. R. 148, O. A.

Annotations:—*Reid.* *Re Floyd, Floyd v. Lyons*, [1897] 1 Ch. 633. *Mentd.* *Bourne & Tant v. Salmon & Gluckstein*, [1907] 1 Ch. 616.

889. ———.]—When in a covenant the things particularly enumerated belong to one genus, such as landlord's fixtures, general words which follow must be construed as applying only to things of the same genus.—*LAMBOURN v. McLELLAN*, [1903] 2 Ch. 268; 72 L. J. Ch. 617; 88 L. T. 748; 51 W. R. 594; 19 T. L. R. 529; 47 Sol. Jo. 582, C. A.

Annotations:—*Reid.* *Slough Picture Hall Co. v. Wade, Wilson v. Nevill, Reid* (1916), 32 T. L. R. 542. *Mentd.* *Re British Red Ash Collieries*, [1920] 1 Ch. 326.

890. ———.]—You have to see whether you can constitute a genus of the particular words, & if you can, then unless there is some indication to the contrary, you must construe the general words as having relation to that genus. If you cannot do this, then, so far as I understand the judgment, you must read all the particular words separately, & take the general words separately also. When you find specific words followed by general words, you must *primâ facie* refer the general words to the specific words unless you find some reason for not doing so (*PICKFORD, J.*).—*MUDIE & Co. v. STRICK* (1909), 100 L. T. 701; 25 T. L. R. 453; 53 Sol. Jo. 400; 11 Asp. M. L. C. 235; 14 Com. Cas. 135.

Annotation:—*Reid.* *Magnhild (Owners) v. McIntyre*, [1920] 3 K. B. 321.

891. Application of rule—Assisted by frame of deed.]—F., by indentures of lease & release, in consideration of natural love & affection for his sisters, & a nominal consideration, released a particular freehold estate to B., his heirs & assigns; & he assigned a particular leasehold estate, & all other the property in Great Britain or Ireland, whether real or personal, which he might be entitled to at the time of executing the indenture to B., his exors., administrators, & assigns, upon trust that B., his heirs, exors., administrators, & assigns, should stand possessed thereof upon trust to pay the rent, interest, dividends, or annual produce

arising therefrom, or the money arising from the sale thereof, equally between his three sisters. F. was, at the date of this indenture & of his death, seised of a share in a freehold house situate in King Street, not mentioned in the lease or release:—*Held*: the release could not operate as a covenant to stand seised of the house in King Street, there being in the release no mention of that house, & the general words being, from the frame of the deed, applicable only to leasehold or other personal estate.—*DOUNSWORTH v. BLAIR* (1837), 1 Keen. 795; 6 L. J. Ch. 263; 48 E. R. 513; *sub nom.* *DONNSWORTH v. BLAIR*, 1 Jur. 620.

Annotation:—*Reid.* *Bulley v. Bulley* (1874), 44 L. J. Ch. 79.

892. ———.] Where unlimited construction entails unexpected loss.]—Under a will F. was entitled on the death of A. to a certain share of a fund. By deed made by him, living the tenant for life, he assigned stock in trade, scheduled, & all his real & personal estate, using very general language, to a trustee, to sell for the payment of his creditors. No creditors were parties, but some were paid under it. Afterwards the trustee sold the residue. The will contained a clause that on any legatee becoming bkpt. or mortgaging or selling or anticipating his share or compounding with his creditors, his share should go over:—*Held*: the deed did not pass the share of F. under the will, & his representatives were entitled to it.—*Re WALEY'S TRUSTS* (1855), 3 Drew. 165; 3 Eq. Rep. 380; 24 L. J. Ch. 499; 25 L. T. O. S. 77; 1 Jur. N. S. 338; 3 W. R. 286; 61 E. R. 866.

893. ———.] Intention to apply rule must be clear.]

—When in the operative part of a deed general words follow an enumeration of particular things, those words are *primâ facie* to be construed as having their natural & larger meaning, & are not to be restricted to things *ejusdem generis* with those previously enumerated, unless there is something in the deed which shows an intention so to restrict them.

By a post-nuptial settlement made by a husband upon his wife he demised to the trustees a leasehold messuage & premises particularly described in a schedule, & he assigned to them "all the household furniture, plate, linen, china, glass, & tenant's fixtures, wines, spirits, & other consumable stores, & other goods, chattels, & effects in, or upon, or belonging to" the leasehold messuage. In the schedule the leasehold premises were described as a piece of ground, "with the messuage, tenement, or dwelling-house, back buildings, coach-houses, stable buildings, & all other erections thereupon":

—*Held*: under the general words "other goods, chattels & effects" there passed to the trustees the carriages, horses, harness, & stable furniture in or upon the coach-houses & stable buildings.—*ANDERSON v. ANDERSON*, [1895] 1 Q. B. 749; 64 L. J. Q. B. 457; 72 L. T. 313; 43 W. R. 322; 11 T. L. R. 253; 14 R. 367, C. A.

Annotations:—*Consd.* *Tillmanns v. S.S. Knutsford*, [1908]

2 K. B. 385; *Bolam v. Allgood* (1913), 108 L. T. 461. *Reid.* *Richmond Hill E.S. Co. v. Trinity House Corp.* (1896), 65 L. J. Q. B. 561; *Jacob v. Jacob* (1898), 78 L. T. 451; *Lambourn v. McLellan*, [1903] 2 Ch. 268; *Larsen v. Sylvester* (1908), 99 L. T. 94; *Mudie v. Strick* (1909), 100 L. T. 701; *Bolam v. Allgood* (1913), 110 L. T. 8; 1 R. Comrs. v. Smyth, [1914] 3 K. B. 406; *Re Layard, Layard v. Beesborough* (1916), 85 L. J. Ch. 505; *A.-G. v. Brown*, [1920] 1 K. B. 773; *Maynchild E.S. v. McIntyre*, [1920] 3 K. B. 321; *Ambatielos v. Anton Jurgens Margarine Works*, [1922] 3 K. B. 185. *Mentd.* *Re Stockport Ragged, Industrial, & Reformatory Schools*, [1898] 2 Ch. 687.

892.1. Application of rule—Where unlimited construction entails unexpected loss.]—A mtgee. granted a power of attorney authorising his agent to appear at the several meetings of creditors in the mtgor.'s insolvent estate & to prove claim thereat, to

vote for the election of a trustee, to give directions as to management of the estate, & further to represent him in all matters relating to the estate:—*Held*: the general words in the power must be restricted to matters *ejusdem generis* & did not authorise the agent

to vote for a resolution indefinitely postponing the realisation of the mortgaged property to the prejudice of his principal.—*MARSHALL BROTHERS TRUSTEE v. TRANSVAALISCHE BANK*, [1907] T. S. 1060.—S. AF.

894. — Particular words must form part of one genus or category.]—*THAMES & MERSEY MARINE INSURANCE CO. v. HAMILTON, FRASER & CO.*, No. 697, *ante*.

895. — [The *ejusdem generis* rule is merely one of the rules of construction applied by the ct. in construing documents. It is perhaps not desirable, when dealing with the construction of statutes & mercantile documents, to cite authorities on the construction of wills, because a testator is of his own bounty doing what he pleases & there is no presumption that he will not be capricious. In a mercantile document or a statute there is a presumption that business men do not intend to do anything absurd, which is some slight guide; but in all cases it is a question of construction. Now there is no room for the application of the *ejusdem generis* doctrine unless there is a genus or class or category—perhaps category is the better word, as “class gift” has a technical meaning in wills, & its employment might lead to confusion. Unless you can find a category there is no room for the application of the *ejusdem generis* doctrine. It is first of all necessary to find that the document in question in any case contains a category properly so called at all; when that is once determined in the affirmative, it becomes necessary to ascertain the items which fall within that category. Having got a category, it remains to ascertain the extent of the limit which is to be applied. If no limit can be suggested other than those which are naturally to be inferred from the preceding words specified, & apparently specified for that purpose only, & the only alternative is to strike those words out, then the general rule still applies (FARWELL, L.J.).—*TILLMANN & CO. v. S.S. KNUTSFORD, LTD.*, [1908] 2 K. B. 385; 77 L. J. K. B. 778; 24 T. L. R. 454; 13 Com. Cas. 244; *sub nom.* S.S. KNUTSFORD, LTD. *v.* *TILLMANN & CO.*, 99 L. T. 399, C. A.; *on appeal, sub nom.* S.S. KNUTSFORD, LTD. *v.* *TILLMANN & CO.*, [1908] A. C. 406, H. L. Annotations:—*Consd.* Thorman *v.* Dowgate S.S. Co., [1910] 1 K. B. 410. *Reid.* Larson *v.* Sylvester (1908), 99 L. T. 94; *Mudie v. Strick* (1909), 100 L. T. 701; I. R. Comrs. *v.* Smyth, [1914] 3 K. B. 406; *Re Layard, Layard v. Bessborough* (1916), 85 L. J. Ch. 505; *Akt. Frank v. Namaqua Copper Co.* (1920), 90 L. J. K. B. 36; A.-G. *v.* Brown, [1920] 1 K. B. 773; *Magnhild S.S. v. McIntyre*, [1920] 3 K. B. 321; *Ambatielos v. Anton Jurgens Margarine Works*, [1922] 2 K. B. 185. *Mentd.* The Okehampton, [1913] P. 173.

896. — How genus ascertained.]—The rule of *ejusdem generis* cannot be applied at all unless there be some broad test for the ascertainment of genus. So far as I can see the only test seems to be whether the specified things which precede the general words can be placed under some common category. By this I understand that the specified things must possess some common & dominant feature (McCARDIE, J.).—*MAGNHILD (OWNERS) v. MCINTYRE BROTHERS & CO.*, [1920]

3 K. B. 321; 89 L. J. K. B. 1110; 124 L. T. 160; 36 T. L. R. 744; 15 Asp. M. L. C. 107; 25 Com. Cas. 347; *on appeal*, [1921] 2 K. B. 97, C. A.

Annotation:—*Apld.* *Ambatielos v. Anton Jurgens Margarine Works* (1922), 38 T. L. R. 294.

897. Exclusion of rule.—Where general words relied on precede specific enumeration.]—The rule does not apply to the general words where they precede or introduce the specific enumeration (YOUNGER, L.J.).

The expression, “etc.,” whatever may be its true dictionary meaning, or whatever may be its meaning in classical Latin, unquestionably enlarges the list of causes to be included in the exception beyond the specified examples (WARRINGTON, L.J.).—*AMBATIELOS v. ANTON JURGENS MARGARINE WORKS*, [1922] 2 K. B. 185; 91 L. J. K. B. 703; 127 L. T. 345; 38 T. L. R. 577; 15 Asp. M. L. C. 598; 27 Com. Cas. 352, C. A.; *on appeal*, [1923] A. C. 175; 92 L. J. Ch. 306; 128 L. T. 417; 39 T. L. R. 106; 16 Asp. M. L. C. 28; 28 Com. Cas. 285, H. L.

898. — Exception in general words of something not *ejusdem generis*.]—Under an assignment to creditors by a debtor of all his stock in trade, books & other debts, goods, securities chattels, & effects whatsoever, except the wearing apparel of himself & his family:—*Held*: a contingent interest in the residuary estate of a testator, to which the debtor was entitled in the event of his sister dying without a child, passed.—*IVISON v. GASSIOT* (1853), 3 De G. M. & G. 958; 43 E. R. 375, L. J.J.

Annotation:—*Reid.* *Atoherley v. Du Moulin* (1855), 2 K. & J. 186.

899. — Particular words exhausting whole genus.]—If the particular words exhaust a whole genus the general word must refer to some larger genus (WILLES, J.).—*FENWICK v. SCHMALZ* (1868), L. R. 3 C. P. 313; 37 L. J. C. P. 78; 10 W. R. 481.

Annotations:—*Mentd.* *Furness v. Forwood* (1897), 77 L. T. 95; *Knutsford (Owners) v. Tillmanns* (1908), 99 L. T. 399; *Mudie v. Strick* (1909), 100 L. T. 701; *Matsoukia v. Priestman*, [1915] 1 K. B. 681; *Magnhild S.S. v. McIntyre*, [1920] 3 K. B. 321.

900. — By context.]—A charterparty contained an exemption from liability arising from frost, flood, strikes, lock-outs, & any other unavoidable accidents or hindrances of what kind soever beyond their control, either preventing or delaying the working, loading, or shipping of the cargo:—*Held*: that “hindrances of what kind soever” could not be restricted to hindrances *ejusdem generis* with those previously enumerated.

I hope nothing will be deduced from our decision to-day which shakes the soundness of what is called the *ejusdem generis* rule of construction because it seems to me that both in law, & also as matter of literary criticism, it is perfectly sound. The parties may well have realised the applicability

894 i. — Particular words must form part of one genus or category.]—*Ptff.* sold a lot to B., whose husband sold it to deft. No transfers were registered, & deft. was unaware that his vendor's wife was the owner. *Ptff.* sold this lot & others with a restrictive covenant that no purchaser or assignor should sell liquor nor carry on the business of a licensed victualler on the lot:—*Held*: the *ejusdem generis* rule did not apply, & a wholesale liquor business could not be carried on.—*INTERNATIONAL COAL & COKE CO. v. EVANS* (1908), 9 W. L. R. 711.—CAN.

894 ii. — [By an agreement, in terms of which, the parties thereto agreed to acquire jointly property of gold-bearing formation in a certain district, it was provided that

the agreement should apply to the property & to all claims, ground or rights which either party might acquire within a specified time & radius. There was nothing in the agreement to indicate that it was ever intended to apply to anything else than gold-bearing ground:—*Held*: the agreement could not be construed to include interests in tin claims acquired by one of the parties in the district.—*WADE v. DINSDALE*, [1904] T. H. 269.—S. AF.

h. Exclusion of rule.—In consideration of the construction of a siding to their mill premises, *ptff.* co. entered into an agreement with the railway co. freeing them from liability for damage to the “siding or to buildings, fences or other property whatsoever” of *ptff.* co. “or of any other person.” Two horses of *ptff.*

co., engaged in hauling a car from one part of the siding to another, were killed by being run down by a car sent on the siding by a flying switch:—*Held*: the word “property” in the agreement was not confined to fixtures, buildings & rolling stock, & the horses were properly included.—*EAST KOOTENAY LUMBER CO. v. CANADIAN PACIFIC RY. CO.* (1907), 13 B. C. R. 422.—CAN.

k. — [A trust for “charitable benevolent religious & educational institutions, societies, associations & objects” is void for uncertainty by reason of the presence of the word “benevolent.” The adjective “charitable” cannot be read as governing each of the three later adjectives.—*Re KNOWLES, BROWN v. KNOWLES* (1915), 35 N. Z. L. R. 83.—N.Z.

Sect. 3.—Rules of construction: Sub-sect. 10, A. & B.; sub-sects. 11, 12 & 13, A.]

of that rule to such contracts, & they insert these words "of what kind soever" simply for the purpose of excluding that rule of construction. The effect of the insertion of these words is, this: it excludes the limitation which would naturally arise from the context & gives to the word "hindrance" its full meaning (LORD ROBERTSON).—LARSEN v. SYLVESTER & Co., [1908] A. C. 295; 77 L. J. K. B. 993; 99 L. T. 94; 24 T. L. R. 640; 11 Asp. M. L. C. 78; 13 Com. Cas. 328, H. L.

Annotations:—Consd. Thorman v. Dowgate S.S. Co., [1910] 1 K. B. 410; Re Layard, Layard v. Beesborough (1916), 85 L. J. Ch. 505; Magnhild (Owners) v. McIntyre (1920), 124 L. T. 160. **Reid.** France, Fenwick v. Spackman (1912), 108 L. T. 371; Herman v. Morris (1919), 35 T. L. R. 574; Diamond Alkali Export Corp. v. Bourgeois, [1921] 3 K. B. 443. **Mentd.** Leonis S.S. Co. v. Rank (1908), 99 L. T. 513.

901. — Act or thing specifically included in another category in same document.]—It is impossible under any rule of construction to hold as included in a class brought in, *ejusdem generis*, with a specific subject-matter, other acts or things which are actually specified in the document itself as included in another category. However it might be if there were no such specifically excluded category, it is impossible in the face of the express terms of that category to say that any acts therein included can be brought in under general words as *ejusdem generis* with the particular acts (FAHWELL, L.J.).—BOLIVIA REPUBLIC v. INDEMNITY MUTUAL MARINE ASSURANCE CO., LTD., [1909] 1 K. B. 785; 78 L. J. K. B. 596; 100 L. T. 503; 25 T. L. R. 254; 53 Sol. Jo. 266; 11 Asp. M. L. C. 218; 14 Com. Cas. 156, C. A.

902. — Addition of "etc." to particular words.]—A contract for the sale of a ship to be repaired & fitted with engines by deft. provided for demurrage & contained a clause relieving him from liability for delay caused by "strikes of workmen, lock-outs, etc., or any cause beyond the vendor's control." Delay was caused by the fact that the firm from which vendor was obtaining the engines were already engaged on Govt. work to which they had to give priority. This work was already in hand when the contract was made, & no order was subsequently received from the Govt.:—**Held:** "etc." as used in the contract was too vague to have any effect, & the failure of the sub-contractor was not a cause *ejusdem generis* with strikes or lock-outs.—HERMAN v. MORRIS (1919), 35 T. L. R. 574, C. A.

Annotation:—Consd. Ambatielos v. Anton Jurgens Margarine Works, [1922] 2 K. B. 185.

903. — — — — —]—AMBATIELOS v. ANTON JURGENS MARGARINE WORKS, No. 897, *ante*.

B. Application in Particular Instances.

Assignment of choses in action.]—See CHOSSES IN ACTION, Vol. VIII., p. 458, No. 308.

Assignment of lease.]—See LANDLORD & TENANT.

Bill of lading.]—See SHIPPING & NAVIGATION.

Bills of sale.]—See BILLS OF SALE, Vol. VII., pp. 74-76, Nos. 427-433.

Charities.]—See CHARITIES, Vol. VIII., p. 244, No. 39.

Charterparty.]—See SHIPPING & NAVIGATION.

Conveyance of real property.]—See SALE OF LAND.

Conveyances to & by trustees.]—See TRUSTS & TRUSTEES.

Crown grants.]—See CONSTITUTIONAL LAW, Vol. XI., pp. 568 *et seq.*, Nos. 675 *et seq.*

Leases.]—See LANDLORD & TENANT.

Mortgages.]—See MORTGAGES.

Policy of insurance.]—See INSURANCE.

Power of attorney.]—See AGENCY, Vol. I., p. 297, Nos. 248-251.

Sale of goods.]—See SALE OF GOODS.

Sale of land.]—See SALE OF LAND.

Settlements.]—See SETTLEMENTS.

Statutes.]—See STATUTES.

Trusts.]—See TRUSTS & TRUSTEES.

Wills.]—See WILLS.

SUB-SECT. 11.—VERBA RELATA HOC MAXIME OPERANTUR PER REFERENTIAM UT IN EIS INESSE VIDENTUR.

904. General rule.]—By referring in a document, signed by the party, to another document, the person so signing in effect signs a document containing the terms of the one referred to (CROMPTON, J.).—FITZMAURICE v. BAYLEY (1860), 9 H. L. Cas. 78; 3 L. T. 69; 6 Jur. N. S. 1215; 8 W. R. 750; 11 E. R. 657, H. L.; *affg.* S. C. *sub nom.* BAYLEY v. FITZMAURICE (1857), 8 E. & B. 664, Ex. Ch.

Annotations:—**Reid.** Dale v. Humfrey (1858), E. B. & E. 1004; Clarke v. Fuller (1864), 16 C. B. N. S. 24; Austin v. Newham, [1906] 2 K. B. 167.

905. Document referring to schedule—Schedule necessary to make sensible construction.]—Where by articles under seal deft. bound himself under a penalty to deliver to pltf. by a certain day "the whole of his mechanical pieces as per schedule annexed," the schedule forms part of the deed, which, without it, would be insensible.—WEEKS v. MAILLARDET (1811), 14 East, 568; 104 E. R. 719.

Annotations:—**Distd.** West v. Steward (1845), 14 M. & W. 47; Daines v. Heath (1847), 3 C. B. 938; Dyer v. Green (1847), 1 Exch. 71; Vint v. Vint (1888), 4 T. L. R. 639. **Reid.** England v. Downs (1840), 2 Beav. 522; Hibblewhite v. M'Morine (1840), 6 M. & W. 200. **Re** Deprez, Henriques v. Deprez, [1917] 1 Ch. 24. **Mentd.** Re Queensland Land & Coal Co., Davis v. Martin, [1894] 3 Ch. 181.

906. — Construction intelligible without schedule.]—Pltf. tendered in evidence a bill of sale & schedule, the former of which assigned to him "all the goods, fixtures, household furniture, plate, china, etc., in & about a messuage tenement & premises where he now resides, & the chief articles whereof are particularly enumerated & described in a certain schedule hereunto annexed." The schedule was in no way annexed to the deed, & was inadmissible for want of a stamp:—**Held:** the bill of sale was admissible in evidence without the schedule.

In the case of *Weeks v. Maillardet*, No. 905, *ante*, deft. bound himself to deliver all the articles mentioned in a schedule, so that the deed was insensible without the schedule; here the deed is sensible without the schedule (ALDERSON, B.).—DYER v. GREEN (1847), 1 Exch. 71; 16 L. J. Ex. 239; 154 E. R. 30.

907. — — — — —]—In *Weeks v. Maillardet*, No. 905, *ante*, the action was brought for non-performance of the covenant to deliver the goods enumerated in the schedule annexed to the deed. Common sense would teach us that the covenant could not be made intelligible without recourse being had to the schedule (WILDE, C.J.).—DAINES v. HEATH (1847), 3 C. B. 938; 16 L. J. C. P. 117; 11 Jur. 185; 136 E. R. 376; *sub nom.* DAVIES v. HEATH, 8 L. T. O. S. 390.

908. — — — — —]—WEST v. STEWARD (1845), 14 M. & W. 47; 153 E. R. 383.

909. — — — — —]—In *Weeks v. Maillardet*, No. 905, *ante*, the whole deed was inoperative

without a schedule. In that case the ct. said: "Taken by itself the deed is insensible." That is not so in the present case; the deed is quite sensible without the schedule (COTTON, L.J.).—*VINT v. VINT* (1888), 4 T. L. R. 630, C. A.

910. Contract referring to plan.]—If a contract refer to a plan, to the extent & for the purpose for which the contract refers to the plan, undoubtedly it is part of the contract (LORD COTTENHAM, C.).—*NORTH BRITISH RY. Co. v. TOD* (1846), 12 Cl. & Fin. 722; 4 Ry. & Can. Cas. 449; 10 Jur. 975; 8 E. R. 1595, H. L.

Annotations:—*Reid. Beardmer v. L. & N. W. Ry.* (1849), 1 Mac. & G. 112; *Edinburgh Street Tram. Co. v. Black* (1873), L. R. 2 Sc. & Div. 336. *Mentd. Braynton v. L. & N. W. Ry.* (1846), 4 Ry. & Can. Cas. 553; *R. v. Cale. Ry.* (1850), 16 Q. B. 19; *Ware v. Regent's Canal Co.* (1858), 3 De G. & J. 212; *A.-G. v. Tewkesbury & Malvern Ry.* (1863), 1 De G. J. & Sm. 423; *Buolclench v. Metropolitan Board of Works* (1870), L. R. 5 Exch. 221; *A.-G. v. G. E. Ry.* (1872), 7 Ch. App. 475; *Mackett v. Horne Bay Comrs.* (1876), 35 L. T. 202; *Taff Vale Rly. v. Cardiff Rly.* [1917] 1 Ch. 299.

911. Contract referring to plan.]—A written contract, referring to a schedule of plans & specifications "as annexed thereto," was produced at the trial without the plans & specifications therein alluded to. An objection was taken that the deed was inadmissible for incompleteness, & not pltf.'s deed without the production of the schedule:—*Held:* as the deed was sensible without the annexation of the schedule of plans & specifications, it was admissible.—*HUMPHREYS v. JONES & PICKERING* (1850), 16 L. T. O. S. 88, N. P.; *subsequent proceedings*, 5 Exch. 952.

912. Contract of insurance—Reference to property insured.]—The engagement is to insure a brick building (described in the paper attached to this policy), situated, etc. The description in the attached paper must be supposed to be introduced into the body of the policy between the brackets instead of the reference to it (LORD CAMPBELL, C.J.).—*SILLEM v. THORNTON* (1854), 3 E. & B. 868; 23 L. J. Q. B. 362; 23 L. T. O. S. 187; 18 Jur. 748; 2 W. R. 524; 2 C. L. R. 1710; 118 E. R. 1367.

Annotations:—*Mentd. Hurst v. Usborne* (1856), 25 L. J. C. P. 209; *Stokes v. Cox* (1856), 1 H. & M. 533; *Thompson v. Hopper* (1858), E. B. & E. 1038; *Scott v. Legg* (1877), 46 L. J. M. C. 267.

See, generally, INSURANCE.

913. Conveyance made under Act of Parliament—Incorporates sections of Act.]—A deed of conveyance made under the authority of an Act of Parliament must be read as if the sects. of the Act were incorporated in it.—*ELLIOT v. NORTH EASTERN RY. Co.* (1863), 10 H. L. Cas. 333; 2 New Rep. 87; 32 L. J. Ch. 402; 8 L. T. 337; 9 Jur. N. S. 555; 11 W. R. 604; 11 E. R. 1055, H. L.; *affg. S. C. sub nom. NORTH-EASTERN RY. Co. v. ELLIOTT* (1860), 2 De G. F. & J. 423, L. C. **Annotations:—***Consd. R. v. L. & N. W. Ry.*, [1899] 1 Q. B. 921. *Apld. Manchester Corpn. v. New Moss Colliery*, [1906] 1 Ch. 278. *Reid. G. W. Ry. v. Bennett* (1867),

L. R. 2 H. L. 27; *L. & N. W. Ry. v. Walker*, [1903] A. C. 289. *Mentd. Stourbridge Navigation Co. v. Dudley* (1860), 3 E. & E. 409; *N. E. Ry. v. Crossland* (1862), 32 L. J. Ch. 353; *Goold v. Great Western Deep Coal Co.*, *Great Western Deep Coal Co. v. Goold* (1865), 6 New Rep. 86; *Mid. Ry. v. Checkley* (1867), L. R. 4 Eq. 19; *Richards v. Jenkins* (1868), 18 L. T. 437; *Poppewell v. Hodgkinson* (1869), L. R. 4 Exch. 248; *Colebeck v. Girdlers' Co.* (1876), 45 L. J. Q. B. 225; *Mid. Ry. v. Haunchwood Brick & Tile Co.* (1882), 20 Ch. D. 552; *Pountney v. Clayton* (1882), 47 L. T. 731; *L. & N. W. Ry. v. Evans*, [1893] 1 Ch. 16; *Aldin v. Latimer Clark, Muirhead*, [1894] 2 Ch. 437; *Bradford Corpn. v. Pickles* (1894), 64 L. J. Ch. 101; *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q. B. 836; *Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co.* (1901), 85 L. T. 53; *L. & N. W. Ry. v. Howley Park Coal & Cannel Co.*, [1911] 2 Ch. 97.

914. Reference must appear on face of document signed.]—Where it is necessary to connect the document which has been signed with that containing the terms of the contract, the reference of one to the other must appear on the face of the document signed (WILLES, J.).—*CRANE v. POWELL* (1868), L. R. 4 C. P. 123; 38 L. J. M. C. 43; 20 L. T. 703; 33 J. P. 263; 17 W. R. 161.

Annotation:—*Reid. Banks v. Crossland* (1874), L. R. 10 Q. B. 97.

Application of rule—To wills.]—*See WILLS.*

—To statutes.]—*See STATUTES.*

SUB-SECT. 12.—AD PROXIMUM ANTECEDENS FIAT RELATIO NISI IMPEDIATUR SENTENTIA.

915. Words refer to last antecedent—"The said."]—In a declaration containing several counts on different bills of exchange, each count, after describing the bill, referred to it as "the said" bill of exchange:—*Held:* sufficiently certain, even on special demurrer, for the words "the said" ought to be referred to the last antecedent.—*ESDAILE v. MACLEAN* (1846), 15 M. & W. 277; 16 L. J. Ex. 71; 153 E. R. 854.

Annotations:—*Reid. Clark v. Woods* (1848), 2 Exch. 395. *Mentd. Miller v. Hay* (1848), 3 Exch. 14.

916. —Which will give a meaning.]—Is not the last antecedent the last word which can be made an antecedent so as to have a meaning? (TINDAL, C.J.).—*R. v. WRIGHT* (1834), 1 Ad. & El. 431; 110 E. R. 1273, Ex. Ch.

Annotations:—*Reid. Ashton v. Brevitt* (1845), 14 M. & W. 106. *Mentd. De Bode v. R.* (1848), 13 Q. B. 384; *R. v. Scale, H. v. Alford* (1855), 24 L. J. Q. B. 221; *Moore v. Smith* (1859), 6 Jur. N. S. 892; *Weymouth Corpn. v. Nugent* (1865), 6 New Rep. 302; *Rathbone v. Munn* (1868), 9 B. & S. 708.

SUB-SECT. 13.—FALSA DEMONSTRATIO NON NOCET. A. Statement of Rule.

917. Adequate & sufficient description—Not vitiated by further erroneous description.]—When there is an error in the description of the principal thing, though there is no error in the addition,

PART III. SECT. 3, SUB-SECT. 12.

915 I. Words refer to last antecedent—"The said."]—The word "said" applies to the immediate antecedent.—*Re WILLOMER'S TRUSTS* (1864), 16 I. Ch. R. 389.—IR.

915 II. —.]—*WILSON v. FORRESTER*, [1915] 34 N. Z. L. R. 604.—N.Z.

I. —"The same."]—*PHILAN v. PHILAN* (1850), 1 C. P. 275.—CAN.

916 I. —Which will give a meaning.]—*SHORT v. TYERMAN* (1909), 28 N. Z. L. R. 955.—N.Z.

PART III. SECT. 3, SUB-SECT. 13.—A.

917 I. Adequate & sufficient description—Not vitiated by further erroneous

description.]—Where the description in the deed is so ambiguously expressed that it is very doubtful what is intended to be the boundaries of land, & the language & the description equally admits of two different constructions, the one making the quantity conveyed agree with the quantity mentioned in the deed, & the other making the quantity altogether different, the former construction must prevail.—*HERRICK v. SIXBY* (1867), 17 L. C. R. 146; L. R. 1 P. C. 436.—CAN.

917 II. —.]—A general description of land as being part of a specified lot must give way to a particular description by boundaries & if necessary, the general description will be rejected as a *falsa demonstratio*.

—*BARTHEL v. SCOTTEN* (1895), 24 S. C. R. 387.—CAN.

917 III. —.]—It is a rule in construing written instruments, that when an interest is given, or an estate conveyed in one clause of the instrument in clear & decisive terms, such interest or estate cannot be taken away or cut down by causing a doubt upon the extent, & meaning, & application, of a subsequent clause, nor by inference therefrom, nor by any subsequent words, that are not as clear & decisive as the words of the clause giving that interest.—*THORNHILL v. HALL* (1834), 2 Cl. & Fin. 22; 8 Bil. N. S. 88.—IR.

917 IV. —.]—The rule *falsa demonstratio non nocet* is not designed to ascertain the subject-matter of the

Sect. 3.—Rules of construction: Sub-sect. 13, A. & B. (a) & (b).]

nothing passes; but when the first description is true, a false addition does not vitiate the grant.—

DOWTIE'S CASE, A.-G. v. DOWTIE (1584), 3 Co. Rep. 9 b; 76 E. R. 643.

Annotations:—*Apld.* Foote v. Berkley (1864), O. Bridg. 527. *Refd.* Stakeley v. Butler (1814), Hob. 168; Sidney v. Hulme (1816), 6 Taunt. 177; Doe d. Beach v. Jersey (1818), 1 B. & Ald. 550; Eastwood v. Ashton, [1915] A. C. 900. *Mentd.* Reynal's Case (1612), 9 Co. Rep. 95 a; Sheffield v. Ratcliffe (1815), Hob. 334; Brockham's Case (1628), Litt. 128; Grosse v. Gayer (1629), Cro. Car. 172; Stone v. Newman (1635), Cro. Car. 427; Zetland v. Lord Advocate (1878), 3 App. Cas. 505.

918. ———.]—Where there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation, mistaken or false, respecting it, will not frustrate the grant; but where a grant is in general terms, there the addition of a particular circumstance will operate by way of restriction & modification of such grant.—*ROE d. CONOLLY v. VERNON* (1804), 5 East, 51; 1 Smith, K. B. 318; 102 E. R. 988.

Annotations:—*Refd.* Doe d. Beach v. Jersey (1818), 1 B. & Ald. 550; Pullin v. Pullin (1825), 3 Bing. 47; Wilkinson v. Malin (1832), 2 Cr. & J. 636; Doe d. Campton v. Carpenter (1850), 15 Jur. 719; Dean v. Gibson (1867), 15 W. R. 809. *Mentd.* Portland v. Hill (1866), L. R. 2 Eq. 765.

919. ———.]—A deed conveyed a piece of land, forming part of a close, by reference to a schedule annexed. The schedule described the land, in a column headed "No. on the plan of the B. estate," as "153b"; in a second column, headed "Description of premises," as "a small piece marked on the plan"; in a third column, as being "in the occupation of E."; & in a fourth, as "34 perches." At the time of the contract, a line was drawn upon the plan as the boundary line dividing the piece 153b from the rest of the close of which it formed a part. The plan was drawn to a scale, but, upon measurement of the land, was found incorrect; & 153b contained, within the line so drawn, less than 34 perches according to the actual measurement on the plan, & 27 perches only according to the actual measurement of the land:—*Held*: the statement that the piece of land conveyed contained 34 perches, was merely *falsa demonstratio*, the prior portion of the description being sufficient to convey it, & that the deed passed only the portion of land actually marked off on the plan, as measured by the scale.

It appears to me that this case may be determined by the application of two well-known maxims of law. The first is that "*verba illata inesse videntur*"; according to which, we must consider it to be the same thing here, as if the map or plan, which is there referred to, had been actually inserted in the deed. But the words "34 perches," having no relation to the plan, must be taken to mean 34 perches by admeasurement. Then the other rule of law applies, that as soon as there is an adequate & sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it, according to the maxim "*falsa demonstratio non nocet*" (PARKER, B.).—*LLEWELLYN v. JERSKY* (EARL) (1849), 11 M. & W. 183; 12 L. J. Ex. 243; 152 E. R. 767.

Annotations:—*Apld.* Barton v. Dawes (1850), 10 C. B. 361. *Consd.* Eastwood v. Ashton, [1915] A. C. 900. *Refd.* Hewer v. Cox (1860), 3 E. & E. 428; Mellor v. Walmesley, [1904] 2 Ch. 525; Norman v. Norman, [1919] 1 Ch. 297. *Mentd.* Wood v. Rowcliffe (1851), 6 Exch. 407.

contract; but when that is ascertained, & a perfect description given of the subject-matter, the addition of any

further particulars, inconsistent with the general description, shall be rejected as a *falsa demonstratio*.—

920. ———.]—The question is what the words mean, after applying to them the established rules of construction. One of these rules is, "*Falsa demonstratio non nocet*"; another is, "*Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram.*" The first rule means, that if there be an adequate & sufficient description, with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it. The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all, & so far as it is true, applies to one only. The other rule means that, if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some land, wherein all the demonstrations are true, & some wherein part are true & part false, they shall be intended words of true limitation, to pass only those lands wherein the circumstances are true (ALDERSON, B.).—*MORRELL v. FISHER* (1849), 4 Exch. 591; 19 L. J. Ex. 273; 14 L. T. O. S. 398; 154 E. R. 1350.

Annotations:—*Apld.* Wood v. Rowcliffe (1851), 6 Exch. 407; Eastwood v. Ashton (1913), 83 L. J. Ch. 263. *Refd.* Josh v. Josh (1858), 6 C. B. N. S. 454; Griffiths v. Penson (1863), 1 New Rep. 330; Webber v. Stanley (1864), 16 C. B. N. S. 698; Early v. Rathbone (1888), 57 L. J. Ch. 552; Mellor v. Walmesley, [1904] 2 Ch. 525; Re Brocket, Dawes v. Miller, [1908] 1 Ch. 185; Eastwood v. Ashton, [1915] A. C. 900; Norman v. Norman, [1919] 1 Ch. 297; Watcham v. East Africa Protectorate, [1919] A. C. 533. *Mentd.* Harloe v. Harloe (1875), L. R. 20 Eq. 471.

921. ———.]—As to the case where there is property in respect of which all the facts of the description are found to be true, so that the property exactly fits the description, the whole of that property, & nothing more, passes. As to the case where there is property in respect of which none of the facts of description are true, no property passes. Where the inquiry results in the third alternative, viz. where there is property in respect of which some of the facts of description are true & some not, there the ct. must inquire whether the part of the description which applies to the property is a complete definition of a subject of devise, so that the misdescribing part may be justly regarded as a mistake, & rejected as a false demonstration, in order to prevent a total failure of the devise. If this latter inquiry results in an affirmative answer, the property which is so found to be completely defined passes, notwithstanding a partial failure of the applicability of the whole of the description. It is in the case of this third alternative that the doctrine relating to the rejection of false demonstration is brought into use; but it never can be properly applied where there is a property which every part of the description fits, & on which every word thereof has full effect (ERLE, C.J.).—*WEBBER v. STANLEY* (1864), 16 C. B. N. S. 698; 4 New Rep. 192; 33 L. J. C. P. 217; 10 L. T. 417; 10 Jur. N. S. 657; 12 W. R. 833; 143 E. R. 1301.

Annotations:—*Apld.* Re Seal, Seal v. Taylor, [1894] 1 Ch. 316. *Refd.* Carr v. Montefiore (1864), 4 New Rep. 169; Pedley v. Dodds, Dodds v. Pedley (1866), L. R. 2 Eq. 819; Smith v. Ridgway (1866), L. R. 1 Exch. 331; White v. Birch (1867), 36 L. J. Ch. 174; Cosby v. Millington (1869), 38 L. J. C. P. 373; Hardwick v. Hardwick (1873), L. R. 16 Eq. 168; Re Cleveland's S. E., [1893] 3 Ch. 244; Re Brocket, Dawes v. Miller, [1908] 1 Ch. 185. *Mentd.* Re Stephenson, Donaldson v. Bamber (1896), 66 L. J. Ch. 93.

922. ———.]—Where in a grant or devise the description of parcels is made up of more than

ROCHFORD v. ENNIS (1861), 13 L. C. L. R. 324, 366, 367.—*IR.*

one part, & one part is true & the other false, there, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected as *falsa demonstratio*, & will not vitiate the grant or devise. The doctrine is not to be confined to cases where the first part of the description is true & the latter untrue, it being immaterial in what part of the description the *falsa demonstratio* occurs.—*COWEN v. TRUEFIT, LTD.*, [1899] 2 Ch. 309; 68 L. J. Ch. 563; 81 L. T. 104; 47 W. R. 661; 43 Sol. Jo. 622, C. A.

Annotations.—*Reid*. *Anderson v. Borkley*, [1902] 1 Ch. 936; *Eastwood v. Ashton*, [1915] A. C. 900; *Watcham v. East Africa Protectorate*, [1919] A. C. 533. *Mentd*. *Cradock v. Hunt*, [1923] 2 Ch. 136.

923. ———.]—The principle that, when an instrument contains an ambiguity, evidence of user under it may be given in order to show the sense in which the parties used the language employed, applies to a modern as well as to an ancient instrument, & where the ambiguity is patent as well as where it is latent.

Where in a grant the description of the parcels is made up of more than one part, & one part is true & the other false, then if the part which is true describes the subject with sufficient accuracy, the untrue part will be rejected as a *falsa demonstratio*, & will not vitiate the grant (*per Cur.*).—*WATCHAM v. A.-G. OF EAST AFRICA PROTECTORATE*, [1919] A. C. 533; 87 L. J. P. C. 150; 120 L. T. 258; 34 T. L. R. 481, P. C.

Annotation.—*Mentd*. *Belton v. Bass, Ratcliffe & Grotton*, [1922] 2 Ch. 447.

B. Application of Rule.

(a) In General.

924. Immaterial that false description precedes true part.—*COWEN v. TRUEFIT, LTD.*, No. 922, *ante*.

925. Where elimination of part renders whole description intelligible.—*COWEN v. TRUEFIT, LTD.*, No. 922, *ante*.

926. Where error part of description itself.—I cannot agree that the present case is one in which the undoubted rule that, when you have in the words of description a sufficiently certain definition of what is conveyed, inaccuracy of dimensions or of plans as delineated will not vitiate or affect that which is there sufficiently defined, applies, because the description itself is

a description of a piece of land situate on the sea-shore of certain dimensions which are set forth. Those dimensions, in my opinion, are not an addition to something which had already been certainly described, but are part & parcel of the description itself (*VAUGHAN WILLIAMS, L.J.*).—*MELLOR v. WARMESLEY*, [1905] 2 Ch. 164; 74 L. J. Ch. 475; 93 L. T. 574; 53 W. R. 581; 21 T. L. R. 591, C. A.

Annotations.—*Apld*. *Eastwood v. Ashton* (1913), 83 L. J. Ch. 263. *Reid*. *Watcham v. East Africa Protectorate*, [1919] A. C. 533. *Mentd*. *Assheton-Smith v. Owen* (1905), 75 L. J. Ch. 181; *Mercer v. Denne*, [1905] 2 Ch. 538; *Re Djambi (Sumatra) Rubber Estates* (1912), 107 L. T. 631; *Nesbitt v. Mablethorpe U. C.*, [1918] 2 K. B. 1.

Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram.—*See* Sub-sect. 14, *post*.

To Crown grants.]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 573, Nos. 729, 730.

To wills.]—*See* WILLS.

Misdescription as ground for rectification.]—*See* MISTAKE.

Admissibility of evidence.]—*See* Sect. 4, *post*.

(c) Particular Instances.

See, generally, LANDLORD & TENANT; REAL PROPERTY & CHATELS REAL; SALE OF LAND; WILLS.

927. Misdescription of locality.]—Where the parish of H. extended into two counties, B. & W., a lease of a close by name of C. in the parish of H., in the county of B. though the close was in W. is good; but where the name of the parish itself is mistaken, the lease is bad.—*NORRIS'S CASE & CAMPAN'S CASE* (1570), 3 Dyer. 292 a; 73 E. R. 656.

Annotation.—*Reid*. *Hardwick v. Hardwick* (1873), 42 L. J. Ch. 636.

928. ———.]—If a deed correctly describe land by its quantities & occupiers though it describe it as being in a parish in which it is not, the land shall pass by the deed.—*LAMBE v. REASTON* (1813), 5 Taunt. 207; 1 Marsh. 23; 128 E. R. 666.

Annotation.—*Folld*. *Sidney v. Hulme* (1815), 6 Taunt. 177.

929. ———.]—Where a deed to lead the uses of a recovery conveyed land by a minute specific description, & afterwards added a general description of the parish, which was false as to a particular parish & the recovery specified that parish only, the ct. permitted the parish wherein that parcel

PART III. SECT. 3, SUB-SECT. 13.—B. (a).

925 i. Where elimination of part renders whole description intelligible.]—If a grant indicates the thing conveyed by an enumeration of several particulars, & there be in existence no subject-matter, the property of the grantor, in which all those particulars concur, but there be a subject in which some of them do, that subject shall pass, & the inapplicable particulars shall be rejected as mistaken description; otherwise, nothing would pass by the grant.—*BOYLE v. MULHOLLAND* (1860), 10 I. C. L. R. 150, 157; 12 Ir. Jur. 192, 196.—IR.

m. Rejection to be governed by intention of parties.]—Where there are two conflicting descriptions of the subject-matter of a grant, or two conflicting parts of the same description, that which is the more certain & stable, & the least likely to have been mistaken or to have been inserted inadvertently, must prevail, if it sufficiently identifies the subject-matter. But where there is gross divergency, preference should be given to that element of the description of the subject-matter which is more consistent with the intention of the parties to be collected from the other

parts of the deed, illuminated, if necessary, by the surrounding circumstances & the subsequent conduct of the parties.—*DURGA PRASAD SINGH v. RAJENDRA NARIAN BAGCHI* (1909), L. R. 37 Cal. 293.—IND.

n. Exclusion of rule.]—A general description being wholly insufficient, was followed by a particular description which was not a *falsa demonstratio* added to a complete description, but an entire description in itself.—*Held*: the particular description governed.—*HART v. BOWN* (1863), 10 Gr. 266.—CAN.

o. ———.]—Where the first description was not sufficient to describe with clearness the land intended to be conveyed, the words which followed could not be rejected as *falsa demonstratio*.—*OLESON v. JONASSON* (1906), 16 Man. L. R. 94.—CAN.

PART III. SECT. 3, SUB-SECT. 13.—B. (b).

927 i. Misdescription of locality.]—A deed of conveyance described the land as a piece of land "being lot no. 7" in the division of a certain property, & running from C., etc.—*Held*: the whole of lot no. 7 passed by the deed, though the line of that lot did not run from C.—*STILES v. KEIVER* (1862), 5 All. 286.—CAN.

927 ii. ———.]—*TALBOT v. ROSSIN* (1863), 23 U. C. R. 170.—CAN.

927 iii. ———.]—The land was described as commencing at a stake on the O. road, about thirty chains from M.'s angle, when in fact the nearest point of the locus was not within ninety chains of M.'s north-east angle:—*Held*: the words "from M.'s north-east angle" could not be rejected as *falsa demonstratio*.—*MCPHERSON v. RAMSAY* (1869), 1 F. E. T. 288.—CAN.

927 iv. ———.]—On the conclusion of negotiations between C. & B. as to the sale of two city lots on the corner of H. street & W. avenue, in Vancouver, C. signed a document as follows: "Received from B. the sum of \$10, being a deposit on the purchase of lots Nos. 9 & 10, block 10, district lot 196." The lots on the corner of the streets mentioned were, in fact, lots 9 & 10 in block 9, & the trial judge found that these were the lots intended to be sold. In an action for specific performance of the agreement for sale of the lands:—*Held*: the inaccuracy of the description in the receipt was a mere discrepancy, which should be disregarded, & a decree made for specific performance in respect of the lots actually bargained for between the parties.—*COOTE v. BOBLAND* (1904), 35 S. C. R. 282; leave to appeal refused, July 6, 1905, P. C.—CAN.

Sect. 3.—Rules of construction: Sub-sect. 13, B. (b).]

lay to be added in the recovery.—**SIDNEY v. HULME** (1815), 6 Taunt. 177; 1 Marsh 532; 128 E. R. 1002.

930. ——Where a fine comprised only lands lying in the parishes of S. & S. within a larger district, the island of F., the deed so describing the lands, which were in truth within the parish of F., in the same district, the ct. refused to amend the fine by inserting also the parish of F. *Semble*: by the grant of lands in a vill, only those lands will pass which lie in a vill bearing a different name from the parish.—**COTTEREL v. FRANKLIN** (1815), 6 Taunt. 284; 128 E. R. 1044.

931. Misdescription of occupation.—**WROTESLEY v. ADAMS** (1859), 1 Plowd. 187; 2 Dyer, 177 b; 75 E. R. 287.

Annotations:—**Consd. Morrell v. Fisher** (1849), 4 Exch. 591. **Apld. Cowen v. Truett**, [1898] 2 Ch. 551. *Reid. Dodding-ton's Case* (1594), 2 Co. Rep. 32 b; **Shrewsbury's Case** (1610), 9 Co. Rep. 46 b; **Swyft v. Eyres** (1639), Cro. Car. 546; **Foot v. Berkeley** (1666), O. Bridg. 527; **Doe d. Harris v. Greathed** (1806), 8 East, 91; **Holford v. Bailey** (1849), 18 L. J. Q. B. 109; **Norman v. Norman**, [1919] 1 Ch. 297. *Mentd. Bath's, Bp., Case* (1605), 6 Co. Rep. 34 b; **Osney v. Hicks** (1610), Cro. Jac. 263; **Podger's Case** (1612), 9 Co. Rep. 104 a; **Edwards v. Woodden** (1633), Cro. Car. 323; **Thomas v. Sorrell** (1673), *Freem. K. B.* 85; **Beal v. Simpson** (1698), 1 Ld. Raym. 408; **Phillips v. Salisbury, Bp.** (1699), 13 Mod. Rep. 321; **Holliday v. Fletcher** (1727), 2 Stra. 781; **Molden v. Bartlett** (1750), Park. 106; **Wood v. Rowcliffe** (1851), 6 Exch. 407; *Re Bellamy, Elder v. Pearson* (1883), 25 Ch. D. 620.

932. ——One having bought a messuage in D. of T. C. makes a feoffment by deed of his messuage late of R. C. in D. This mistake does not vitiate the conveyance.—**WINDHAM v. WINDHAM** (1581), 3 Dyer. 376 b; 73 E. R. 843.

Annotations:—**Consd. Conolly v. Vernon** (1804), 5 East, 51. *Reid. Stukeley v. Butler* (1614), Hob. 168.

933. ——If a man giveth all his lands in D. in the tenures of A. & B. & he hath lands in D. but not in their tenures, in that case all his lands in D. passeth (**WARBURTON, J.**).—**CLAY & BARNET'S CASE** (1613), Godb. 236; 78 E. R. 137.

934. ——A lease of "all that glebe land lying in A., viz. seventy-eight acres of land, & also all the tithes of the said seventy-eight acres, all which lately were in the ferm or occupation of B." is sufficiently certain to pass the tithes although they never were in the occupation of B., for the words "all which were lately, etc." shall be taken as an explanation, & not as a restriction.—**SWYFT v. EYRES** (1639), Cro. Car. 546; 79 E. R. 1070; *sub nom. SWIFT v. HEIRS*, March, 31; *sub*

nom. LITCHFIELD (VICARS CHORAL) v. AYRES, W. Jo. 435.

Annotations:—*Reid. R. v. Rochester, Bp. & Clark* (1675), 2 Mod. Rep. 1; **Roe d. Conolly v. Vernon** (1804), 5 East, 51; **Doe d. Beach v. Jersey** (1818), 1 B. & Ald. 550.

935. ——**DOE d. FREELAND v. BURT**, No. 875, *ante*.

936. ——Where the words of a second deed are sufficient to pass the whole of the property conveyed by a former deed, & the intention to do so is clear, a mistake in describing the occupation will not vitiate.—**WILKINSON v. MALIN** (1832), 2 Cr. & J. 636; 2 Tyr. 544; 1 L. J. Ex. 234; 149 E. R. 268.

Annotations:—*Mentd. Smith v. Keating* (1848), 6 C. B. 136; **Perry v. Shipway** (1859), 1 Giff. 1; *Re Campden Charities* (1881), 18 Ch. D. 310; *Re Whiteley, London, Bp. v. Whiteley*, [1910] 1 Ch. 600.

937. ——Under a lease of all that part of B., situate & being in O., & now in the occupation of S., lying within certain specified abutments, with all houses, etc. belonging thereto, & which are now in the occupation of S. a house on a part, which is within the abutments but not in the occupation of S., will pass.—**DOE d. SMITH v. GALLOWAY** (1833), 5 B. & Ad. 43; 2 Nev. & M. K. B. 240; 2 L. J. K. B. 182; 110 E. R. 708.

Annotations:—**Apld. Dyne v. Nutley** (1853), 14 C. B. 122. *Reid. Morrell v. Fisher* (1849), 4 Exch. 591; **Doan v. Gibson** (1867), 15 W. R. 809; **Wellington v. Shepherd** (1872), 27 L. T. 832; **Magee v. Lavell** (1874), 43 L. J. C. P. 131; **Cowen v. Truett**, [1898] 2 Ch. 551; **Mellor v. Walmesley**, [1904] 2 Ch. 525.

938. ——A shop was demised to H. C., the landlord retaining the right of occupying the flat roof. Shortly afterwards the landlord demised an adjoining house to another person, with the right of walking & sitting on the roof of the shop. H. C.'s lease having determined, the landlord demised the shop to pltf. by the description of "all that shop situate at, etc., as the same was late in the occupation of H. C." The lease of the house having afterwards determined, the landlord re-let it to deft., with the right to occupy the roof of the shop & to erect on it a photographic studio:—*Held*: the words "as the same was late in the occupation of H. C." ought to be considered as inserted only for the purpose of identifying the property, & not of limiting the operation of the deed.—**MARTYR v. LAWRENCE** (1864), 2 De G. J. & Sm. 261; 4 New Rep. 312; 10 L. T. 677; 28 J. P. 580; 10 Jur. N. S. 858; 12 W. R. 1043; 46 E. R. 375, L. J. J. *Annotation*:—*Reid. Francis v. Hayward* (1882), 20 Ch. D. 773.

939. Misdescription of area.—Lease of all my meadows in D. containing ten acres, when I have

939 i. Misdescription of area.—The front half of a lot supposed to contain in all 200 acres, but in reality consisting of more, was construed to mean half the real quantity.—**ELLIS v. WADDEL** (1837), 5 O. S. 639.—**CAN.**

939 ii. ——Where the number of acres mentioned in a patent does not correspond with the quantity of land according to the description in the grant, the description will control.—**MANNING v. DOE d. FERGUSON** (1839), (1823-1900), 1 Ont. Dig. 1854.—**CAN.**

939 iii. ——Deft. agreed, under seal, with pltf. to pay them £275 by a certain day, for "the south 100 acres of lot 15 in the 7th concession of N., beginning at the S.E. corner, & run by the surveyor 100 acres exactly":—*Held*: under these words deft. was entitled to the tract as "run by the surveyor," that being in accordance with the substance of the agreement, & the latter words being the principal feature of the description, not the words, "the south 100 acres."—**JOINER v. COLBORNE** (1854), 11

U. C. R. 631.—**CAN.**

939 iv. ——The Crown in 1804 granted lots 18 & 19 in the 6th concession of F., containing 247 acres, more or less, & bounded as follows: "Commencing in front of the concession at the S.E. angle of lot 19, then N. 31° W. 65 chains, then S. 59° W. 38 chains, more or less, to the allowance for road between lots 18 & 17, then S. 31° E. 65 chains, more or less, to the allowance for road in front of the concession, then N. 59° E. 38 chains, more or less, to the place of beginning:—*Held*: this included all of lots 18 & 19, not merely that part extending 65 chains back from the front or south end.—**CARTWRIGHT v. DETTOR** (1860), 19 U. C. R. 210.—**CAN.**

939 v. ——The description contained in a grant of lands gave one of the boundaries as follows: "Thence along shore to a point due north of a small pond six chains from an old fort." This pond by admeasurement shortly before trial was found to be at its eastern end nine, & at its western end

eleven chains from the fort:—*Held*: this discrepancy must be rejected as *falsa demonstratio*, & the pond being a natural monument, its actual position should control & correct the description in the deed.—**ARCHIBALD v. MORRISON** (1868), 7 N. S. R. 272.—**CAN.**

939 vi. ——There being a reasonably accurate particularisation of the four boundaries the quantity of acres must not be regarded as the controlling term.—*Re TRENT VALLEY CANAL* (1886), 12 O. R. 153.—**CAN.**

939 vii. ——A specific lot of land was conveyed by deed & also: "A strip of land 25 links wide, running from the eastern side of the aforesaid lot along the northern side of the railway station about 12 rods unto the western end of the railway station ground, the lot & strip together containing one acre, more or less":—*Held*: the strip conveyed was not limited to 12 rods in length, but extended to the western end of the station, which was more than 12 rods

twenty in D., all pass.—WILLOUGHBY (LORD) v. FOSTER (1553), 1 Dyer. 80 b; 73 E. R. 172.

940. —.]—Where, in a deed to make a tenant to the *precipue*, lands were described as a farm generally, without particularising their quality or quantity, & in the recovery the parcels were set out as amounting to fifty acres, but on a late admeasurement, they had been found to comprise seventy, the ct. allowed the quantity to be increased to that number, the terms of the deed being large enough to comprise all the lands of which the farm consisted at the time the recovery was suffered.—BATTISALL v. TURNER (1824), 9 Moore, C. P. 591.

941. —.]—If the word "farm" be used, & an enumeration is afterwards included which does not embrace the whole, the description applying only to a part, will not prevent the part not contained in that latter description from being included in that which is the general description.—PORTMAN v. MILL (1839), 9 L. J. Ch. 161; 3 Jur. 356.

942. —.]—LLEWELLYN v. JERSEY (EARL), No. 919, *ante*.

943. —.]—J. D., by deed dated in 1719, demised to J. B. "all that part of the townland of B., containing 509 acres, arable, meadow, & pasture, English statute measure, for three lives, renewable for ever, bounded on the south," etc. Within the boundaries mentioned in the deed, in addition to the 509 acres of arable, etc., there were contained 400 acres & upwards of bog land, the whole of which, except at one point, where it approached the boundary, lay within the arable & other land. There were several renewals, each being made in the terms of the original demise. In ejectment by a party deriving title from the original lessor, against the tenant in possession under the last renewal:—*Held*: the 400 acres of bog land passed by the original demise to J. B.—JACK v. MCINTYRE (1845), 12 Cl. & Fin. 151; 9 Jur. 415; 8 E. R. 1356, H. L.

944. —.]—A lease of land described by admeasurement, "with the houses now erected or being erected thereon," it being found as a fact that at the time the lease was executed the foundations of the houses had been laid, is in effect the

same as though the lease had been of a specific house, & though the dimensions considerably exceeded those stated:—*Held*: it was merely *falsa demonstratio*.

The question parcel or no parcel is always for the jury (*per* CUR.).—MANNING v. FITZGERALD (1859), 1 F. & F. 634, n.; 29 L. J. Ex. 24.

945. —.]—A. was in possession of two contiguous estates, M. & P. In 1872 he sold M. to resps., & a survey was made on behalf of both parties to determine the boundary between M. & P., & resps. thenceforward occupied the lands of M. as determined by the survey. In 1881 the estate of P. was sold to applt. & in 1896 he commenced proceedings to establish that resps. were occupying as part of the estate of M. lands which were really part of the estate of P. It appeared that on measuring up the acreage of the plots of land specifically mentioned in the deeds as forming part of M., they were found to be less than the land actually occupied by resps.:—*Held*: the measurements in the deeds did not affect the title of resps. to the lands included in the conveyance to them as determined by the contemporary survey.—BARNARD v. DE CHARLEROY (1899), 81 L. T. 497, P. C.

946. —.]—MELLOR v. WALMESLEY, No. 926, *ante*.

947. *Misdescription as to name.*—The omission to describe land by the name of "Muckland," & even the description of it, as within another denomination, amount at most to an erroneous additional description of that which is identified beyond doubt by reference to the map (WILLES, J.).—RORKE v. ERRINGTON (1859), 7 H. L. Cas. 617; 5 Jur. N. S. 1227; 11 E. R. 246, H. L.

Annotations:—*Held*. Eastwood v. Ashton, [1915] A. C. 900. *Mentd.* Nawab Sidhee Nuzur Ally Khan v. Ojoodhyar Khan (1866), 10 Moo. Ind. App. 540; Jacob v. Turner, [1892] 1 Q. B. 47; Hewson v. Shelley, [1913] 2 Ch. 384.

948. *Misdescription of boundaries.*—When after a description of a property it is stated that on one side it is bounded by a certain other property, & it appears that it is not so bounded for every inch, there is an inaccuracy in the statement of the boundary; but this is not enough to exclude what is not so bounded if it appears from the evidence to have been part of the property dealt

from the starting point.—DOYLE v. MCPHEE (1895), 24 S. C. R. 65.—CAN.

939 viii. —.]—A description answering to the holding must prevail over an implied description, or subsequent addition, which would be false.—MACÉCHEN v. MACDONALD (1904), 37 N. S. R. 59.—CAN.

939 ix. —.]—In a suit for ejectment a mere misstatement of the area of the land sought to be recovered ought not to be regarded as anything more than a "false demonstration." If the space is precisely defined by other description, the statement of its measurement in square yards may be treated as surplusage & of no consequence.—VIRJIVANDAS MADHAVDAS v. MAHOMED ALI KHAN (1880), 1 L. R. 5 Bom. 208.—IND.

947 i. *Misdescription as to name.*—In a lease for lives renewable for ever, the name of "Beauchamp Colclough the younger, son of Beauchamp Colclough of Zion-Hill," was inserted. No person answered the entire description. There was a Beauchamp Urquhart Colclough, son of Beauchamp, who did not reside at Zion-hill & there was also a Beauchamp, son of Henry, who did reside at Zion-hill:—*Held*: the case was governed by the rule "*Veritas nominis tollit errorem demonstrationis*." The name being substantially correct, the false description should be rejected, & Beauchamp

Urquhart, son of Beauchamp was therefore the life in the lease.—COLCLOUGH v. SMITH (1864), 10 L. T. 918.—IR.

948 i. *Misdescription of boundaries.*—In a patent the land was described as "certain parcel of land in the township of N., containing by admeasurement 35 acres, more or less, which 35 acres of land are butted & bounded as follows," etc. The boundaries given would embrace about seventy acres, including several lots in the town of N. From the facts it was clear this was not the intention of the govt.:—*Held*: the description as in the township, coming first, must govern, & therefore no land could pass which was then in the town.—DOE d. CAMPBELL v. CROOKS (1852), 9 U. C. R. 639.—CAN.

948 ii. —.]—Where land was described as commencing at a post planted 4 chains & 50 links from the N.E. angle of a lot:—*Held*: the post, the existence & position of which were satisfactorily established, was the point of commencement, though its distance from the true N.E. angle was inaccurately given.—MARRS v. DAVIDSON (1867), 26 U. C. R. 641.—CAN.

948 iii. —.]—In 1792 lot 17 in the 2nd concession of H. was appropriated by the land board for the district to O'B. He had made no improvements up to 1794, & in 1853 the location

made to him by the board was formally cancelled. In 1801 a patent issued to F. for lot 17 in the front concession of H., which had been appropriated to him by the land board about a year after their grant to O'B. described as commencing in front of the concession at the N.E. angle of the lot on the river, then S. 45 degrees E. 80 chains, more or less to the lands of O'B., then S. 45 degrees W. 30 chains, more or less, to lot 16, then N. 45 degrees W. 68 chains to the river, then along the water's edge north-easterly the place of beginning, containing 200 acres, more or less. Up to this time there had been no second concession line run. In 1863 the Crown granted to deft. the rear part of the lot, 188½ acres, & pft., claiming it under the patent to F., brought trespass:—*Held*: as O'B. never got a patent or became entitled to claim one, the reference to his land was *falsa demonstratio*, & pft. was confined to the distance of 80 chains mentioned in the patent to F.—FIELDS v. MILLER (1868), 27 U. C. R. 416.—CAN.

948 iv. —.]—In a patent there was a general description of a lot as lot 23 in the 10th concession, etc., & also a particular description by metes & bounds, which would exclude the part in question from the limits of lot 23:—*Held*: the piece in question passed under the general description in the

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with, & the previous description of that property is sufficient to include it (JESSEL, M.R.).—**FRANCIS v. HAYWARD** (1882), 22 Ch. D. 177; 52 L. J. Ch. 291; 48 L. T. 297; 47 J. P. 517; 31 W. R. 488, C. A.

Annotation.—**Mentl. Swainston v. Finn & Metropolitan Board of Works** (1883), 48 L. T. 634.

949. Misdescription of subject-matter.]—Deft. received an order from a correspondent at B. to purchase for him bar iron of a description known there as S. & H. crown iron. Upon inquiry, he found that the firm of S. & H., whose mark that was, had ceased to exist, & had been succeeded by a firm of H. & Co., pltf., & he accordingly, through a broker, bought of pltf. 67 tons of iron, which was described in the bought & sold notes as "S. & H., crown, common bars." The iron when tendered was found to bear the mark of the new firm "H. & Co." with a crown, & was rejected by deft. In an action for refusing to

accept the iron, the jury found that the mark "S. & H." was not a material part of the bargain, & that the article tendered was substantially what deft. bargained for:—**Held**: construing the contract by the surrounding circumstances, the mark S. & H. might, if necessary, be rejected as *falsa demonstratio*, & the contract was complied with by the tender of iron marked "H. & Co."—**HOPKINS v. HITCHCOCK** (1863), 14 C. B. N. S. 65; 32 L. J. O. P. 154; 8 L. T. 204; 9 Jur. N. S. 896; 11 W. R. 597; 143 E. R. 369.

950. Misdescription of tenure.]—A mtge. was expressed to comprise by way of grant in fee "all & every the estate, right, title, property, & interest of the mtgor. of & in all & every those two fields or parcels of land containing together about twenty-two acres or thereabouts, situate at & abutting upon the main road at "H., & "bounded upon one side by "B. Lane, " & also of & in all & every other, if any, the lands, hereditaments, & premises at H. aforesaid of, in, or to which the mtgor. hath any estate, right, title, property, or interest."

patent, & the particular description, which was inconsistent therewith, must be rejected as *falsa demonstratio*.—**HUNTSMAN v. LYND** (1879), 30 C. P. 100.—CAN.

948 v. —.]—**IMRIE v. ARCHIBALD** (1895), 25 S. C. R. 368.—CAN.

949 i. Misdescription of subject matter.]—Where in a deed a certain quantity of land, & half of a saw-mill thereon erected, were conveyed, & the description of the premises covered the whole site of the mill:—**Held**: the vendee was entitled to only one-half of the mill.—**DOR d. MILLER v. DIXON** (1835), 4 O. S. 101.—CAN.

949 ii. —.]—Where land is described generally as part of lot 4, & the specific description afterwards clearly given embraces a part of lot 3, the specific will govern.—**DOR d. MURRAY v. SMITH** (1848), 5 U. C. R. 225.—CAN.

949 iii. —.]—Where land is so described by its local abutments as to enable any one to find it with certainty, it is unnecessary to state further in what lot in the township the land lies. If, therefore, the land so described is stated to be part of lot 42, when it is in reality part of lot 45, the deed is nevertheless certain & good.—**DOR d. NOTMAN v. McDONALD** (1848), 5 U. C. R. 321.—CAN.

949 iv. —.]—A. by deed dated Jan. 22, 1840, conveyed to pltf. lots 134, 135, & 136 in the 3rd concession of S., adding this description "which lots were patented to A., bearing date Mar. 15, 1836, & which was surveyed & laid off by W., on Jan. 21, 1840"—**Held**: pltf. was not bound by such survey, but could claim the whole of lot 136, as laid out by govt.—**MAHONY v. CAMPBELL** (1858), 15 U. C. R. 396.—CAN.

949 v. —.]—A particular description being clearly inaccurate in many respects, cannot control a previous grant, so as to exclude the part of a lot not described.—**McCOLLUM v. WILSON** (1859), 18 U. C. R. 445.—CAN.

949 vi. —.]—In ejectment brought to recover possession of certain land, called part of 22 in the 8th concession of H., & described as extending to the edge of R. lake, it was proved that there was a concession in the original survey of the township, called the 9th, between the 8th, to the north thereof, & R. lake. Pltf. proved that the patent under which he traced title described the 8th concession as extending to the bank of R. lake, but the deed to himself only stated the lot without giving metes & bounds:—**Held**: although the specific description in the patent, & not the general description, would

probably govern, yet pltf. having in his notice of title only claimed lot 22 in the 8th concession whereas the part contended for was in the 9th concession, deft. was entitled to a verdict.—**HENDERSON v. HARRIS** (1860), 10 C. P. 374.—CAN.

949 vii. —.]—A mtge. described the land as all those certain parcels of land situate in the township of N., containing 2½ acres, more or less, being composed of part of lot 23 in the 5th concession of N., particularly described in the deed of conveyance thereof made between, etc. This deed referred to was for 2½ acres, part of lot 23 in the 4th concession, & of lot 23 in the 5th concession, describing the part in each concession separately by metes & bounds, that in the 5th containing less than half an acre:—**Held**: the mtge. included only the land in the 5th concession.—**FERRIE v. WRIGHT** (1861), 20 U. C. R. 644.—CAN.

949 viii. —.]—**DOHN v. TICE** (1861), 11 C. P. 289.—CAN.

949 ix. —.]—The Crown in 1836 granted to S., under whom defts. claimed, "200 acres, more or less, in the township of C., being lot 41 in front on lake E., in the township," describing it as "commencing in front on lake E., at the S.E. angle of the lot; thence N. 175 chains," etc. In 1839 a grant issued to B. for the rear parts of lots 41, 42, & 43 in the front or 1st concession of C., "described as commencing in the limit between lots 40 & 41, at a distance of 175 chains from the S.E. angle of the said lot 41 & then going north:—**Held**: the first grant must be taken to include the whole of lot 41, notwithstanding the particular description, & therefore nothing could pass by the second patent.—**ILER v. NOLAN** (1861), 21 U. C. R. 309.—CAN.

949 x. —.]—Pltf. claimed under a deed from one C. of "all that parcel of land being composed of lot 26, as laid down upon a plan of lots laid out by G. & W., being on the west side of G. street in the town of B., described as follows," adding a description by metes & bounds, which left a small strip at the south end of the lot uncovered:—**Held**: the whole lot passed, & the description curtailing its size should be rejected as *falsa demonstratio*.—**GILLEN v. HAYNES** (1873), 33 U. C. R. 516.—CAN.

949 xi. —.]—L. in conveying land to S. described it as being composed of the southerly half of lot 17 in the 4th concession of K., giving it the metes & bounds of the east half, but excepting out of the same 45 acres sold for taxes. The only part of lot 17

which L. had before the tax sale was that conveyed to him by B. as part of lot 17, giving it the metes & bounds of the east half, the same as in the deed to S. & the same quantity was conveyed in both deeds:—**Held**: the metes & bounds given in the deed to S. correctly described the lands intended to be conveyed, & the words "southerly half" were controlled by them.—**PEARSON v. MULHOLLAND** (1889), 17 O. R. 502.—CAN.

949 xii. —.]—By an indenture of lease lessees were given the right to "a sufficient supply of water for the purpose of propelling a wheel not exceeding 44 inches in diameter, being the size of the present wheel upon the premises." The "present wheel" was 40 inches in diameter:—**Held**: the governing words were "not exceeding 44 inches in diameter," & the subsequent words "being the size of the present wheel upon the premises," should be rejected as *falsa demonstratio*.—**BRANTFORD ELECTRIC & OPERATING CO. v. BRANTFORD STARCH WORKS** (1901), 3 O. L. R. 118; 22 C. L. T. 13.—CAN.

949 xiii. —.]—**McDONALD v. GALLAGHER** (1915), 48 N. S. R. 332.—CAN.

949 xiv. —.]—Where a recital in an agreement for sale of cattle described them as "the cattle known as the C. cattle at present grazing on the C. ranch, near B.," whereas other parts of the contract made it appear that the cattle sold were all the "C. cattle" some of which were not on the C. ranch:—**Held**: it was intended to sell all the C. cattle & the words "at present grazing, etc." were rejected as used mistakenly for better description of what was sufficiently certain without them, applying the maxim *falsa demonstratio non nocet*.—**McLEAY v. BURNS**, [1919] 3 W. W. R. 917; *affd.*, [1920] 2 W. W. R. 815.—CAN.

949 xv. —.]—A full & complete description of the subject-matter of a deed being followed by another description in the same instrument, the first description will be preferred although the second is equally full & complete.—**ROE v. LIDWELL** (1860), 11 L. C. L. R. 320.—IR.

p. — Bill of sale.]—Goods intended to be included in a chattel mtge. were described therein as those mentioned in the schedule, the property of the mtgors., situate upon the premises on the north-east corner of certain streets in a township:—**Held**: although when the mtge. was executed the goods were in the house at the north-west corner, & not the north-east corner, the mtge. was not void. The erroneous part of the description

All of the mtgor.'s property at H. was freehold, except a strip of land of about three-quarters of an acre which lay between the freeholds & B. Lane, & which was of copyhold tenure:—*Held*: the copyhold strip passed under the general words, & was included in the mtge.

Semble: having regard to the position of the property & the description in the deed, the copyhold strip was included in the parcels themselves.—*EARLY v. RATHBONE* (1888), 57 L. J. Ch. 652; 58 L. T. 517; 4 T. L. R. 382.

Misdescription on plan.—See No. 926, *ante*.

SUB-SECT. 14.—NON ACCIPI DEBENT VERBA IN DEMONSTRATIONEM FALSAM QUÆ COMPETUNT IN LIMITATIONEM VERAM.

951. *Meaning of rule.*—If there be some land wherein all the demonstrations in a grant are true, & some, wherein part are true & part false, the words of such grant shall be intended words of true limitation to pass only those lands wherein all the circumstances are true (PARKE, J.).—*Doe d. ASHFORTH v. BOWER* (1832), 3 B. & Ad. 453; 1 L. J. K. B. 156; 110 E. R. 163.

Annotations.—*Reid*. *Doe d. Smith v. Galloway* (1833), 5 B. & Ad. 43; *Jack v. McIntyre* (1845), 12 Cl. & Fin. 151; *Josh v. Josh* (1858), 5 C. B. N. S. 454; *White v. Birch* (1867), 15 L. T. 605. *Mentd*. *Homer v. Homer* (1878), 8 Ch. D. 758.

952. —. *MORRELL v. FISHER*, No. 920, *ante*.

953. —. You cannot reject part where there is something which answers the whole description (WILLES, J.).—*JOSH v. JOSH* (1858), 5 C. B. N. S. 454; 23 L. J. C. P. 100; 5 Jur. N. S. 225; 7 W. R. 122; 141 E. R. 185.

might be rejected, & the statement that they were contained in the mtgors.' dwelling-house would remain.—*SUPREME COURT OF JUDICATURE (ACCOUNTANT) v. MAROON* (1899), 30 O. R. 135.—CAN.

g. *Misdescription of measurements.*—Where two tenants agreed to take leases of two houses in a terrace as such, & in the leases an error was made in the cell measurements, but the boundaries were clearly marked out:—*Held*: the premises were conveyed by the boundaries & the measurements were immaterial.—*WALLACE v. DUNLOP* (1910), 44 I. L. T. 209.—IR.

r. *Misdescription in plan.*—*PHILLIPS v. R.* (1910), 12 C. L. R. 287.—AUS.

s. —. When a parcel of land is granted by a specific name, & it can be shown what are the boundaries of such parcel, the governing part of the description is the specific name, & the whole parcel will pass, even though to the general description there is superadded a particular description by meter & bounds, or by a plan which does not show the whole contents of the land as included in the designation by which it is known.—*ATRELL v. PLATT* (1883), 10 S. C. R. 425.—CAN.

t. —. *GUARDIAN ASSURANCE Co. v. CONNELLY* (1891), 20 S. C. R. 208.—CAN.

u. —. *Held*: there being, irrespective of the map, an adequate description of what was intended to pass under the deed, the subsequent description, appearing on the face of the map, being at variance with the former description, might be rejected on the principle *falsa demonstratio non nocet*.—*DUBLIN & KINGSTOWN RY. Co. v. BRADFORD* (1857), 7 I. C. L. R. 624.—IR.

a. —. *Held*: the description in the body & schedule of a conveyance was an adequate description of what was intended to be conveyed, & the additional description on the

map was an erroneous description, & should be rejected.—*KENNY v. LABARTE*, [1902] 2 I. R. 63.—IR.

b. *Misdescription of commencement of term.*—*Pltf.*, by lease, consisting of seven sheets, & bearing date Mar. 15, 1862, demised certain premises to W. On the July 21 following, this lease was cancelled by an instrument under seal; the second & fourth sheets were taken out & replaced by others, & it was re-executed & re-delivered without any other alteration. As it then stood it was dated as before, to hold "from Apr. 1 now next," for nine years "from thence next ensuing," at a yearly rent, payable in advance on Apr. 1, 1862, & on Apr. 1 in each year; the conclusion being that the parties had theunto set their hands & seals, "the day & year first above written":—*Held*: the lease took effect from the delivery on July 21, 1862, not from the date; & the term began on Apr. 1, 1863; & the first year's rent, payable in advance was not due until that day, the words "on Apr. 1, 1862" being merely *falsa demonstratio*.—*BELL v. MCKINDSEY* (1865), 3 E. & A. 9.—CAN.

c. *Misdescription of quantity—Sale of goods.*—By agreement in writing between pursuers & defenders pursuers agreed to supply "the whole steel" required for the F. bridge, less 12,000 tons of plates, subject to the conditions herein contained, at certain prices. The conditions contained these clauses: "The estimated quantity of steel we understand to be 30,000 tons, more or less":—*Held*: pursuers were entitled to supply the whole of the steel required for the bridge, & their right was not qualified or affected by the statement that the estimated quantity which would be required was understood to be "30,000 tons, more or less."—*TANCRED, ARROL & Co. v. STEEL Co. OF SCOTLAND, LTD.* (1899), 15 App. Cas. 125.—SCOT.

954. —. The rule is that where words can be applied so as to operate on a subject-matter & limit the other terms employed in its description, or, in other words, where there is a subject-matter to which they all apply it is not possible to reject any of these terms as *falsa demonstratio* (WILLES, J.).—*SMITH v. RIDGWAY* (1866), L. R. 1 Exch. 331; 25 L. J. Ex. 198; 14 L. T. 632; 12 Jur. N. S. 742; 14 W. R. 868, Ex. Ch.

Annotations.—*Mentd*. *Cosby v. Millington* (1869), 38 L. J. C. P. 373; *Cuthbert v. Robinson* (1882), 51 L. J. Ch. 238; *Re Seal, Seal v. Taylor*, [1894] 1 Ch. 316.

955. —. *HARDWICK v. HARDWICK* (1873), L. R. 16 Eq. 168; 42 L. J. Ch. 636; 21 W. R. 719, L. C.

Annotations.—*Reid*. *Whitfield v. Langdale* (1875), 1 Ch. D. 61; *Homer v. Homer* (1878), 8 Ch. D. 758; *Re Bright-Smith, Bright-Smith v. Bright-Smith* (1886), 31 Ch. D. 314; *Re Brocket, Dawes v. Miller*, [1908] 1 Ch. 185.

956. *Grant in general terms—Followed by restrictive words.*—*ANON.* (1617), 1 Roll. Rep. 407; 81 E. R. 570.

957. —. General words do not imply any certainty, nor conclude any person; as where the condition of a bond is to devise or grant all his lands in the tenure of A., etc., the obligor may say that he has nothing there; *secus* where the condition is particular.—*DODDINGTON'S CASE, HALL v. PEART* (1594), 2 Co. Rep. 32 b; Poph. 60; 76 E. R. 484; *sub nom.* *HALL v. COMBES*, Cro. Eliz. 368.

Annotations.—*Reid*. *Stukely v. Butler* (1615), Hob. 168; *Swyft v. Kyres* (1639), Cro. Car. 546; *Foot v. Berkley* (1666), O. Bridg. 527; *Doe d. Smith v. Galloway* (1833), 5 B. & Ad. 43; *Morrell v. Fisher* (1849), 4 Exch. 591; *Norman v. Norman*, [1919] 1 Ch. 297. *Mentd*. *Barker v. Bacon* (1604), Cro. Jac. 48; *Mirril v. Nichols* (1614), 2 Bulst. 176; *It. & Hunsdon v. Arundel & Howard* (1616), Hob. 109; *Jewell v.* (1617), 1 Roll. Rep. 408; *Bainbridge v. Gardiner* (1665), O. Bridg. 402.

PART III. SECT. 3, SUB-SECT. 14.

951 i. *Meaning of rule.*—The rule *falsa demonstratio non nocet* is subject to another which shows its real meaning, *non accipi debent verba in falsam demonstrationem quæ competunt in limitationem veram*; the meaning of which is, if there be a subject-matter in which all the particulars mentioned in the grant concur, & another subject in which some only of them concur, the particulars wanting in the latter, but found in the former, shall not be considered mistaken description to pass the latter, but that subject shall pass in which all the particulars concur.—*BOYLE v. MULHOLLAND* (1860), 10 I. C. L. R. 150; 12 Ir. Jur. 192.—IR.

956 i. *Grant in general terms—Followed by restrictive words.*—When two deeds were given to different parties of a lot containing 150 acres, the first covering fifty acres by moles & bounds, the last containing the whole lot, & commencing at the same point as the first "except fifty acres already sold":—*Held*: the last deed covered only the remaining 100 acres of the lot.—*ARNER v. MCKENNEY* (1858), 8 C. P. 373.—CAN.

956 ii. —. *Held*: where a deed of entail contained substantive prohibition against alienation & contracting debt, a subsequent prohibition against granting "any right or security either heritably or irredeemably" was to be read as an additional prohibition, & not as qualifying the preceding prohibitions.—*HAMILTON v. LINDSEY-BUCKNALL* (1869), 8 Macph. (Cl. of Sess.) 323; 42 So. Jur. 152.—SCOT.

d. *Words will not be rejected—Unless impossible to give effect to them.*—*Held*: a grant from the Crown of "all that certain parcel or tract of land in Y., containing 200 acres, more or less (including lot 21 in the 7th concession), being the clergy reserve lot 21 in the 6th concession west of Y. street, in the township," the land

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958. ———.]—**OGNEL'S CASE** (1587), 4 Co. Rep. 48 b; 76 E. R. 1000.

*Annotations:—***Reid.** Clay & Barnett's Case (1613), Godb. 238; Stukeley v. Butler (1615), Hob. 168. **Mentd.** Anon. (1584), Owen, 3; Lillingston's Case (1607), 7 Co. Rep. 38 a; Chamberlaine v. Turner (1628), Cro. Car. 129; Robins v. Warwick (1661), 1 Keb. 72; Manby v. Scot (1662), 1 Keb. 337; Dixon v. Harrison (1670), Vaugh. 36; Witherhead v. Harrison (1670), T. Jo. 2; Shuttleworth v. Garnett (1688), Carth. 90; Hool v. Bell (1697), 1 Ld. Raym. 172; St. David's, Bp. v. Lucy (1699), 1 Salk. 134; Prescott v. Boucher (1832), 3 B. & Ad. 849; Thomas v. Sylvester (1873), L. R. 8 Q. B. 368; Apaden v. Seddon, Preston v. Seddon (1876), 48 L. J. Q. B. 353; Harding v. Howell (1889), 14 App. Cas. 307; *Re* Herbage Rents, Greenwich Charity Comrs. v. Green, [1896] 2 Ch. 811.

959. ———.]—**BARTLETT v. WRIGHT** (1593), Cro. Eliz. 299; 78 E. R. 552.

960. ———.]—**BARKER v. BACON** (1604), Cro. Jac. 48; 79 E. R. 40; *sub nom.* **BAKER v. BACON**, Moore, K. B. 754.

*Annotation:—***Consd.** Pratt v. Moon (1605), Yelv. 82.

961. ———.]—**CLAY & BARNET'S CASE**, No. 933, *ante*.

962. ———.]—**GIBSON v. CLARK** (1819), 1 Jac. & W. 159; 37 E. R. 336, L. C.

*Annotation:—***Mentd.** A.-G. v. Murdoch (1852), 1 De G. M. & G. 86.

963. ———.]—Under a lease of "all that messuage or tenement called, etc., now or late in the occupation of C.," the boundaries given not accurately, defining the premises:—**Held:** a "gateway" under a portion of the messuage & leading to a yard behind, in which were some small houses not included in the demise, the tenants of which had always used the gateway, did not pass in the absence of evidence to show that it had been in the exclusive occupation of C.—**DYNE v. NUTLEY** (1853), 14 C. B. 122; 2 C. L. R. 81; 139 E. R. 51.

964. ———.]—**True description not to be construed as falsa demonstratio.**—If all the words of description are true, & correctly describe a thing certain, the ct. will not presume that there is any error, so as to extend the meaning of the words to something not properly comprehended in the express words.—**PEDLEY v. DODDS**, **DODDS v. PEDLEY** (1866), L. R. 2 Eq. 819; 14 L. T. 823; 12 Jur. N. S. 759; 14 W. R. 884.

*Annotation:—***Consd.** Hardwick v. Hardwick (1873), L. R. 16 Eq. 168.

965. ———.]—Pltf. entered into an agreement for the transfer of his tenancy in a public-house, & the sale of the goodwill thereof to deft. The subject-matter of the agreement, which was in writing, was therein described as "the house & premises he now occupies, known by the sign of the 'White Hart.'" There was a coach-house which belonged to the "White Hart," & which, at the time of the making of the agreement, was not in the occupation of pltf., but of one S., who held it as tenant to pltf. for a period which had not expired at the time fixed for the completion

not being set out by metes & bounds, conveyed to the grantee lot 21 in the 7th concession as well as lot 21 in the 6th concession.—**Doe d. KEATING v. WYANT** (1842), 6 O. S. 314.—**CAN.**

e. ———.]—Pltf. conveyed his farm to his son, subject to the payment of an annuity & pltf.'s maintenance in board, washing, & keep out of the farm, or to receive in cash an amount sufficient to pay for the same yearly. Deft. sold the farm & went to reside elsewhere. Pltf. went & lived with him on the new farm for some years, receiving his maintenance, etc., but becoming dissatisfied left:—**Held:** pltf. was not bound to reside with the deft. wherever he might choose to go; & in the circumstances was entitled to

be paid a reasonable sum for his maintenance, payable at the end of each year.—**SWEENEY v. SWEENEY** (1888), 16 O. R. 92.—**CAN.**

f. *Words that may or may not be falsa demonstratio.—Upon the happening of a contingency.*—Where an instrument is susceptible of two meanings, one of which is reasonable & probable & the other altogether improbable, it ought to be construed in the former sense, unless it is clear that the other construction was intended. J. agreed to deliver to M. a quantity of lumber. At the time of entering into the contract the former signed a writing as follows: "When the season's shipments are over, if M. cannot turn out \$8 for lumber,

of the transfer by the agreement. The agreement contained a variety of stipulations, & concluded as follows: "If either party shall refuse or neglect to perform all & every part of this agreement, they hereby promise & agree to pay to the other who shall be willing to complete the same the sum of £100 as damages, & recoverable in any of Her Majesty's cts. of law." Deft. refused to perform the agreement on the ground that it included the coach-house, & that pltf. could not perform his part, not being able to deliver up possession of that portion of the premises on the day fixed for completion, & pltf. accordingly brought his action to recover the £100 as liquidated damages:—**Held:** the words "he now occupies" formed an essential part of the description of the subject-matter of the agreement, & could not be rejected as *falsa demonstratio*.

With respect to the admission of parol evidence, Lord Wensleydale's dictum in *Baird v. Fortune*, No. 1293, *post*, seems to exhaust the matter. He says, "No parol evidence can be used to add to or detract from the description in the deed, or to alter it in any respect, but such evidence is always admissible to show the condition of every part of the property, & all other circumstances necessary to place the ct., when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument" (**COLERIDGE, C.J.**).—**MAGEE v. LAVELL** (1874), L. R. 9 C. P. 107; 43 L. J. C. P. 131; 30 L. T. 169; 38 J. P. 344; 22 W. R. 334.

*Annotations:—***Reid.** Mowats v. Hudson (1911), 105 L. T. 400. **Mentd.** *Re* Newman, *Ex p.* Capper (1876), 4 Ch. D. 724; *Scrutton v. Childs* (1877), 36 L. T. 212; *Wallis v. Smith* (1882), 21 Ch. D. 243; *Ward v. Monaghan* (1895), 39 Sol. Jo. 485; *Willson v. Love*, [1896] 1 Q. B. 626; *Pye v. British Automobile Commercial Syndicate*, [1906] 1 K. B. 425.

966. Grant with descriptive words referring to schedule—**Restricted by description in schedule.**—A deed purported to convey "all that messuage or farm-house, etc., & several closes, etc., of land thereto belonging, called G. Farm, in the occupation of J. S., & containing, etc., & consisting of the several particulars specified in the first division of a schedule thereunder written, & more particularly delineated in a map or plan thereof drawn in the margin of the schedule." There were no general words. In an action brought to try the right to a slip of land, which was not mentioned either in the schedule or in the plan above referred to, evidence was offered on the part of deft. to show that the *locus in quo* had always been occupied with the closes mentioned & delineated in the schedule & plan, & treated as part of G. Farm:—**Held:** this evidence was not admissible, & the deed was conclusive.—**BARTON v. DAWES** (1850), 10 C. B. 261; 19 L. J. C. P. 302; 138 E. R. 106.

*Annotations:—***Reid.** Wood v. Rowcliffe (1851), 6 Exch. 407; *Re* Brocket, Dawes v. Miller, [1908] 1 Ch. 185.

as paid J. will take off 25 cents of each superficial, or the loss, if any:—**Held:** this meant that the deduction of 25 cents was intended to be a maximum sum, & the words, "or the loss, if any," would only apply in the event of the loss being less than 25 cents per thousand.—**JONES v. MCINTOSH** (1874), 2 P. 343.—**CAN.**

966 i. Grant with descriptive words referring to schedule—**Restricted by description in schedule.**—When the real & chattel property of a bankrupt is conveyed to trustees by deed, to which a schedule is attached enumerating a portion of the chattels, the list of chattels in the schedule will control the deed.—*Re* CRAIG (1869), 4 L. R. Eq. 158.—**IR.**

967. ———.]—A. settled on B. "all that messuage or dwelling-house with the lands, etc., thereto belonging, situate, etc., & now or late in the occupation of T., his under-tenants or assigns, & which said messuage, dwelling-house, & lands are also known, or described, by the names, & contain the several quantities by admeasurement following, that is to say, etc." setting out a list of the names & acreages of all the closes included in the farm, except the four closes sought to be recovered in this action:—*Held*: though all the closes had been let to T. at one undivided rent, there was here no *falsa demonstratio*, & the four closes not mentioned in the parcel did not pass to B.—*GRIFFITHS v. PENSON* (1863), 1 New Rep. 330; 8 L. T. 84; 9 Jur. N. S. 385; 11 W. R. 313.

Annotations:—*Reid*. *Smith v. Ridgway* (1865), 14 W. R. 207; *Re Brocket, Dawes v. Miller*, [1908] 1 Ch. 185.

SUB-SECT. 15.—OMNIA PRAESUMUNTUR RITE ESSE ACTA.

See, generally, EVIDENCE.

968. *General rule.*—In the absence of evidence that no lease was ever executed, the ct., must clearly presume that the instrument is what it professes to be, viz. the counterpart of the lease (*CRESSWELL, J.*).—*HUGHES v. CLARK* (1851), 10 C. B. 905; 15 Jur. 430; 138 E. R. 358.

969. ———.]—It is a maxim of the Law of England to give effect to everything which appears to have been established for a considerable course of time, & to presume that what has been done has been done of right, & not in wrong (*POLLOCK, C.B.*).—*GIBSON v. DOEG* (1857), 2 H. & N. 615; 27 L. J. Ex. 37; 30 L. T. O. S. 156; 21 J. P. 808; 6 W. R. 107; 157 E. R. 253; *on appeal* (1862), 7 L. T. 71, Ex. Ch.

Annotations:—*Apld.* *Hepworth v. Pickles*, [1900] 1 Ch. 108; *Re Summerson, Downie v. Summerson*, [1900] 1 Ch. 112, n. *Reid*. *Clippens Oil Co. v. Edinburgh & District Water Trustees*, [1904] A. C. 64; *Gibson v. Payne* (1905), 22 T. L. R. 54; *Heath v. Deane*, [1905] 2 Ch. 86.

970. ———.]—A certificate of two justices, that new roads had been formed & completed under 41 Geo. 3, c. 109, s. 9, was put in & proved; but no order of two justices for stopping the old road was produced:—*Held*: it might be presumed that an order of two justices for stopping up the old road had been duly made.

After so long a period, the presumption *omnia rite esse acta* arises. In matter of private right, after so long a period, all presumptions of this sort are made. Thus the enrolment of a deed may be presumed. Where there has been a conveyance by lease & release, the existence of the lease may be presumed on the production of the release.

PART III. SECT. 3, SUB-SECT. 15.

968 *l. General rule.*—A ct. after a lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be.—*JHANDA SINGH v. WAHID-UD-DIN* (1916), 1 L. L. R. 38 All. 570.—*IND.*

g. Application of rule.—The deed of a Master in Chancery, purporting to be made in pursuance of a decree of foreclosure, duly registered, is evidence that all the proceedings on which it is founded were rightly done, without producing the decree.—*JARVIS v. EDGERT* (1848), 1 All. 66.—*CAN.*

h. ———.]—Deft. in ejectment filed a bill to restrain the action, alleging that the deed under which plff. claimed was a forgery. The deed was dated about fifty years before the bill was filed, & the four witnesses to

it were dead before the validity was impeached in any way. The ct. dismissed the bill with costs.—*FICK v. McMICHAEL* (1857), 5 Gr. 646.—*CAN.*

k. ———.]—Where depositions taken under a commission are returned to the ct. enclosed in an envelope, addressed as directed by the Act, & sealed up, it will be presumed that the seal is that of the commissioner who took the deposition.—*DOE v. HEATHCOTE v. HUGHES* (1878), 3 P. & B. 296.—*CAN.*

l. ———.]—In a borough which had been divided into polling districts the objector could not swear that he signed several notices of objection on the days they purported to bear date, but the notices were duly signed by him before they were served, & they were duly served within the limits of

So livery of seisin, the surrender of a copyhold estate, or a reconveyance from the mtgee. to the mtgor., may be presumed (*WATSON, B.*).—*WILLIAMS v. EYTON* (1858), 2 H. & N. 771; 27 L. J. Ex. 176; 30 L. T. O. S. 277; 22 J. P. 259; 157 E. R. 318; *affd.* (1859), 4 H. & N. 357, Ex. Ch.

Annotations:—*Apld.* *Leigh U. C. v. King*, [1901] 1 K. B. 747. *Reid*. *Cababé v. Walton-on-Thames District Council*, [1913] 1 K. B. 481.

971. ———.]—*Re SALISBURY (MARQUIS) & LONDON & NORTH WESTERN RY. CO.* (1879), [1892] 1 Ch. 75, n.; 66 L. T. 63, n.

Annotations:—*Mentd.* *Lowther v. Cale Ry.*, [1892] 1 Ch. 73; *Leconfield v. L. & N. W. Ry.*, [1907] 1 Ch. 38; *Re Northumberland & Tynemouth Corp.*, [1909] 2 K. B. 374.

972. ———.]—When a deed comes from an unsuspected repository, the ct., in the absence of evidence to the contrary, is bound to presume that, so far as the deed appears to have been executed by the parties to it, it was in fact executed by them; that is to say, executed under seal & delivered by them so as to be a complete deed (*KEKEWICH, J.*).—*Re AIREY, AIREY v. STAPLETON*, [1897] 1 Ch. 164; 66 L. J. Ch. 152; 76 L. T. 151; 45 W. R. 236; 41 Sol. Jo. 128.

973. ———.]—*Re SUMMERSON, DOWNIE v. SUMMERSON* (1899), [1900] 1 Ch. 112, n.; 69 L. J. Ch. 57; 81 L. T. 810, n.

Annotations:—*Follid.* *Hepworth v. Pickles*, [1900] 1 Ch. 108. *Mentd.* *Greenhalgh v. Brindley*, [1901] 2 Ch. 324.

974. ———.]—If you find a long course of usage such as in the present case for 24 years, which is wholly inconsistent with the continuance of the covenant relied upon, the ct. infers some legal proceeding which has put an end to that covenant, in order to show that the usage has been & is now lawful & not wrongful (*FARWELL, J.*).—*HEPWORTH v. PICKLES*, [1900] 1 Ch. 108; 69 L. J. Ch. 55; 81 L. T. 818; 48 W. R. 184; 44 Sol. Jo. 44.

Annotation:—*Mentd.* *Greenhalgh v. Brindley*, [1901] 2 Ch. 324.

975. ———.]—*LEIGH URBAN COUNCIL v. KING*, [1901] 1 K. B. 747; 70 L. J. K. B. 313; 83 L. T. 777; 65 J. P. 243; 17 T. L. R. 205; 45 Sol. Jo. 220, D. C.

Annotations:—*Consd.* *Esher & Dittons U. C. v. Marks* (1902), 71 L. J. K. B. 309. *Dbtd.* *Cababé v. Walton-on-Thames U. C.*, [1914] A. C. 102. *Mentd.* *Kingston-upon-Thames Corp. v. Baverstock* (1909), 100 L. T. 935.

976. *Exchange of parsonage—Statutory sanction.*—A deed made in 1785, by which the rector of a parish purported to grant & transfer to the lord of the manor the parsonage house in exchange for another house granted to him by the latter, would not have been valid unless it had been authorised by statute. There was no evidence that the deed had been so authorised, but it was shown to have been properly made in all other respects:—*Held*: the ct. was justified in presuming

time for giving such notice:—*Held*: the general *prima facie* presumption that all documents are made on the day they bear date applies to notices of objection.—*KENNY v. KENNELLY*, [1895] 2 I. R. 544; 29 I. L. T. 20.—*IR.*

m. Exclusion of rule.—In ejectment, plffs. claimed title under a sheriff's deed, purporting to be a conveyance of the land under a ven. ex.; the deed, however, only recited in an informal manner the ven. ex., not referring to the *fi. fa.*, goods or lands, & no evidence was given to prove the lapse of the year required by law before such sale could take place:—*Held*: under the deed as proved the ct. could not presume the sale to be regular, & a verdict for plff. was ordered to be set aside.—*ROE v. McNEILL* (1863), 13 C. P. 189.—*CAN.*

Sect. 3.—Rules of construction: Sub-sects. 15, 16, 17 & 18, A.]

that the deed had received statutory sanction & was in all respects valid.—*HARPER v. HEDGES*, [1928] 2 K. B. 314; 92 L. J. K. B. 568; 129 L. T. 248; 87 J. P. 125; 39 T. L. R. 387; on appeal, 40 T. L. R. 156, C. A.

See, further, ECCLESIASTICAL LAW.

See, also, **BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS**, Vol. VI., pp. 50, 51, 508, Nos. 375-383, 3240.

Presumption as to due execution of wills.]—See WILLS.

SUB-SECT. 16.—CERTUM EST QUOD CERTUM REDDI POTEST.

977. Application of rule.]—MORGAN v. JOHNSON (1597), Cro. Eliz. 561; 78 E. R. 806.

978. —.]—JOHNSON v. MORGAN (1600), Cro. Eliz. 758; 78 E. R. 989.

979. — Sale of goods—"Certain quantity."]—The word "certain" must in a variety of cases refer to an indefinite quantity at the time of the contract made, & must mean a quantity which is to be ascertained according to the maxim *Id certum est quod certum reddi potest* (LORD ELLENBOROUGH, C.J.).—*WILDMAN v. GLOSSOP* (1817), 1 B. & Ald. 9; 106 E. R. 4.

980. — Lease—Commencement & duration of term.]—There must be a certainty in the lease as to the commencement & duration of the term; but that certainty need not be ascertained at the time; for if in the fluxion of time a day will arrive which will make it certain, that is enough. *Id certum est quod certum reddi potest* (LORD KENYON, C.J.).—*GOODRIGHT d. HALL v. RICHARDSON* (1789), 3 Term Rep. 462; 100 E. R. 678.

Annotations:—*Held*, *Dann v. Spurrier* (1803), 3 Bos. & P. 399; *Chapman v. Towner* (1840), 6 M. & W. 100.

981. — No inference drawn from executory agreement.]—(1) An executory agreement for a lease does not satisfy Stat. Frauds,

unless it can be collected from it on what day the term is to begin, & there is no inference that the term is to commence from the date of the agreement in the absence of language pointing to that conclusion.

(2) Where an agreement is clear, the ct. must act upon its own view of the construction without regard to the view entertained by the parties.—*MARSHALL v. BERRIDGE* (1881), 19 Ch. D. 233; 51 L. J. Ch. 329; 45 L. T. 599; 46 J. P. 279; 30 W. R. 93, C. A.

Annotations:—*As to* (1) *Fold. Humphrey v. Conybeare* (1899), 80 L. T. 40. *Consd. Edwards v. Jones* (1921), 124 L. T. 740. *Held. Rock Portland Cement Co. v. Wilson* (1852), 52 L. J. Ch. 214; *Wood v. Aylward* (1887), 57 L. T. 54; *Furness v. Bond* (1888), 4 T. L. R. 457; *Re Lander & Bagley's Contract*, (1892) 3 Ch. 41; *Oxford Corp. & Citizens v. Crow* (1893), 69 L. T. 228; *Curtis v. B. U. R. T. Co.* (1912), 28 T. L. R. 353.

982. —.]—In order to satisfy the requirements of Statute of Frauds, s. 4, the written memorandum of a contract for the grant of a lease must either expressly or by reasonable inference state the time at which the term is to commence.—*HUMPHREY v. CONYBEARE* (1899), 80 L. T. 40; 15 T. L. R. 162, C. A.

983. — Sale of realty—Identification—By reference to other deeds.]—An agreement in writing for the sale of a house did not by description ascertain the particular house, but it referred to the deeds as being in the possession of a person named in the agreement:—*Held*: the agreement was sufficiently certain, if it could be ascertained, by an inquiry before the master, that the deeds in the possession of the person named referred to the house in question.

It is true that the agreement must be certain in its terms, but *Id certum est quod certum reddi potest* (LEACH, M.R.).—*OWEN v. THOMAS* (1834), 3 My. & K. 353; 3 L. J. Ch. 205; 40 E. R. 134.

Annotations:—*Held. Carpenter v. Churchill* (1854), 2 W. R. 364; *McMurray v. Spicer* (1868), L. R. 5 Eq. 527; *Smith v. Webster* (1876), 3 Ch. D. 49; *Naylor v. Goodall* (1877), 47 L. J. Ch. 53; *Shardlow v. Cotterill* (1881), 44 L. T. 549; *Sheers v. Thimbleby* (1897), 76 L. T. 709.

984. —.]—A house & premises were put up for sale by auction under conditions of

PART III. SECT. 3, SUB-SECT. 16.

n. Application of rule.—Lease—Restriction of general terms.]—A provision in an agreement for a lease that the lease shall contain all usual & necessary covenants & conditions does not render the agreement uncertain in its terms. Such a provision has now a definite meaning. The fact that the agreement, in providing for the purchase of parts of the land from time to time by the lessee, left the proportion of the purchase-money for each part to the mutual agreement of the parties did not make the agreement too uncertain to be enforced, especially as a basis upon which the proportion was to be ascertained was provided by the agreement.—*FRANCE v. STEVENS* (1904), 24 N. Z. L. R. 357. —N.Z.

983 i. — Sale of realty—Identification.]—Where a contract was for the sale of lot 16, " & as much of lot 17 as should require to be flooded for the purpose of working a mill on lot 16 ":—*Held*: as the quantity of land in lot 17 could be ascertained by a jury or the master, there was not such an uncertainty as to make the contract void.—*HOOK v. MCQUEEN* (1861), 3 Gr. 490. —CAN.

983 ii. —.]—Where the description of the land was too vague to show on the face of the instrument where the land must lie:—*Held*: sufficient if it could be ascertained on the ground, or by a jury.—*CUMMIS v. NORTON* (1861), 3 U. C. R. 681. —CAN.

983 iii. —.]—Defts. claimed under two deeds from the sheriff, made upon different sales, one in 1841, the other in 1851, under a sale in 1846. One described the land as thirty acres of the lot, " to be measured according to the statute in that case made & provided," the other as " twenty-five acres " of the lot, giving no further description:—*Held*: the first deed was sufficient, the second not.—*FRASER v. MATTICE* (1860), 19 U. C. R. 150. —CAN.

983 iv. — By reference to other deeds.]—In a deed under which defts. claimed in ejectment the description was " the east side of the southerly part of lot 24, containing 90 acres ":—*Held*: this was a good description of the east 90 acres of the southerly part of the lot, & it sufficiently appeared what the southerly part was, for the patent from the Crown was for the rear or southerly part of lots 23 & 24 described by metes & bounds, & the deed of defts.'s grantor referred to the patent.—*MCCRACKEN v. WARNOCK* (1878), 43 U. C. R. 214. —CAN.

983 v. —.]—A., to whom the Government had made a grant of certain villages, executed an instrument in favour of his brother charging the payment of an annual allowance to him & his heirs for ever on the " granted villages." The instrument did not name the villages which had been granted to A., but there was no doubt as to the particular villages which had been granted to A. by the Government:—*Held*: the instrument was valid.

did not specify the villages which had been granted to A. did not constitute such an ambiguity in such instrument as to render the charge created thereby invalid.—*KANAHIA LAL v. MUHAMMAD HUBAIN KHAN* (1882), 1 L. R. 5 All. 11. —IND.

983 vi. — "Grantor" identified with named party.]—In a deed intended to convey land, & signed & sealed by the owner of the land & his wife, the parties were named as of the first, second & third parts, the words " hereinafter called the grantor " & " hereinafter called the grantee " not being added, while the grant was in the words " the grantor doth grant unto the grantee, " & " the party of the third part, wife of the party of the second part " barred her dower—her husband being named as party of the first part:—*Held*: notwithstanding the defect in form, the deed passed the title to the land.—*Re GALBRAITH & KERRIGAN* (1917), 39 O. L. R. 519; 12 O. W. N. 192. —CAN.

983 vii. — Identification of parties.]—It is not absolutely necessary to set forth the parties to a deed by their names; it is enough to describe them so that they can be accurately ascertained. Thus D. L. & Co. held a sufficient designation of all the partners in the firm.—*LATOUCHE v. WHALBY* (1833), Hayes & Jo. 43. —EN.

a. — Change on realty—Identification.]—The written contract signed by the parties to a deed, & the deed itself, are both necessary to constitute a deed.

sale which did not contain any description of what was sold, but were so expressed that it could be inferred from them that the subject of sale was real estate. *A. Shardlow* became the purchaser. After the sale, the auctioneer signed & gave to him the following memorandum at the foot of the conditions: "The property duly sold to A. Shardlow, Butcher, Pinxton, & deposit paid at close of sale," & at the same time signed & gave to him the following receipt: "Pinxton, March 29, 1880. Received of A. Shardlow, the sum of £21 as deposit on property purchased at £420 at Sun Inn, Pinxton, on the above date. G. Cotterell, owner":—*Held*: the receipt, memorandum, & conditions contained a sufficiently definite description of the property sold to enable the ct. to receive parol evidence of what the property consisted.

The general rule is, *Id certum est quod certum reddi potest*, & I am of opinion that this maxim applies here (*LUSH, L.J.*).—*SHARDLOW v. COTTERELL* (1881), 20 Ch. D. 90; 51 L. J. Ch. 353; 45 L. T. 572; 30 W. R. 143, C. A.

Annotations:—*Consd. Plant v. Bourne*, [1897] 2 Ch. 281; *Auerbach v. Nelson*, [1919] 2 Ch. 383. *Reid. Studds v. Watson* (1884), 28 Ch. D. 305; *Savory v. World of Golf*, [1914] 2 Ch. 566.

985. ——— By parol evidence.]—By contract in writing, A. agreed to sell & B. to buy 24 acres of land, freehold, at T., in the parish of D., possession to be had on Mar. 25 next, the vendor guaranteeing possession accordingly. In an action by A. against B. for specific performance:—*Held*: parol evidence was admissible to show what was the subject-matter of the contract.—*PLANT v. BOURNE*, [1897] 2 Ch. 281; 66 L. J. Ch. 643; 76 L. T. 820; 46 W. R. 59; 13 T. L. R. 470; 41 Sol. Jo. 606, C. A.

Annotations:—*Consd. Auerbach v. Nelson*, [1919] 2 Ch. 383. *Reid. Re African Gold Concessions & Development Co., Markham & Darter's Case*, [1899] 1 Ch. 414; *Carr v. Lynch*, [1900] 1 Ch. 613; *Savory v. World of Golf*, [1914] 2 Ch. 566; *Stokes v. Whicher*, [1920] 1 Ch. 411.

986. ———.]—*PICKLES v. SUTCLIFFE*, [1902] W. N. 200.

987. ——— Arbitrator's award—Costs of.]—All matters in difference between two persons were referred by them to arbn. The submission recited that certain actions were depending, in which they

& others were jointly made parties. The arbitrators awarded that the costs of those actions should be paid by them in certain proportions, & that the sums already paid by either of them should be considered as part payment by them:—*Held*: the award was sufficiently certain & final.—*CARGEY v. AITCHESON* (1823), 2 B. & C. 170; 3 Dow. & Ry. K. B. 433; 1 L. J. O. S. K. B. 252; 107 E. R. 346; *affd. sub nom. AITCHESON v. CARGEY* (1824), 2 Bing. 199, Ex. Ch.

Annotations:—*Reid. Kendrick v. Davies* (1837), 5 Dowl. 893; *Plummer v. Lee* (1837), 5 Dowl. 755; *Stone v. Phillips* (1837), 4 Bing. N. C. 87; *Re Marshall & Dresner* (1843), 3 Q. B. 878; *Perry v. Mitchell* (1844), 2 Dow. & L. 462; *Mays v. Cannell* (1854), 15 C. B. 107; *Harrison v. Lay* (1863), 13 C. B. N. S. 528.

—.]—*See further*, *ARBITRATION*, Vol. II., pp. 484, 489, 493, 498, 569, Nos. 1262, 1314, 1351, 1388, 2001.

Identification of parties & subject-matter—Admission of extrinsic evidence.]—*See Sect. 4, sub-sect. 6, post.*

SUB-SECT. 17.—CONTEMPORANEA EXPOSITIO EST OPTIMA ET FORTISSIMA IN LEGE.

See Sect. 4, sub-sect. 8, post.

SUB-SECT. 18.—UT RES MAGIS VALEAT QUAM PEREAT.

A. In General.

988. *General rule.*]—(1) The general rules of law in respect to the exposition of deeds are that *benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat, et verba intentioni, et non e contra, debent inservire* (*WILLES, C.J.*)

(2) That there are inservire words to make a covenant I shall show more particularly by & by; but if there were no other word but the word "grant," that would be sufficient according to all the cases (*WILLES, C.J.*).

(3) It is not necessary that a party taking under a deed should be a party; remainders are most commonly limited to persons who are not parties (*WILLES, C.J.*).—*ROE d. WILKINSON v. TRANMARR*

upon the "N.E. ¼ Section 2, Township 4, Range 14," without stating whether the range meant was 14 west or east of the principal meridian, both of which ranges are in this province, but the evidence showed that it was range 14 west that was intended:—*Held*: (1) the expression "N.E. ¼" sufficiently designated the north-east quarter as such contractions are in daily use; (2) the description was sufficient to warrant the order for a charge on the N.E. ¼ 2-4-14 W.; for, if judicial notice should be taken of the surveys that had been already made in Manitoba & of those which had not been made, then, as township 4 in range 14 east had not been surveyed into sections, township 4 in range 14 west must have been the one intended by the contract, & there was no ambiguity requiring evidence to explain.—*ABELL v. McLAREN* (1901), 21 C. L. T. 453; 13 Man. L. R. 463.—*CAN.*

p. General description qualified.]—Where by a document "the properties," of one of the parties are made liable & it appears on the construction of the document that the word "properties" does not mean the properties of such party generally but certain specific properties, a charge will be created on such specific properties alone. A distinction must be drawn between wideness & indefiniteness of language.—*MANICKAM PILLAI*

v. AUDINARAYANA PILLAI (1910), 1 L. R. 34 Mad. 47.—*IND.*

q. General description charging all lands.]—A covenant that, notwithstanding any former grant of £1,500 charged upon the whole estate of covenantor, the lands of B. acre, & W. acre, shall stand exonerated therefrom, & that all his other lands & estates shall stand charged therewith, creates a charge on the lands of which he was then seized or possessed, though not specified by name.—*FALKNER v. O'BRIEN* (1812), 2 Ball & B. 214.—*IR.*

r. License to occupy land—Identification.]—A license to occupy unsold crown lands as a pastoral run is not void for uncertainty because one of the boundaries remains "to be fixed."—*NEW ZEALAND & AUSTRALIAN LAND CO. v. BOYES*, Mac. 693.—*N.Z.*

PART III. SECT. 3, SUB-SECT. 18.—A.

988 *l. General rule.*]—In construing written documents, if different parts are inconsistent with each other, effect should be given to that part which is calculated to carry into effect the real intention of the parties, & that part which would defeat it should be rejected.—*Ex p. CAMERON* (1890), 11 N. S. W. L. R. 422; 7 N. S. W. N. 54.—*AUS.*

988 *ii.* ———.]—The intention of the parties to a deed is paramount & must govern regardless of consequences.

Res magis valeat quam pereat is only a rule to aid in arriving at the intention, & does not authorise the ct. to override it.—*BARTHEL v. SCOTTEN* (1895), 24 S. C. R. 367.—*CAN.*

988 *iii.* ———.]—If a clause in a deed be distinct & express, however absurd it may be, it must prevail, & it is not its consequences which will justify the ct. in swerving from its clear obvious meaning; but if a rational exposition can be given consistent with a fair interpretation of the language, it would then relinquish its most valuable powers if it did not abandon a construction which, although more consonant with the literal interpretation, led to a capricious & irrational result.—*LAIRD v. TOBIN* (1830), 1 Mol. 543.—*IR.*

988 *iv.* ———.]—Where a clause in a written contract is capable of two interpretations, one of which will make such clause valueless, while the other will render it effectual, the latter construction is to be adopted.—*BRICKMAN'S TRUSTEE v. TRANSVAAL WAREHOUSE CO., LTD.*, [1903] T. H. 440.—*S. AF.*

988 *v.* ———.]—When a document is fairly open to two constructions, the argument of inconvenience is a strong one.—*DEUTSCHE EVANGELISCHE KIRCHE ZU PRETORIA v. HOEPNER*, [1911] T. P. D. 218.—*S. AF.*

s. Based on construction of entire deed—Rejection of surplusage.]—

Sect. 3.—Rules of construction: Sub-sect. 18, A.]

(1757), Willes, 682; 2 Wils. 75; 2 Keny. 239; 125 E. R. 1383.

Annotations:—*As to* (1) *Consd.* Evans v. Robins (1863), 33 L. J. Ex. 68. *Reid.* Roe d. Berkeley v. York Archbp. (1805), 6 East, 86; Solly v. Forbes (1830), 2 Brod. & Bing. 38; Squire v. Ford (1851), 30 L. J. Ch. 308; Davis v. Nichols (1868), 17 W. R. 281; Ellis v. M'Henry, Ellis v. M'Henry (1871), 40 L. J. C. P. 109; Minchin v. Minchin (1871), 19 W. R. 993. *As to* (2) *Consd.* Monypenny v. Monypenny (1850), 3 De G. & J. 572. *Generally, Consd.* Doe d. Lewis v. Davies (1837), 2 M. & W. 503. *Reid.* Re Johnston Foreign Patents Co., Re Johnston Die Press Co., Re Johnston Engraving Co., J. P. Trust v. Johnston Foreign Patents Co., Johnston Die Press Co., Johnston Engraving Co., [1904] 2 Ch. 234. *Mentd.* Doe d. Dyke v. Whittingham (1811), 4 Taunt. 20; Doe d. Starling v. Prince (1851), 20 L. J. C. P. 923; Patch v. Shore (1869), 11 W. R. 142; Re Financial Corp'n., Ex p. Holmes & Pritchard, etc. (1867), 36 L. J. Ch. 695; Nichols v. Davis (1868), L. R. 4 C. P. 89; Gunnestad v. Price, Fullmore v. Wait (1875), L. R. 10 Exch. 65; Savill v. Bethell, [1902] 2 Ch. 523.

989. —.]—THROCKMERTON v. TRACY, No. 634, ante.

990. —.]—ATTOR v. HEMMINGS (1614), 2 Bulst. 281; 80 E. R. 1123.

Annotations:—*Mentd.* Evans v. Robins (1863), 33 L. J. Ex. 68; Delacherols v. Delacherols (1864), 11 H. L. Cas. 62.

991. —.]—CROSSING v. SCUDAMORE (1674), 2 Lev. 9; 1 Vent. 137; 83 E. R. 428; *sub nom.* SCUDAMORE v. CROSSING, 1 Mod. Rep. 175.

Annotations:—*Consd.* Doe d. Milburn v. Salkeld (1755), Willes, 673; Roe d. Wilkinson v. Tranmarr (1757), Willes, 682. *Reid.* Samon v. Jones (1690), 2 Vent. 318; Morley v. Jones (1698), Show. Parl. Cas. 140; Solly v. Forbes (1820), 2 Brod. & Bing. 38; Squire v. Ford (1851), 9 Hare, 47; Re Johnston Foreign Patents Co., Re Johnston Die Press Co., Re Johnston Engraving Co., J. P. Trust v. Johnston Foreign Patents Co., Johnston Die Press Co., Johnston Engraving Co., [1904] 2 Ch. 234. *Mentd.* Shaw v. Weigh (1725), Fortes. Rep. 58.

992. —.]—In Chancery no conveyance is ever to be set aside, where it can be supported by a reasonable construction (LORD NOTTINGHAM, C.).—HOWARD v. NORFOLK (DUKE) (1682), 3 Cas. in Ch. 40; 2 Rep. Ch. 229; 2 Show. 235; 22 E. R. 955, L. C.

Annotations:—*Reid.* Kelley v. Fowler (1768), Wilm. 298; Thellusson v. Woodford (1805), 11 Ves. 112. *Mentd.* Heywood v. Maunder (1687), 2 Freem. Ch. 98; Lamb v. Archer (1692), Skin. 340; Scattergood v. Edge (1699), 12 Mod. Rep. 278; Gore v. Gore (1721), 10 Mod. Rep. 501; Mansell v. Mansell (1732), Cas. temp. Talb. 252; Stanley v. Leigh (1732), 2 P. Wms. 686; Gower v. Grosvenor & Pigott (1739), 9 Mod. Rep. 249; Gower v. Grosvenor (1740), 5 Madd. 337; Beauclerk v. Dormer (1742), 2 Atk. 308; Bagehaw v. Spencer (1748), 3 Atk. 570; Garth v. Cotton (1753), 3 Atk. 751; Willoughby v. Willoughby (1755), Amb. 282; Jones v. Morgan (1753), 1 Bro. C. C. 206; Jee v. Audley (1787), 1 Cox, Eq. Cas. 324; Long v. Blackall (1797), 7 Term Rep. 100; Cadell v. Palmer (1833), 7 Bl. N. S. 302; Dunganon v. Smith (1846), 12 Cl. & Fin. 546; Cole v. Sewell (1848), 2 H. L. Cas. 186; Egerton v. Brownlow (1853), 4 H. L. Cas. 1; Greenwood v. Verdon (1854), 3 Eq. Rep. 181; Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt, [1893] 1 Ch. 630; Wigram v. Buckley, [1894] 3 Ch. 483; Hancock v. Watson (1901), 85 L. T. 729; Re Ashforth, Sibley v. Ashforth, [1905] 1 Ch. 535.

993. —.]—HATTER v. ASHE (1696), 3 Lev. 438; 1 Ld. Raym. 84; 83 E. R. 770; *sub nom.* HATHS v. ASH, 2 Salk. 413.

Annotations:—*Reid.* Pugh v. Leeds (1777), 2 Cowp. 714; Ackland v. Lutley (1839), 9 Ad. & El. 879.

A policy of marine insurance provided that L. & Co., on account of owners, in case of loss to be paid to L. & Co., do cause to be insured, lost or not lost, the sum of \$2,000, on advances, upon the body, etc., of The *Lizzie Perry*. The rest of the policy was applicable to insurance on the ship only. L. & Co. were managing owners who had expended considerable money in repairs on the vessel.—*Held:* the instrument must, if possible, be construed as valid & effectual, & to do so the words "on advances" might be treated as surplusage or as merely a reference to the inducement which led the owners to insure the ship.—

BRITISH AMERICA ASSURANCE CO. v. LAW & CO. (1892), 21 S. C. R. 325.—CAN.

t. — *General words construed to make intention of parties effective.*—It is established law that a power of attorney must be construed strictly. When an agent has a general power of attorney to act in some business or series of transactions, he may be assumed to have all usual powers, including the power to transfer decrees.—KRISHNA-BHOOPATHI DEO v. VIZIANAGARUM (RAJA) (1914), 1 L. R. 38 Mad. 832.—IND.

a. — — —.]—The assignor of a

994. —.]—Where words are capable of different expositions, that shall be taken which supports the declaration or agreement, & not that which defeats it.—WYAT v. ALAND (1703), 1 Salk. 324; Holt, K. B. 210; 91 E. R. 287.

Annotations:—*Consd.* R. v. Stevens (1804), 5 East, 244. *Reid.* Burgess v. Bracher (1724), 2 Ld. Raym. 1366; Bret v. Hillars (1728), 1 Barn. K. B. 127.

995. —.]—Where words are capable of a twofold construction, it is just & reasonable that such construction should be received as tends to make it good (LORD TALBOT, C.).—ATKINSON v. HUTCHINSON (1734), 3 P. Wms. 258; 24 E. R. 1053.

Annotations:—*Consd.* Beauclerk v. Dormer (1742), 2 Atk. 308. *Reid.* Exel v. Wallace (1751), 2 Ves. Sen. 117; Kelley v. Fowler (1768), Wilm. 298; O'Mahoney v. Burdett (1874), L. R. 7 H. L. 388. *Mentd.* Sabbarton v. Sabbarton (1734), Cas. temp. Talb. 55; Sheppard v. Lessingham (1751), Amb. 122; Bigge v. Bensley (1783), 1 Bro. C. C. 188; Chaudless v. Price (1796), 3 Ves. 99; Lyon v. Mitchell (1816), 1 Madd. 467.

996. —.]—PARKHURST v. SMITH, No. 650, ante.

997. —.]—GOODTITLE d. EDWARDS v. BAILEY, No. 638, ante.

998. —.]—If words are capable of a twofold construction, the rule is to adopt such as tends to make it good, even in the case of a deed.—THELLUSSON v. WOODFORD (1798), 4 Ves. 227; 31 E. R. 117, L. JJ.; *on appeal* (1805), 11 Ves. 112, H. L.

Annotations:—*Reid.* Southampton v. Hertford (1813), 2 Ves. & B. 54; Green v. Green (1816), 2 Mer. 86; Winter v. Perratt (1843), 9 Cl. & Fin. 606; Eastern Counties, etc. Cos. v. Marriage (1860), 9 H. L. Cas. 32. *Mentd.* Godfrey v. Davis (1801), 6 Ves. 43; St. Paul's Warden, etc. v. Morris (1804), 9 Ves. 316; Underhill v. Horwood (1804), 10 Ves. 209; Beard v. Westcott (1813), 5 Taunt. 393; Blackburn v. Stables (1814), 2 Ves. & B. 367; Leake v. Robinson (1817), 2 Mer. 363; Churchman v. Ireland (1831), 1 Russ. & M. 250; Cadell v. Palmer (1833), 10 Bing. 140; Doe d. Winter v. Perratt, Doe d. Viney v. Perratt, Doe d. Slade v. Perratt (1843), 7 Scott, N. R. 1; Cooke v. Turner (1844), 14 Sim. 218; Nightingale v. Goulbourn (1848), 2 Ph. 594; Plowden v. Hyde (1852), 2 Sim. N. S. 171; Egerton v. Brownlow (1853), 8 State Tr. N. S. 193; Schroder v. Schroder (1854), 24 L. T. O. S. 245; Langdale v. Briggs (1856), 8 De G. M. & G. 391; Turvin v. Newcome (1856), 3 K. & J. 16; Thellusson v. Rendlesham (1859), 7 H. L. Cas. 429; Hance v. Truwhitt (1862), 2 John. & H. 216; Income Tax Special Purposes Comr. v. Pemsel, [1891] A. C. 531; Re Burrows, Cleghorn v. Burrows, [1895] 2 Ch. 497; Jacob v. Jacob (1898), 78 L. T. 451; Re Wilmers Trusts, Moore v. Wingfield, [1903] 1 Ch. 874; Villar v. Gilbey, [1907] A. C. 139; Re Stamford & Warrington, Payne v. Grey, [1911] 1 Ch. 255.

999. —.]—Words construed so as to have some meaning, rather than rejected.—STRATFORD v. BOSWORTH (1813), 2 Ves. & B. 341; 35 E. R. 349.

Annotations:—*Reid.* Ogilvie v. Foljambe (1817), 3 Mer. 53; Ridgway v. Wharton (1857), 6 H. L. Cas. 238.

1000. —.]—Based on construction of entire deed—*Intent ambiguous.*—SOLLY v. FORBES, No. 723, ante.

1001. —.]—Grant of toll—*Whether reasonable.*—We think that where a grant of toll is found in a charter it ought to have some meaning & the charter some operation & that it can receive

judgment who, by the deed of assignment, covenants not to do anything to vitiate or defeat the assigned judgment, is not entitled to enforce prior securities vested in him, so as to exhaust the property subject to the assigned judgment.—WILLIAMS v. WILLIAMS (1861), 12 I. Ch. R. 507.—IR.

b. *Any possible meaning accepted—Rather than deed should be inoperative.*—Land described in a deed as a suburban section in the town of F. is not a fatal misdescription of the land, & means a section in the district of F.—NEAL v. ADAMS (1885), 4 N. Z. L. R. 177.—N.Z.

operation only by being construed to mean a reasonable toll (ALEXANDER, C.B.).—STAMFORD CORPN. v. PAWLETT (1830), 1 Cr. & J. 57.

Annotations.—*Reid*, Brecon Markets Co. v. Neath & Brecon Ry. (1872), L. R. 7 C. P. 555; Newcastle v. Workop U. C., [1902] 2 Ch. 145; A.-G. v. Horner (1912), 107 L. T. 547. *Mentd.* Wright v. Brulster (1832), 2 L. J. N. S. K. B. 6.

1002. — **Whether omitted words can be supplied.**—There are two modes of reading an instrument: where the one destroys & the other preserves, it is the rule of law, & of equity that you should rather lean towards that construction which preserves, than towards that which destroys. *Ut res magis valeat quam pereat* is a rule of common law & common sense; & much the same principle ought surely to be adopted where the question is, not between two rival constructions of the same words appearing in the same instrument, but where the question is on so reading an instrument as that you may either take it verbally & literally, as it is, or with a somewhat larger & more liberal construction, & by so supplying words as to read it in the way in which you have every reason to believe that the maker of it intended it should stand; & thus again, according to the rule *ut res magis valeat quam pereat*, to supply, if you can safely & easily do it, that which he *per incuriam* omitted, & that which instead of destroying preserves the instrument; which, instead of putting an end to the instrument & defeating the intention of the maker of it, tends rather to keep alive & continue & give effect to that intention (LORD BROUGHAM, C.).—LANGSTON v. LANGSTON (1834), 8 Bli. N. S. 167; 2 Cl. & Fin. 194; 5 E. R. 908, H. L.

Annotations.—*Consd.* Surtees v. Hopkinson (1867), L. R. 4 Eq. 98; Grant v. Grant (1870), L. R. 5 C. P. 727; Locke v. Dunlop (1888), 39 Ch. D. 387; *Re* Haygarth, Wickham v. Haygarth, [1913] 2 Ch. 9. *Reid*, Monypenny v. Dering (1850), 7 Hare, 568; Hart v. Tulk, Tulk v. Hart (1852), 22 L. J. Ch. 649; Abbott v. Middleton, Ricketts v. Carpenter (1858), 7 H. L. Cas. 68; Ricketts v. Carpenter, Abbott v. Middleton (1859), 33 L. T. O. S. 66; Tuite v. Birmingham (1875), L. R. 7 H. L. 634. *Mentd.* Grey v. Pearson (1857), 6 H. L. Cas. 61; *Re* Thomson's Trusts (1870), L. R. 11 Eq. 146; Tavernor v. Grindley (1875), 32 L. T. 424.

1003. — **Language ambiguous — Intention clear.**—Where the language of an instrument is ambiguous, but the intentions of the parties are plain, it will be so construed *ut res magis valeat quam pereat*.—POLLETT v. FORREST (1845), 1 New Pract. Cas. 105; 4 L. T. O. S. 397; 9 J. P. 408; *subsequent proceedings* (1847), 11 Q. B. 962.

Annotations.—*Reid*, Phillips v. Jones (1850), 15 Q. B. 859; Hooper v. Land (1857), 6 H. L. Cas. 443. *Mentd.* Freeman v. Edwards (1848), 2 Exch. 732; Grey v. Friar (1850), 14 Jur. 1105; Elliott v. Bishop (1855), 11 Exch. 321; Parr v. Jewell (1855), 16 C. B. 684; Robins v. Evans (1863), 2 H. & C. 410; Yeoman v. Ellison (1867), L. R. 2 C. P. 681.

1004. — **Intention not clear.**—FORD v. BEECH, No. 665, *ante*.

1005. — **—**—S., & another, the deacons of a Baptist congregation, bound themselves to J., then resigning the office of minister of the church, to repay him £700., which he had advanced for the building of a chapel. S. afterwards resigned; & the new minister gave him a written undertaking as follows:—"In consideration of your having resigned the office of deacon & your connection with the Baptist Church, I hereby agree to hold myself responsible to you for the payment of the sum due to J." In an action by S. on this promise:—*Held*: the written instrument given by the minister showed a valid contract; for the words might import either a past or a concurrent consideration on S.'s part, & that construction was to be preferred which made the instrument good.—STEELE v. HOE (1849), 14 Q. B. 431; 19 J.—VOL. XVII.

L. J. Q. B. 89; 14 L. T. O. S. 827; 14 Jur. 147; 117 E. R. 168.

Annotations.—*Reid*, Colbourn v. Dawson (1851), 10 C. B. 765. *Mentd.* *Re* McHenry, McDermott v. Boyd, [1894] 2 Ch. 428.

1006. — **—**—STRATTON v. PETTIT, No. 670, *ante*.

1007. — **—**—Where by acting on one interpretation of the words used we are driven to the conclusion, that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably & properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh & unreasonable (LORD CRANWORTH).—ABBOTT v. MIDDLETON, RICKETTS v. CARPENTER, (1858), 7 H. L. Cas. 68; 28 L. J. Ch. 110; 33 L. T. O. S. 66; 5 Jur. N. S. 717; 11 E. R. 28; H. L.; *affg.* (1855), 21 Beav. 143.

Annotations.—*Consd.* Gordon v. Gordon (1871), L. R. 5 H. L. 254; Bathurst v. Errington (1877), 2 App. Cas. 698; Taylor v. St. Helen's Corp'n. (1877), 6 Ch. D. 294; Rogers v. Maddock (1892), 62 L. J. Ch. 219. *Reid*, Slingsby v. Grainger (1859), 7 H. L. Cas. 273; Wing v. Angrave (1860), 8 H. L. Cas. 183; Coates v. Hart (1863), 32 Beav. 349; Eastwood v. Lockwood (1867), L. R. 3 Eq. 487; Leach v. Jay (1877), 6 Ch. D. 496; *Re* Hudson, Hudson v. Hudson (1882), 20 Ch. D. 406; Rhodes v. Rhodes (1882), 7 App. Cas. 192; *Re* Northen, Salt v. Pym (1884), 54 L. J. Ch. 273; Locke v. Dunlop (1888), 39 Ch. D. 387; Mills v. Dunham, [1891] 1 Ch. 576; *Re* Whitmore, Walters v. Harrison, [1902] 2 Ch. 66; *Re* Raynor, Raynor v. Raynor, [1904] 1 Ch. 176; Cave v. Horsell, [1913] 3 K. B. 533; *Re* Layard, Layard v. Bosborough (1916), 85 L. J. Ch. 505; Whitmore v. King (1918), 87 L. J. Ch. 647. *Mentd.* Anderson v. Abbott (1857), 3 Jur. N. S. 833; Hope v. Potter (1857), 3 K. & J. 206; Neighbour v. Thurlow (1860), 28 Beav. 33; Stevens v. Pyle (1860), 28 Beav. 388; Stanley v. Stanley (1862), 2 John. & H. 491; Nunn v. Hancock (1868), 16 W. R. 818; Keogh v. Keogh (1874), 22 W. R. 508; Hervey-Bathurst v. Stanley, Craven v. Stanley (1876), 4 Ch. D. 251; Evans v. Ball (1882), 47 L. T. 165; *Re* Bowman, *Re* Lay, Whythead v. Boulton (1889), 41 Ch. D. 625; Foxwell v. Van Grutten (1900), 82 L. T. 272; Phillips v. Ball (1906), 54 W. R. 517; *Re* Mitchell, Mitchell v. Mitchell (1913), 108 L. T. 180.

1008. — **Effect of avoiding statute.**—MOORE v. RAWLINS, No. 831, *ante*.

1009. — **—**—CROPPER v. SMITH (1884), Griffin's Patent Cases 60; 1 R. P. C. 81, C. A.; *subsequent proceedings*, 26 Ch. D. 700, C. A.; *sub nom.* SMITH v. CROPPER (1885), 10 App. Cas. 249, H. L.

Annotations.—*Reid*, Van Berkel v. Simpson (1906), 23 R. P. C. 237. *Mentd.* Shoe Machinery Co. v. Cutlan, [1896] 1 Ch. 108; *Re* Oughton & Law Car & General Insee. Corp'n., [1910] 2 K. B. 738.

1010. — **—**—It is a settled canon of construction that where a clause is ambiguous a construction which will make it valid is to be preferred to one which will make it void (KAY, L.J.).—MILLS v. DUNHAM, [1891] 1 Ch. 576; 60 L. J. Ch. 362; 64 L. T. 712; 39 W. R. 289; 7 T. L. R. 238, C. A.

Annotations.—*Consd.* Whitmore v. King (1918), 87 L. J. Ch. 646. *Reid*, Moenich v. Feneestre (1892), 61 L. J. Ch. 737; Rogers v. Maddocks, [1892] 3 Ch. 346; Haynes v. Doman, [1899] 2 Ch. 13; Millers v. Steedman (1915), 84 L. J. K. B. 2057. *Mentd.* Maxim Nordenfolt Guns & Ammunition Co. v. Nordenfolt, [1893] 1 Ch. 630; Hood & Moore's Stores v. Jones (1899), 81 L. T. 169; Morris v. Ryle (1910), 103 L. T. 545; North-Western Salt Co. v. Electrolytic Alkali Co. (1912), 107 L. T. 439; Eastes v. Russ, [1914] 1 Ch. 408; Attwood v. Lamont, [1920] 3 K. B. 571.

1011. — **Onus of proof of construction.**—When the terms of a contract are too ambiguous to be interpreted by the ct., judgment will be given against the party whose duty it was to make it clear (MARTIN, B.).—HEUGH v. ESCOMBE (1861), 4 L. T. 517; 1 Mar. L. C. 79.

1012. — **—**—When a contract is so obscurely

Sect. 3.—Rules of construction: Sub-sect. 18, A. & B.; sub-sect. 19, A. & B. (a).]

worded as to be capable of two constructions, the onus lies on the party who seeks to enforce his own construction of it, to prove to the ct. that his construction is correct.—**MEESON v. FINNIGAN** (1863), 1 New Rep. 448.

1013. Right of interpretation—Party not responsible for ambiguity.]—I think, & have always thought, that when a vendor sells property under stipulations which are against common right, & place the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself (**BRUCE, V.-C.**).—**SEATON v. MAPP** (1846), 2 Coll. 556; 63 E. R. 859.

Annotations:—*Apld.* **Rhodes v. Ibbetson** (1853), 4 De G. M. & G. 787. *Consd.* **Brumfit v. Morton** (1857), 30 L. T. O. S. 98. *Mentd.* **Drysdale v. Mace** (1854), 5 De G. M. & G. 103; **Sidney v. Clarkson** (1865), 14 W. R. 157; **Day v. Luhke** (1868), L. R. 5 Eq. 336.

1014. ———.]—**RHODES v. IBBETSON** (1853), 4 De G. M. & G. 787; 2 Eq. Rep. 76; 23 L. J. Ch. 459; 43 E. R. 715, L. J. J.

Annotations:—*Mentd.* **Saunders v. Druce** (1855), 3 Drew. 139; **Lawrie v. Lees** (1881), 7 App. Cas. 19.

1015. ———.]—Where a person makes a communication to another in an ambiguous terms, he cannot afterwards complain if the recipient of the communication *bond fide* puts upon it a meaning not intended by the sender.—**MILES v. HASLEHURST & Co.** (1906), 23 T. L. R. 142; 12 Com. Cas. 88

Latent ambiguity—Admissibility of evidence.]—*See* Sect. 4, sub-sect. 4, *post*.

Patent ambiguity—Admissibility of evidence.]—*See* Sect. 4, sub-sect. 4, *post*.

Instrument capable of construction as bill of exchange or promissory note.]—*See* BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS, Vol. VI., p. 42, No. 305.

B. Deeds operating as Conveyance without Appropriate Words.

Deeds operating as leases.]—*See* LANDLORD & TENANT.

Deeds operating as execution or release of powers.]—*See* POWERS.

Settlements.]—*See* SETTLEMENTS.

Voluntary settlements.]—*See* FRAUDULENT & VOIDABLE CONVEYANCES.

Words operating as words of grant.]—*See* REAL PROPERTY & CHATTELS REAL; SALE OF LAND.

Words operating as grant of reversion.]—*See* REAL PROPERTY & CHATTELS REAL.

SUB-SECT. 19.—VERBA FORTIUS ACCIPIUNTUR CONTRA PROFERENTEM.

A. Statement of Rule.

Crown grants.]—*See* Sub-sect. 19, B. (c), *post*.

1016. Instrument construed most strongly against

PART III. SECT. 3, SUB-SECT. 19.—A.

1023 I. Instrument construed most strongly against maker or grantor—Ambiguous words.]—If language in a letter is ambiguous it must be construed most strongly against the writer.—**WELDON v. VAUGHAN** (1878), 3 P. & B. 70; *reved. on other grounds*, 5 S. C. R. 35.—**CAN.**

1023 II. ———.]—The rule as to

the construction of the language in which a gift is made is that indefinite words of gift are calculated to convey all the interest of the grantor, it being also necessary to read the whole of an instrument in order to gather the intention.

—**KALIDAS MULLICK v. KANHAYA LAL PUNDIT** (1884), L. R. 11 Cal. 121; L. R. 11 Ind. App. 218.—**IND.**

1023 III. ———.]—Where a person

maker or grantor.]—**ABREE v. PAGE** (1627), *Hob.* 9; 124 E. R. 299.

1017. ———.]—**CORE'S CASE** (1536), 1 Dyer, 20 a; 73 E. R. 42.

Annotations:—*Mentd.* **Gumbleton v. Grafton** (1600), *Cro. Eliz.* 731; **Flewelin v. Rare** (1610), 1 Bulst. 68; **Isaack v. Clark** (1615), 2 Bulst. 306; **Brigs Case** (1623), *Palm.* 364; **Dutton v. Poole** (1678), T. Jo. 102; **Ryall v. Rolle** (1749), 1 Atk. 165.

1018. ——— Most favourably towards grantee.]—In the common law the grant of every common person is taken most strongly against himself, & most favourably towards the grantee; but the King's grant is taken most strongly against the grantee, & most favourably for the King (**WESTON, J.**).—**WILLION v. BERKLEY** (1561), 1 Plowd. 223; 75 E. R. 339.

Annotations:—*Mentd.* **Heydon's Case** (1584), 3 Co. Rep. 7 a; **Sadlers' Co.'s Case** (1588), 4 Co. Rep. 54 b; **Strata Mercella's Case** (1591), 9 Co. Rep. 24 a; **Anderson's Case** (1597), 7 Co. Rep. 21 a; **Alton Wood's Case** (1600), 1 Co. Rep. 26 b; **Butt's Case** (1606), 7 Co. Rep. 23 a; **Ecclesiastical Persons Case** (1601), 5 Co. Rep. 14 a; **Atkins v. Longville** (1604), *Cro. Jac.* 50; **Case of a Fine** (1605), 7 Co. Rep. 32 a; **Rutland's Case** (1605), 6 Co. Rep. 52 b; **Prince's Case** (1606), 8 Co. Rep. 13 b; **Calvin's Case** (1608), 7 Co. Rep. 1 a; **Turnor's Case** (1610), 8 Co. Rep. 132 a; **Peytoe's Case** (1611), 9 Co. Rep. 77 b; **Fridde & Napper's Case** (1612), 11 Co. Rep. 8 b; **Seymour's Case** (1612), 10 Co. Rep. 95 b; **Sutton's Hospital Case** (1612), 10 Co. Rep. 23; **Whistler's Case** (1613), 10 Co. Rep. 63 a; **Magdalen College, Cambridge Case** (1615), 11 Co. Rep. 66 b; **Winchcombe v. Winchester, Bp. & Puleston** (1616), *Hob.* 165; **R. v. Hampden**, 1637, 3 State Tr. 826; **Wiseman v. Cotton** (1663), 1 Keb. 505; **R. v. London, Bp. & Lancaster** (1693), 1 Show. 441; **R. v. Horpby, Bankers' Case** (1695), 5 Mod. Rep. 29; **Banbury v. Wood** (1703), 1 Salk. 5; **A.-G. v. Allgood** (1743), *Park* 1; **R. v. Berkley & Bragge** (1754), 1 Keny. 80; **Wolferstan v. Lincoln, Bp. & Whitehead** (1763), 2 Wils. 174; **Doe d. Hayne v. Redfern** (1810), 12 East, 96; **Holloway v. Berkeley** (1826), 6 B. & C. 2; **Meath, Bp. v. Winchester** (1836), 3 Bing. N. C. 183; **A.-G. v. Donaldson** (1842), 10 M. & W. 117; **Crofts v. Middleton** (1856), 8 De G. M. & G. 192; **Rustomjee v. R.** (1876), 1 Q. B. D. 487.

1019. ———.]—**LOFIELD'S CASE** (1612), 10 Co. Rep. 160 a; 77 E. R. 1086.

Annotations:—*Refd.* **Riddell v. White** (1793), 1 Anst. 281. *Mentd.* **Selbye v. Becke** (1626), *Litt.* 17; **Fawkeners v. Bellingham** (1627), *Cro. Car.* 80; **R. v. London Bp. & Birch** (1694), 1 Ld. Raym. 23.

1020. ———.]—**THURMAN v. COOPER**, No. 751, *ante*.

1021. ———.]—It is a general rule that the words in a deed are to be construed most strongly *contra proferentem* (**LORD KENYON, C.J.**).—**BARRETT v. BEDFORD (DUKE)** (1800), 8 Term Rep. 602; 101 E. R. 1669.

Annotation:—*Mentd.* **Moore v. Clark** (1813), 5 Taunt. 90.

1022. ———.]—An equivocal expression shall, in the first instance, be taken in the sense unfavourable to the party using it.—**HOBSON v. MIDDLETON** (1827), 6 B. & C. 295; 9 Dow. & Ry. K. B. 249; 5 L. J. O. S. K. B. 160; 108 E. R. 461.

Annotations:—*Refd.* **Jones v. Waite** (1839), 7 Scott. 317. *Mentd.* **Boydell v. Harkness** (1846), 3 C. B. 168; **Murphy v. Glass** (1869), L. R. 2 P. O. 408; **Toleman v. Portbury** (1872), L. R. 7 Q. B. 344; **Clifford v. Hoare** (1874), L. R. 9 C. P. 362.

1023. ——— Ambiguous words.]—The words of an instrument are to be taken most strongly against the party using them, & therefore if there be any ambiguity in the words of this instrument, they ought to be construed favourably for pltf. & against deft. who made the instrument (**HOLROYD, J.**).—**EDIS v. BURY** (1827), 6 B. & C. 433; 9

writes a business letter binding himself to perform an obligation, & expresses himself in a vague & doubtful manner, the doubt will be resolved in a manner least favourable to the writer.—**ROBERTS v. HILL** (1900), 19 N. Z. L. R. 605.—**N.Z.**

1023 IV. ———.]—An agreement for sale & purchase of a business contained the following clause: "The

DOW. & RY. K. B. 492; 108 E. R. 511; *sub nom.*
EEDIS v. BERRY, 5 L. J. O. S. K. B. 179.

Annotations:—*Mentd.* Sanderson v. Piper (1839), 5 Bing. N. C. 425. *Mentd.* Allen v. Sea, Fire & Life Assoc. (1850), 9 C. B. 574; Lloyd v. Oliver (1852), 18 Q. B. 471; Peto v. Reynolds (1854), 23 L. J. Ex. 98; Willans v. Ayers (1877), 3 App. Cas. 133.

1024. —[—]—There is no reason for putting on a guaranty a construction different from that which the ct. puts on any other instrument. With regard to other instruments the rule is that if the party executing them leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself (TINDAL, C.J.).—HARGREAVE v. SMEE (1829), 6 Bing. 244; 3 Moo. & P. 573; 8 L. J. O. S. C. P. 46; 130 E. R. 1274.

Annotation:—*Mentd.* Nicholson v. Paget (1832), 1 Cr. & M. 48.

1025. —[—]—MAYER v. ISAAC, No. 1076, *post*.

1026. —[—]—Most favourably for parties for whose benefit made.]—The rule of construction is, that the instrument must be construed most favourably for the parties for whose benefit it was made (POLLOCK, C.B.).—BROWN v. HARTILL (1848), 2 Exch. 434; 154 E. R. 561.

1027. —[—]—All deeds are to be construed most strongly against the grantor (LORD ROMILLY, M.R.).—JOHNSON v. EDGWARE, ETC. RY. CO. (1866), 35 Beav. 480; 35 L. J. Ch. 322; 14 L. T. 45; 14 W. R. 416; 55 E. R. 982.

1028. —[—]—Every document as against its author must be read in the sense which it was intended to convey (LORD MACNAGHTEN).—GLUCKSTEIN v. BARNES, [1900] A. C. 240; 69 L. J. Ch. 385; 82 L. T. 393; 16 T. L. R. 321; 7 Mans. 321, H. L.; *affg.* S. C. *sub nom.* Re OLYMPIA, LTD., [1898] 2 Ch. 153, C. A.

Annotations:—*Mentd.* Re Haycraft Gold Reduction & Mining Co., [1900] 2 Ch. 230; Re Lady Forrest (Murchison) Gold Mine, [1901] 1 Ch. 582; Re Leeds & Hanley Theatres of Varieties (1902), 72 L. J. Ch. 1; Watts v. Bucknall (1903), 88 L. T. 845; Re Darby, Ex p. Brougham, [1911] 1 K. B. 95; Omnium Electric Palaces v. Baines (1914), 1 Ch. 332; Re Jubilee Cotton Mills, [1922] 1 Ch. 100.

Where contrary intention appears.]—See No. 720, *ante*.

Construction against party setting up particular construction—Onus of proof.]—See Nos. 1011, 1012, *ante*.

— Construction operating to work wrong.]—See Nos. 1071, 1072, *post*.

payment of the purchase money will be subject to (a) the lease being for three years at £7 per month; (b) the monthly turnover being £800." The clause was prepared by deft. & signed by plff. without taking any independent advice. A literal interpretation of the clause would have reduced it to an absurdity:—*Held*: the words being deft.'s, they should be construed against him.—JENKINS v. KENT, [1922] N. Z. L. R. 882.—N.Z.

PART III. SECT. 3, SUB-SECT. 19.— B. (a)

a. Where rule in accord with dominant intention of deed.]—A deed must be construed most strongly against the grantor, & the dominant intention of the conveyance must control any doubt raised by the use of ambiguous words.—JAGURS v. DOYLE (1881), 2 N. S. W. L. R. 113.—AUS.

d. Exclusion of rule.]—Where there is an ambiguity on the face of a deed incapable of being explained by extrinsic evidence the maxim *verba fortius accipiuntur contra proferentem* cannot be applied in favour of either party.—BARTHEL v. SCOTTEN (1895), 34 S. C. R. 367.—CAN.

B. Application and Qualifications of Rule.

(a) In General.

1029. Whether still applicable.]—TAYLOR v. ST. HELENS CORPN., No. 839, *ante*.

1030. Not applicable where court can give effect to every word.]—When the words of a deed were doubtful, there was a rule that the construction should operate against the grantor; but there was another & sound rule, *viz.* to give effect to every word in a deed, where such a construction is reasonable (WOOD, V.-C.).—PATCHING v. DUBBINS (1853), Kay, 1; 23 L. J. Ch. 45; 22 L. T. O. S. 116; 17 Jur. 1113; 2 W. R. 2; 69 E. R. 1; *affd.* 2 Eq. Rep. 71, L. JJ.

Annotations:—*Mentd.* Schlumberger v. Lister (1860), 6 Jur. N. S. 1336; McLean v. McKay (1873), L. R. 5 P. C. 327.

Whether court will give effect to every word & part of deed.—In construing agreements as whole.]—See Sect. 3, sub-sect. 4, *ante*.

1031. Only applicable where other modes of construction fail.]—The rule *verba fortius accipiuntur contra proferentem* ought to be applied only where other rules of construction fail (COLERIDGE, J.).—LINDUS v. MELROSE (1858), 3 H. & N. 177; 27 L. J. Ex. 326; 31 L. T. O. S. 36; 4 Jur. N. S. 488; 6 W. R. 441; 157 E. R. 434, Ex. Ch.

Annotations:—*Mentd.* Penrose v. Martyn (1858), 28 L. J. Q. B. 28; Bottomley v. Fisher (1862), 1 H. & C. 211; Kelner v. Baxter (1866), L. R. 2 C. P. 174; Courtauld v. Saunders (1867), 16 L. T. 562; Alexander v. Sizer (1869), L. R. 4 Exch. 102; Allan v. Miller (1870), 22 L. T. 825; Dutton v. Marsh (1871), L. R. 6 Q. B. 361; Richardson v. Williamson (1871), 40 L. J. Q. B. 145; Chapman v. Smethurst, [1909] 1 K. B. 927; Stacey v. Wallis (1912), 28 T. L. R. 209.

1032. Only applicable in absence of clear indication of intention.]—In the case of a grant the language of the instrument can be referred to, & it is of course for the ct. to construe that language, & in the absence of any clear indication of the intention of the parties, the maxim that a grant must be construed most strongly against the grantor must be applied (WILLES, J.).—WILLIAMS v. JAMES (1867), L. R. 2 C. P. 577; 36 L. J. C. P. 256; 16 L. T. 664; 15 W. R. 928.

Annotations:—*Mentd.* United Land Co. v. G. E. Ry. (1873), L. R. 17 Eq. 158; Sloan v. Holliday (1874), 30 L. T. 757; Wimbledon & Putney Commons Conservators v. Dixon (1875), 1 Ch. D. 362; Wood v. Saunders (1875), 10 Ch. App. 583, n.; Pym v. Harrison (1876), 33 L. T. 796; Finch v. G. W. Ry. (1879), 5 Ex. D. 254; New Windsor Corpn. v. Stovell (1884), 27 Ch. D. 865; Harris v. Flower (1904), 74 L. J. Ch. 127; Milner's Safe Co. v. G. N. & City Ry., [1907] 1 Ch. 208; Bailey v. Holborn & Finsbury, [1914] 1 Ch. 598.

e. —[—]—In case of doubt the words of a covenant must be taken most strongly against the obligee, stipulator, & in favour of the obligor, *reus promittendi*. The Roman rule "*verba contra stipulatorem interpretanda sunt*" prevails against the old English rule "*verba chartarum fortius accipiuntur contra proferentem*."—SHARP'S ESTATE v. SCHEEPERS, [1919] C. P. D. 26.—S. AF.

f. — Statutory right only taken away by express words or necessary implication.]—Before a person can be said to have deprived himself of what is a statutory right by words used by him in a written document he must do so expressly or by necessary implication from the language used by him.—STILLER v. DURBAN CORPN. (1918), 39 N. L. R. 350.—S. AF.

g. Only applicable where other modes of construction fail.]—Of the lands of which the resp. entered into possession by virtue of a deed they remained in possession for twelve years without objection to the boundaries. They then brought an action to have it declared that, by the proper construction of the deed, an additional strip of land & certain wharves were included & intended to be transferred.

They contended that the description in the deed was ambiguous, & that H. street as a boundary should be construed as meaning H. street extended, & they sought to establish their case by the production of certain correspondence which had taken place between the parties prior to the execution of the deed of Aug. 1882:—*Held*: the deed should be interpreted in the light of the conduct of the parties in taking & remaining so long in possession without objection, which raised against them a strong presumption, not only not rebutted but strengthened by the facts in evidence; & that any doubt or ambiguity in the deed, in the absence of evidence to explain it, should be interpreted against the vendees, & in favour of the vendors.—QUEBEC CITY & NORTH SHORE RY. CO. (1897), 27 S. C. R. 102; *affd.*, 31 Can. Gaz. 11, P. C.—CAN.

h. —[—]—A contract stipulating that the first party shall have the hauling of all ore shipped up to 15,000 tons & not less than 10,000, as required by the second party, does not bind the second party to supply more than 10,000 tons.—HAGGERTY v. LENORA (1901), 9 B. C. R. 6.—CAN.

Sect. 3.—Rules of construction: Sub-sect. 19, B. (b).]**(b) Particular Instances.**

Application to Crown grants.]—See Sub-sect. 19, B. (c), post.

1033. Grant.]—THROCKMERTON v. TRACY, No. 634, ante.

1034. —.]—WINDHAM'S CASE (1589), 5 Co. Rep. 7 a; Jenk. 272; 77 E. R. 58.

Annotations:—*Refd.* Tomson v. Clerke (1820), Palm. 99; Gilbert v. Witty (1822), Cro. Jac. 655; Cooke v. Gerrard (1887), 1 Lev. 212; Boswell v. Coats (1871), 1 Mod. Rep. 33; Cook v. Fountain (1874), 3 Swan. 585; Orby v. Mohun (1706), 3 Rep. Ch. 102; Palmer v. Sparshott (1842), 4 Man. & G. 137. *Mentd.* Veal v. Roberts (1590), Cro. Eliz. 199; Strata Mercella's Case (1591), 9 Co. Rep. 24 a; Loulee's Case (1614), 10 Co. Rep. 78 a; Holmes v. Meynel (1881), T. Raym. 452; Trevivan v. Tooker (1898), 1 Ld. Raym. 495; Withers v. Bircham (1824), 3 L. J. O. S. K. B. 30.

1035. —.]—KINDLER v. LEVERAGE (1591), Cro. Eliz. 241; 78 E. R. 497.

1036. —.]—ANON. (1597), Owen, 60; 74 E. R. 899.

1037. —.]—HEYDON v. EWER (1599), 2 And. 123; 123 E. R. 579; sub nom. EWER v. HEYDON, Cro. Eliz. 658, Ex. Ch.

Annotations:—*Refd.* Meredith v. Webber (1666), O. Bridg. 560; Re Portal & Lamb (1885), 30 Ch. D. 50. *Mentd.* Bosworth v. Forard (1666), O. Bridg. 153.

1038. —.]—DAVENPORT'S CASE (1610), 8 Co. Rep. 144 b; 77 E. R. 693.

Annotations:—*Consd.* Case of Comendams, Woodley v. Exeter Bp. & Mannering (1620), Win. 94. *Refd.* Doe d. Beadon v. Pyke (1816), 5 M. & S. 146; Piggott v. Stratton (1859), 1 De G. F. & J. 33; Harding v. Preece (1882), 9 Q. B. D. 281; David v. Sabin, [1893] 1 Ch. 523. *Mentd.* Fisher v. Wigg (1700), 1 Ld. Raym. 622.

1039. —.]—MANCHESTER COLLEGE v. TRAF-FORD (1678), 2 Show. 31; 2 Lev. 241; 89 E. R. 774.

1040. —.]—DOE d. WEBB v. DIXON (1807), 9 East, 15; 103 E. R. 478.

Annotations:—*Consd.* Charlton v. Driver (1820), 5 Moore, C. P. 59; Lewis v. Stephenson (1898), 67 L. J. Q. B. 296.

1041. —.]—Re STROUD, No. 733, ante.

1042. —.]—Every deed is to be taken strongly against the grantor; but where the owner of an estate is both grantor & grantee, his interest under the deed is to be construed as if a stranger had been the grantor.—VINCENT v. SPICER (1856), 22 Beav. 380; 25 L. J. Ch. 589; 27 L. T. O. S. 226; 2 Jur. N. S. 654; 4 W. R. 667; 52 E. R. 1154.

1043. —.]—It is established on the best authority that, in construing grants from the Crown, a different rule of construction prevails from that by which grants from one subject to another are to be construed. In a grant from one subject to another, every intendment is to be made

against the grantor, & in favour of the grantee, in order to give full effect to the grant; but in grants from the Crown an opposite rule of construction prevails (COCKBURN, C.J.).—FEATHER v. R. (1865), 6 B. & S. 257; 35 L. J. Q. B. 200; 12 L. T. 114; 29 J. P. 709; 122 E. R. 1191.

Annotations:—*Consd.* Rhondda's Claim, [1922] 2 A. C. 339. *Refd.* Dixon v. London Small Arms Co. (1876), 1 App. Cas. 632. *Mentd.* Thomas v. R. (1874), L. R. 10 Q. B. 31; Roden v. London Small Arms Co. (1876), 46 L. J. Q. B. 213; Windsor & Annapolis Ry. v. R. (1886), 11 App. Cas. 607; Income Tax Special Purposes Comrs. v. Fennel, [1891] A. C. 531; Goldsmiths' Co. v. Wyatt, [1907] 1 K. B. 95; Johnstone v. Podlar, [1921] 2 A. C. 262.

1044. —.]—JOHNSON v. EDGWARE, ETC., RY. Co., No. 1027, ante.

1045. —.]—WOOD v. SAUNDERS (1875), 10 Ch. App. 582; 44 L. J. Ch. 514; 32 L. T. 363; 23 W. R. 514.

Annotations:—*Mentd.* New Windsor Corp'n. v. Stovell (1884), 27 Ch. D. 665. *Milner's Safe Co. v. G. N. & City Ry.*, [1907] 1 Ch. 208; *White v. Grand Hotel, Eastbourne* (1912), 82 L. J. Ch. 57.

1046. — Execution for valuable consideration.]

—(1) It is well settled that the words of a deed, executed for valuable consideration, ought to be construed as far as they properly may, in favour of the grantee (LORD SELBORNE, C.).

(2) Usage continued during living memory, when there is nothing to the contrary & when the question is one of prescription may justify the presumption of a similar usage from time immemorial (LORD SELBORNE, C.).—NEILL v. DEVONSHIRE (DUKE) (1882), 8 App. Cas. 135; 31 W. R. 622, H. L.

Annotations:—*As to* (2) *Consd.* Smith v. Andrews, [1891] 2 Ch. 678. *Generally*, *Mentd.* Blount v. Layard (1888), [1891] 2 Ch. 681, n.; A.-G. v. Newcastle-upon-Tyne Corp'n., [1897] 2 Q. B. 384; Hanbury v. Jenkins, [1901] 2 Ch. 401; Foster v. Warblington U. D. C. (1905), 69 J. P. 42; Johnston v. O'Neill, [1911] A. C. 552; A.-G. for British Columbia v. A.-G. for Canada, [1914] A. C. 153.

1047. — Grantor & grantee same person.]—VINCENT v. SPICER, No. 1042, ante.

1048. Lease.]—WINDHAM'S CASE, No. 1034, ante.

1049. —.]—SEAMAN'S CASE (1610), Godb. 166; 78 E. R. 101.

1050. —.]—KEBLE v. IIALS (1630), Litt. 363; 124 E. R. 286; sub nom. KEEBLE'S CASE, Litt. 370.

Annotation:—*Refd.* Dann v. Spurrier (1803), 3 Bos. & P. 399.

1051. —.]—The rule appears to be perfectly clear that if a doubt arise as to the construction of a lease between lessor & lessee, the lease must be construed most beneficially for the latter (LORD ALVANLEY, C.J.).

If A. says to B., "I grant you a horse out of my stable," he puts it in the power of B. to take

PART III. SECT. 3, SUB-SECT. 19.—B. (b).

1033 i. Grant.]—O. conveyed to P. part of lot 33, & he conveyed by the same deed as appurtenant to the land a full, free & unrestricted right of way over a certain strip of land of twenty feet in breadth adjoining the westerly side of the parcel of land, extending from the highway to the water's edge of the river L. In an action for obstructing the right of way by a boat-house.—*Held:* it would be no defence that the boat-house was below high-water mark, though O.'s right only extended so far, for O. & deft. claiming under him were estopped by O.'s deed to P., which granted to the water's edge.—PLUMB v. MCGANNON (1871), 33 U. C. R. 8.—CAN.

1033 ii. —.]—Deft. conveyed to pltf. 19 acres of lot 2, described by metes & bounds, commencing at the N.E. angle of the lot. This starting point upon the ground was undisputed, & it was admitted that the description given

enclosed the land claimed by pltf.:—*Held:* Deft. was estopped by his deed, & could not set up any question as to the boundary between lots 1 & 2.—CROSSWAITE v. GAGE (1871), 32 U. C. R. 196.—CAN.

1033 iii. —.]—Vendors cannot by dividing the property as they see fit narrow the operation & benefit of their own deed.—DUMOULIN v. BUR-FORD (1893), 22 S. C. R. 120.—CAN.

1033 iv. —.]—Where a person has two estates one larger & the other smaller, & purports to convey the entire property, without any words of limitation, he must be taken to be conveying the highest estate he has; thus an exor. having a one-third personal beneficial interest in the estate who purports to convey the whole of it without qualification or limitation, must be taken to convey in his character as exor. & not in that of one having a beneficial interest only in a fraction of the whole estate

purported to be conveyed.—GANGABAI v. SONABAI (1916), 1 L. R. 40 Bom. 69.—IND.

1048 i. Lease.]—The mineral tenants of the lands of M., who had by their lease the usual powers of working & winning the minerals let to them, had also power by a separate clause in the lease to make use of any pits they might sink in the lands of M. for winning & carrying away the coal, limestone, & fireclay in the adjoining lands. The proprietors of M. raised this action for the purpose of preventing the mineral tenants from using the roads on the lands of M. for carrying materials not raised from pits in M. to & from their works on adjoining lands, & from storing minerals & making other uses of the lands for the purposes of these works.—*Held:* the lease did not confer on the mineral tenants any power to use the lands in question for the purposes complained of.—MUNGLA v. YOUNG (1872), 10 Macph. (Ct. of Sess.) 901; 44 Sc. Jur. 499.—SCOT.

which horse he shall think proper (LORD ALVANLEY, C.J.).—DANN v. SPURRIER (1803), 3 Bos. & P. 399; 127 E. R. 218.

Annotations.—*Reid*. Doe d. Pitcher v. Donovan (1809), 1 Taunt. 555. *Mentd.* London General Omnibus Co. v. Lavell (1900), 83 L. T. 453.

See Nos. 733, 1036, 1039, 1040, 1044, *ante*, & generally, LANDLORD & TENANT.

1052. Covenants.]—TRENCHARD v. HOSKINS, No. 716, *ante*.

1053. —.]—RUBERY v. JERVOISE (1786), 1 Term Rep. 229; 99 E. R. 1067.

Annotation.—*Mentd.* Maxwell v. Ward (1824), 13 Price, 674.

1054. —.]—DOE d. DAVIES v. WILLIAMS (1788), 1 Hy. Bl. 25; 126 E. R. 16.

Annotation.—*Mentd.* Doe d. Meyrick v. Meyrick (1832), 3 Cr. & J. 223.

1055. —.]—BROWNING v. WRIGHT, No. 653, *ante*.

1056. —.]—BARTON v. FITZGERALD, No. 720, *ante*.

1057. —.]—Where a lease specified payments to be made by the incoming to the outgoing tenant, among which there was not included any payment for foldage:—*Held*: the outgoing tenant was not entitled to any allowance in respect of foldage.

Although the words of a covenant are to be construed according to the intent of the parties, yet they are to be taken strongly against the party who stipulates. This lease provides for the payments which the incoming tenant is to make. It seems to me that the incoming tenant shall pay for such things as are specified, & no more. For the rule *expressio unius est exclusio alterius* applies (HOLROYD, J.).—WEBB v. PLUMMER (1810), 2 B. & Ald. 746; 106 E. R. 537.

Annotations.—*Consd.* Westacott v. Hahn, [1917] 1 K. B. 605. *Reid*. Holding v. Pigott (1831), 7 Bing. 465; Hutton v. Warren (1836), 1 M. & W. 466; Brown v. Byrne (1854), 3 E. & B. 703; Wooler v. Knott (1876), 1 Ex. D. 124. *Re* Constable & Crauswick (1899), 80 L. T. 164. *Mentd.* Spartali v. Benecke (1850), 10 C. B. 212.

1058. —.]—FOWLE v. WELSH (1822), 1 B. & C. 29; 2 Dow. & Ry. K. B. 133; 1 L. J. O. S. K. B. 17; 107 E. R. 12.

Annotation.—*Mentd.* Shaw v. Stanton (1858), 30 L. T. O. S. 352.

1059. —.]—DOE d. ABDEY v. STEVENS (1832), 3 B. & Ad. 299; 110 E. R. 112; *sub nom.* DOE d. ABDEY v. JEAPE, 1 L. J. K. B. 101.

1060. —.]—WARDE v. WARDE (1852), 16 Beav. 103; 51 E. R. 716.

Annotations.—*Mentd.* Manser v. Dix (1855), 1 K. & J. 451; Ford v. De Pontes (1859), 29 L. J. Ch. 883; O'Shea v. Wood, [1891] P. 237.

1061. —.]—LONG v. BOWRING (1864), 33 Beav. 585; 10 L. T. 683; 28 J. P. 726; 10 Jur. N. S. 668; 12 W. R. 972; 55 E. R. 496.

1062. Of exception.]—(1) A. being seised in fee of the manor F. & the demesne lands thereof, & of all the coal mines lying under the manor, enfeofed D. of & in certain closes, except & always reserved to the feoffor, his heirs, & assigns, all tithes of corn & grain, & also except & always reserved out of the

feoffment unto the feoffor & his heirs, all the coals in all or any of the lands & premises, together with free liberty for them, the feoffor & his heirs, & his & their assigns & servants, at all times thereafter, during the time that he, the feoffor & his heirs, should continue owners & proprietors of the demesne lands of F., to sink & dig pits, or otherwise to sough & get coals in all & every the lands & premises, & to sell & carry away the same. The heirs of the feoffor having for a valuable consideration conveyed to a purchaser in fee the manor F. & its demesne lands, with its appurtenances, & all the coal mines under the lands in question, etc.:—*Held*: the coals were, by the exception, reserved to the feoffor in fee, & therefore they passed to the purchaser, & the latter was entitled, under the express liberty reserved, to enter upon the land, to dig pits, & get the coals, so long as he remained owner of the demesne lands. *Semble*: the express liberty is not restrictive of that which would be implied by law to get the coals, & the purchaser would be entitled to an incidental right to get them coextensive with his estate.

(2) An exception is ever of part of the thing granted & of a thing in *esse*. A reservation is always of a thing not in *esse*, but newly created & reserved out of the thing granted (BAYLEY, J.).

(3) Another rule as to exceptions is to be found in Sheppard's Touchstone, 100. The exception is always taken most in favour of the feoffee & lessee, etc., & against the feoffor, lessor, etc. Yet it is a rule, that what will pass by words in a grant will be excepted by the same or the like words in an exception. It is another true rule, that when anything is excepted, all things that are depending on it, & necessary for the obtaining of it, are excepted also; as if a lessor except the trees, he may bring his chapman to view them, if he desire to sell them, & he or the vendee may cut them & take them away (BAYLEY, J.).

(4) It may be taken as clear, that an express liberty does not always control what would otherwise exist, especially if the express liberty goes beyond what would be implied. To give it a controlling power, the intention that it should have that effect must be very plain (BAYLEY, J.).—CARDIGAN (EARL) v. ARMITAGE (1823), 2 B. & C. 197; 3 Dow. & Ry. K. B. 414; 107 E. R. 356.

Annotations.—*As to* (1) *Reid*. Scrutton v. Brown (1825), 4 B. & C. 485; Rogers v. Taylor (1857), 1 H. & N. 700; Hamilton v. Graham (1871), L. R. 2 Sc. & Div. 166. *As to* (2) *Reid*. Doe d. Douglas v. Lock (1835), 2 Ad. & El. 705. *As to* (3) *Consd.* Bullen v. Denning (1826), 5 B. & C. 842; Savill v. Bethell, [1902] 2 Ch. 523. *Reid*. Blackett v. Royal Exchange Assce. (1832), 1 L. J. N. S. Ex. 101. *As to* (4) *Reid*. Eastern Archipelago Co. v. R. (1853), 2 E. & B. 856. *Generally*, *Mentd.* Wickham v. Hawker (1840), 7 M. & W. 63; Morris v. Rhydydefod Colliery Co., Glamorganshire (1858), 5 Jur. N. S. 339; Clegg v. Clegg (1861), 3 Giff. 322; Gould v. Groat Western Deep Coal Co. (1865), 2 De G. J. & Sm. 600; Proud v. Bates (1865), 6 New Rep. 92; Thomson v. St. Catharine's College, Cambridge & Mappin's Masbro' Old Brewery (1918), 118 L. T. 758.

1063. —.]—BULLEN v. DENNING (1826), 5

1052 i. Covenants.]—In a lease the lessee covenanted to pay all taxes, etc., except land tax:—*Held*: "land tax" was ambiguous in view of the conventional meaning it had acquired as a State land tax imposed under Land & Income Tax Acts which were suspended merely & not repealed by No. 27 of 1908, s. 5, & therefore the words in question constituting an exception in a covenant by the lessee its liability must be decided on the general rule of construction that ambiguous words are to be taken most strongly against the covenantor.—NEW SOUTH WALES SPORTS CLUB, LTD. v. SOLOMON (1914), 14 S. R. N. S. W.

340; 32 N. S. W. W. N. 45.—AUS.

k. —Against lessor where covenant restrictive or penal.]—Where a covenant accompanied by a right of re-entry on breach, is so expressed that its meaning is doubtful, & the tenant in good faith has done what he supposes to be a performance of it, a forfeiture will not be enforced; the difficulty in construing the covenant is a special circumstance entitling deft. to relief.—MCCLAREN v. KERR (1876), 39 U. C. R. 507.—CAN.

l. —.]—Deft. covenanted by deed to make ptfr. certain quarterly

payments, & as soon as the rent, income, & profits of certain premises should realise a certain sum the covenant should become void:—*Held*: the words rent, income, & profits must be interpreted to mean the rental derived from the premises after deducting the payment of all necessary outgoings.—O'NEILL v. O'NEILL (1898), 16 N. Z. L. R. 504.—N.Z.

m. Licence to cut timber.]—A licence to cut timber "from lots 1 to 13":—*Held*: to exclude both 1 & 13.—HAGGART v. KERNAN (1853), 17 U. C. R. 341.—CAN.

Sect. 3.—Rules of construction: Sub-sect. 19, B. (c); sub-sects. 20 & 21.]

name, abutments, etc., but only so many acres, the grant is void, for the patentee shall not have his election, as he shall in the case of a common person (*per* CUR.).—*Doe d. Devine v. Wilson* (1855), 10 Moo. P. C. C. 502; 14 E. R. 581, P. C.

Annotation:—*Mentd.* *Des Barres v. Shey* (1873), 29 L. T. 592. See, also, CONSTITUTIONAL LAW, Vol. XI, p. 566, Nos. 658–660.

Grant of manors.]—See COPYHOLDS, Vol. XIII, p. 13, 46–49.

SUB-SECT. 20.—EXPRESSUM FACIT CESSARE TACITUM.

Implied terms in contract, *see* CONTRACT, Vol. XII, pp. 607–626.

Expressio unius est exclusio alterius.]—See Sub-sect. 21, *post*.

1088. Statement of rule—Implications excluded by express words.]—(1) No implication shall prevail against express words (*PARKER, B.*).

(2) When there are two clauses in a deed, of which the latter is contradictory to the former, there the former shall stand (*NICHOLAS, B.*).

(3) Subsequent words shall not confound those that went before, if by construction they may stand together (*NICHOLAS, B.*).—*COTHER v. MERRICK* (1857), *Hard.* 89; 145 E. R. 395.

Annotations:—As to (2) *Reid, Smith v. Jersey* (1821), 3 Bl. 290. *Generally, Mentd.* *Tankerville v. Wingfield* (1773), 6 Moore, C. P. 346, n.

1089. —.]—The word grant does not amount to an entire warranty in equity; nor always at law, where particular covenants are inserted. In such cases the insertion of what is express excludes the intendment of all presumption.

—*CLARKE v. SAMSON* (1748), 1 Ves. Sen. 100; 27 E. R. 117, L. C.

Annotation:—*Reid.* *Stephens v. Junior Army & Navy Stores*, [1914] 2 Ch. 516.

1090. —.]—Where the parties have come to an express contract none can be implied has prevailed so long as to be reduced to an axiom in the law (LORD KENYON, C.J.).—CUTTER v. POWELL (1795), 6 Term Rep. 320; 101 E. R. 573.

Annotations:—*Reid.* *Harrison v. James* (1862), 31 L. J. Ex. 248; *Lockwood v. Tunbridge Wells L. B.* (1884), *Cab. & El.* 289. *Mentd.* *Collins v. Price* (1828), 5 Bing. 132; *Thomas v. Williams* (1834), 3 Nev. & M. K. B. 545; *Baxter v. Nurse* (1844), 8 Jur. 273; *Burnby v. Bollett* (1847), 16 M. & W. 844; *Ehrensperger v. Anderson* (1848), 3 Exch. 148; *Lilley v. Elwin* (1848), 11 Q. B. 742; *Goodman v. Pocock* (1850), 15 Q. B. 576; *Dawson v. Collis* (1851), 10 C. B. 523; *De Bernardy v. Harding & Pooley* (1853), 1 C. L. R. 884; *Emmons v. Elderton* (1853), 13 C. B. 495; *Hochster v. De La Tour* (1853), 2 E. & B. 678; *Prickett v. Badger* (1856), 1 C. B. N. S. 296; *Kz p. Baker* (1857), 3 Jur. N. S. 937; *The Camilla* (1858), *Sw.* 312; *Munro v. Butt* (1858), 8 E. & B. 738; *Danube & Black Sea Ry. & Kustendjie Harbour Co. v. Xenos*, *Xenos v. Danube & Black Sea Ry. & Kustendjie Harbour Co.* (1861), 11 C. B. N. S. 152; *Bartholomew v. Markwick* (1864), 9 L. T. 651; *Appleby v. Myers* (1867), L. R. 2 C. P. 651; *Crawford v. Crawford* (1867), 16 W. R. 411; *Stubbs v. Holywell Ry.* (1867), L. R. 2 Exch. 311; *Oxford*

v. Provand (1868), L. R. 2 P. C. 135; *Button v. Thompson* (1869), L. R. 4 C. P. 330; *Robinson v. Mollett* (1875), L. R. 7 H. L. 802; *Byrne v. Leon Van Tienhoven* (1880), 42 L. T. 371; *O'Neill v. Armstrong, Mitchell*, [1895] 2 Q. B. 70; *Donkin v. Hastie* (1897), 61 J. P. 568; *Jamen v. Evans* (1897), 77 L. T. 78; *Sumpter v. Hedges*, [1898] 1 Q. B. 673; *Lodder v. Slowey*, [1904] A. C. 442; *Parkin v. South Hetton Coal Co.* (1907), 97 L. T. 98; *Workman, Clark v. Lloyd Bradlano*, [1908] 1 K. B. 968; *George v. Davies*, [1911] 2 K. B. 445; *Harrowing S. S. Co. v. Thomas*, [1913] 2 K. B. 171; *Dakin v. Lee*, [1916] 1 K. B. 566; *Moriarty v. Regent's Garage & Engineering Co.*, [1921] 1 K. B. 423.

1091. — Presumption that parties have expressed all conditions intended to be binding.]—

Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that having expressed some, they have expressed all the conditions by which they intend to be bound under the instrument (*LORD DENMAN, C.J.*).—*ASPDIN v. AUSTIN* (1844), 5 Q. B. 671; 1 Dav. & Mer. 515; 13 L. J. Q. B. 155; 8 Jur. 355; 114 E. R. 1402.

Annotations:—*Consd.* *Phillips v. G. W. Ry.* (1872), 41 L. J. Ch. 614; *Re Shell Transport & Trading Co. & Consolidated Petroleum Co.* (1904), 20 T. L. R. 517. *Mentd.* *Dunn v. Sayles* (1844), 5 Q. B. 685; *Richardson v. Palmer* (1845), 5 L. T. O. S. 177; *Pilkington v. Scott* (1846), 15 M. & W. 657; *Emmons v. Elderton* (1853), 4 H. L. Cas. 624; *H. v. Welch & Wills*, *Birmingham JJ.* (1853), 17 Jur. 1007; *Burton v. G. N. Ry.* (1854), 9 Exch. 507; *Whitmore v. Owen* (1854), 2 W. R. 432; *Whittle v. Frankland* (1862), 31 L. J. M. C. 81; *Worthington v. Sudlow* (1862), 26 J. P. 453; *McIntyre v. Belcher* (1863), 31 L. J. C. P. 254; *Churchward v. R.* (1865), L. R. 1 Q. B. 173; *Lewin v. Brown* (1866), 14 W. R. 640; *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1888), 59 L. T. 345; *Devonald v. Rosser*, [1906] 2 K. B. 728.

1092. —.]—An express contract as to the amount of debt under specialty excludes any implication by which that amount may be enlarged.—*POWDRELL v. JONES* (1854), 2 Sm. & G. 305; 2 Eq. Rep. 624; 23 L. J. Ch. 606; 23 L. T. O. S. 304; 18 Jur. 1048; 2 W. R. 513; 65 E. R. 412.

1093. —.]—If the owner of two adjoining tenements conveys one of them to a purchaser absolutely, the tenement so sold is discharged from any quasi-servitudes to which it was subjected by the vendor during his ownership of both properties, & the purchaser is not bound to take notice of the manner in which the tenement purchased has been used for the convenience of the adjoining & unsold tenement.—*SUFFIELD v. BROWN* (1864), 4 De G. J. & Sm. 185; 3 New Rep. 340; 33 L. J. Ch. 249; 9 L. T. 627; 10 Jur. N. S. 111; 12 W. R. 356; 46 E. R. 888, L. C.

Annotations:—*Consd.* *Morland v. Cook* (1868), L. R. 6 Eq. 252; *Rolason v. Levy* (1868), 17 L. T. 641; *Wheeldon v. Burrows* (1879), 12 Ch. D. 31; *Gordon v. Ogilvie* (1899), 15 T. L. R. 239; *Union Lighterage Co. v. London Graving Dock Co.*, [1902] 2 Ch. 557. *Reid.* *Crosley v. Lightowler* (1867), 2 Ch. App. 478; *Potts v. Smith* (1868), L. R. 6 Eq. 311; *Watts v. Kelson* (1871), 6 Ch. App. 166; *Russell v. Watts* (1883), 25 Ch. D. 559; *Schwann v. Ootton*, [1916] 2 Ch. 120. *Mentd.* *Barnes v. Loach* (1879), 4 Q. B. D. 494; *Shubbrook v. Tufnell* (1882), 46 L. T. 886.

1094. —.]—It is a general good rule of construction that where, if nothing were said, there would be a general applied condition, if there is inserted in a document a specific & limited con-

PART III. SECT. 3, SUB-SECT. 20.

p. Application of rule.—Implication excluded by express limitation.]—In ejectment deft. claimed under two deeds to P. & N. respectively. In the deed to P. the land was described as commencing on the verge of the river Moira at low water mark; & then, after describing the first two courses, the third course was stated to be to the water's edge of the river at low water mark, & it concluded, & thence down the winding of the river to the place of beginning:—*Held:* the particular limitation must be construed

specifically as stated, so that the land must be deemed to extend merely to the low water mark, & not *ad medium flum aquae*.—*COLEMAN v. ROBERTSON* (1880), 30 C. F. 609.—*CAN.*

q. — Erroneous description.—Method of correction expressed.]—Under a patent from the Crown a parcel of land, forming part of a large block originally held under what is known as the French title, was granted to the deft.'s grantor, with the express condition that the patent must be consistent with the patents of other

portions of the block. The description of the land in the patent was erroneous, which was apparent from the other patents & the registered & unregistered plans, & had the effect of including land to which *pltf.* had a good title derivable from such French title, & with which possession had gone. In an action of trespass against the deft. for pulling down the *pltf.*'s fence, & for a declaration as to his boundaries:—*Held:* *pltf.* had failed to prove his ownership either by showing a paper title or title by possession.—*PROLARD v. WELSH* (1907), 9 O. W. R. 491; 14 O. L. R. 64.—*CAN.*

dition, such specific & limited condition was meant to take the place of the general condition.—*Re CLEMENT, Ex p. GOAS* (1886), 3 Morr. 153, C. A.

1095. ———.]—An implied covenant in a lease for quiet enjoyment, is a true case of implied covenant; & the moment you say anything in the deed in the nature of an express covenant for quiet enjoyment the implied covenant is gone (RIGBY, L.J.).—*Re CADOGAN & HANS PLACE ESTATE, LTD., Ex p. WILLIS* (1895), 73 L. T. 387; 11 T. L. R. 477, C. A.

1096. ———.]—It is impossible to write into any instrument by implication a provision which is inconsistent with the express terms of that instrument. Where a mtge. deed contained a covenant by the mtgor. that he would not remove any of the things thereby granted from the mtged. premises which things included machinery then or thereafter to be affixed, thereto, without the written consent of the mtgee:—*Held*: persons who had subsequently supplied, without notice or knowledge of the mtge, trade fixtures to the mtgor., had no right to remove the same from the premises during the continuance of the security.—*ELLIS v. GLOVER & HOBSON, LTD.*, [1908] 1 K. B. 388; 77 L. J. K. B. 251; 98 L. T. 110, C. A.

Annotations:—*Reid. Re Rogerstone Brick & Stone Co., Southall v. Wescomb*, [1919] 1 Ch. 110. *Mentd. Re Morrison, Jones & Taylor, Cookes v. Morrison, Jones & Taylor*, [1914] 1 Ch. 50.

1097. ———.]—When in a lease there is an express covenant to erect buildings by a certain date, a further continuing covenant to erect these buildings cannot be implied from a covenant to repair them contained in the same document.—*STEPHENS v. JUNIOR ARMY & NAVY STORES, LTD.*, [1914] 2 Ch. 518; 84 L. J. Ch. 508; 111 L. T. 1055; 30 T. L. R. 697; 58 Sol. Jo. 568, C. A.

1098. Application of rule—Only where implication clearly inconsistent with words expressed.]—The generality of the maxim *Expressum facit cessare tacitum*, renders caution necessary in its application. It is not enough that the express & the tacit are merely incongruous; it must be clear that they cannot reasonably be intended to co-exist (FARWELL, L.J.).—*LOWE v. DORLING & SON*, [1906] 2 K. B. 772; 75 L. J. K. B. 1019; 95 L. T. 243; 22 T. L. R. 779, C. A.

Annotation:—*Reid. Shenstone v. Freeman*, [1910] 2 K. B. 84.

1099. ———.]—**Mortgage—Covenant for repayment out of particular funds—No implication of parol contract for repayment.**—L. devised certain lands to deft. on trust to sell the same & apply the proceeds in payment of debts, etc. Deft. mortgaged the lands to pltf. as a security for money lent to him. The mtge. deed contained a covenant by deft. that he would, out of the moneys which should come to his hands as such trustee, from the lands comprised in the mortgaged security & the personal estate if any of L., pay to pltf. the principal & interest:—*Held*: as there was an express covenant by deft. to pay in a qualified manner, no contract by parol could be implied for the repayment, & consequently an action for money lent would not lie.—*MATHEW v. BLACKMORE* (1857), 1 H. & N.

762; 26 L. J. Ex. 150; 28 L. T. O. S. 325; 156 E. R. 1409; *sub nom. MATTHEW v. BLACKMORE*, 5 W. R. 363.

1100. ———.]—**Covenant not to remove machinery from mortgaged premises—No right to remove fixtures supplied without notice.**—*ELLIS v. GLOVER & HOBSON, LTD.*, No. 1096, *ante*.

1101. ———.]—**Provision for limited indemnity in deed of assignment—Implication of larger indemnity excluded.**—Where the deed of assignment of an equity of redemption provides for an express & limited indemnity, the fuller indemnity which might otherwise be implied is excluded.—*MILLS v. UNITED COUNTIES BANK, LTD.*, [1912] 1 Ch. 231; 81 L. J. Ch. 210; 105 L. T. 742; 28 T. L. R. 40, C. A.

———.]—**Custom & usages.**—*See CUSTOM & USAGE.*

———.]—**To implied covenants—By use of word demise.**—*See LANDLORD & TENANT.*

———.]—**Under Conveyancing Act, 1881 (c. 41), s. 7.**—*See LANDLORD & TENANT; MORTGAGE; SALE OF LAND; SETTLEMENTS.*

———.]—**To general words implied under Conveyancing Act, 1881 (c. 41), s. 6.**—*See LANDLORD & TENANT; MORTGAGE; SALE OF LAND; SETTLEMENTS.*

1102. Exclusion of rule—Where exception to existing power.]—*CARDIGAN (EARL) v. ARMITAGE*, No. 1062, *ante*.

1103. ———.]—**In Crown grants.**—*EASTERN ARCHITECTURAL CO. v. R.*, No. 1079, *ante*.

———.]—**Verba fortius accipiuntur contra proferentem—In Crown grants.**—*See Sub-sect. 19, B. (c), ante.*

———.]—**Construction of Crown grants generally.**—*See CONSTITUTIONAL LAW, Vol. XI., p. 564 et seq.*

SUB-SECT. 21.—EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.

Expressio facit cessare tacitum.—*See Sub-sect. 20, ante.*

1104. General rule.]—A clause in the arts. of assocn. of a co. registered under 25 & 26 Vict. c. 89, provided that in case the whole of the shares into which the nominal capital of the co. was divided should not be subscribed for or allotted, the registered members of the co. for the time being should, if the directors should by resolution so declare, be & continue associated for the objects thereof; & the regulations for the management of the co. should be in force & binding on such members in like manner as if the whole of the shares into which the nominal capital was divided had been subscribed for & allotted & the business of the co. might be commenced from that time:—*Held*: until the whole of the capital was subscribed for or allotted, or the directors had passed a formal resolution for continuing the co., the directors had no power to make a call, & a call so made could not be recovered against a shareholder.

The proper rule to apply therefore is, not that affirmative words will not take away what is incident of common right, or that words introduced

PART III. SECT. 3, SUB-SECT. 21.

1104 i. General rule.]—An express covenant excludes an implied covenant.—*RITHEY v. BEAVEN* (1897), 5 B. C. R. 457.—CAN.

1104 ii. ———.]—Where there is an affirmative covenant in an agreement & the parties have themselves settled & set out in the contract what deft. is not to do, no further negative covenants will be implied from the affirmative one.—*BENTLEY v. BENTLEY* (1898), 12 Man. L. R. 436.—CAN.

r. Application of rule—Bill of sale.]

—By an assignment by indenture of all the assignor's "stock-in-trade, goods, wares, merchandise, groceries, household furniture, & movable personal property in, upon, or belonging to his store, dwelling, warehouse, wharf, & tenement in O. street, or elsewhere (save & except & excluding the goods & chattels of the said J. F.), the assignor, "in the possession, control, or charge of W. only), & also all his stock in the K. Ry. Co.":—*Held*: shares in the Q. Steamboat Co.

would not pass.—*HEWITT v. CORBETT* (1857), 15 U. C. R. 39.—CAN.

s. ———.]—**Contract.**—Pltf. entered into a contract with the City of J. for 330 hours' dredging, & for so much longer as the city might require by notice at the end of that period, to be paid for at a stated rate subject to deductions for time that the dredge was unable to work by reason of injury to the plant or machinery & interruptions caused by the state of the weather. Delays were caused on

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for the purpose of enlarging are not to be construed so as to restrain which is perhaps a corollary from the first rule; but the ordinary rule, that if authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act authorised under other circumstances than those so defined; *Expressio unius est exclusio alterius* (WILLES, J.).—**NORTH STAFFORD STEEL, ETC. CO. v. WARD** (1868), L. R. 3 Exch. 172, Ex. Ch.

1105. —[If there be any one rule of law clearer than another as to the construction of all statutes & all written instruments it is this; that where the legislature or the parties to any instrument have expressly authorised one or more particular modes of sale or other dealing with property, such expressions always exclude any other mode, except as specifically authorised. That appears to their Lordships to be a correct exposition of the law, & it is substantially carrying out a principle similar to that expressed in the maxim *expressio unius est exclusio alterius* (per CUR.).—**BLACKBURN v. FLAVELLE** (1881), 6 App. Cas. 628; 50 L. J. P. C. 58; 45 L. T. 52; 13 W. R. 67, P. C.

1106. Application of rule—Depends upon intention of parties.—There is certainly an axiom of law *Expressio unius est exclusio alterius*. But that is not of universal application. It depends upon the intention of the parties as it can be discovered upon the face of the instrument or upon the transaction (LORD CAMPBELL, C.).—**SAUNDERS v. EVANS** (1861), 8 H. L. Cas. 721; 31 L. J. Ch. 233; 5 L. T. 129; 7 Jur. N. S. 1293; 9 W. R. 501; 11 E. R. 611, H. L.; *affg.* S. C. *sub nom.* **EVANS v. SAUNDERS** (1855), 6 De G. M. & G. 654, L. J.

Annotation:—**Mentd.** Walker v. Armstrong (1856), 21 Beav. 284.

1107. —Not if leading to inconsistency or injustice.—The maxim *Expressio unius, exclusio alterius*, is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, & the maxim ought not to be applied, when its appln., having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice (LOPES, L.J.).—**COLQUHOUN v. BROOKS** (1888), 21 Q. B. D. 52; 57 L. J. Q. B. 439; 59 L. T. 661; 52 J. P. 645; 36 W. R. 657; 4 T. L. R. 494, C. A.; *on appeal* (1889), 14 App. Cas. 493, H. L.

Annotations:—**Reid**, Lowe v. Dorling, [1906] 2 K. B. 772. **Mentd.** London Bank of Mexico & South America v. Apthorpe, [1891] 2 Q. B. 378; Bartholomay Brewing Co. (of Rochester) v. Wyatt, Nobel Dynamite Trust Co. v. Wyatt, [1893] 2 Q. B. 499; San Paulo (Brazilian) Ry. v. Carter, [1896] A. C. 31; Apthorpe v. Peter Schoonhoven Brewing Co. (1899), 80 L. T. 395; L. C. C. v. A.-G., [1901] A. C. 26; R. v. Clerkdonwell, General Taxes Comrs., [1901] 2 K. B. 879; Kodak v. Clark, [1902] 2 K. B. 540; Garbutt

v. Durham Joint Committee, [1904] 2 K. B. 514; De Beers Consolidated Mines v. Howe (1905), 21 T. L. R. 460; Gramophone & Typewriter v. Stanley, [1908] 2 K. B. 89; American Thread Co. v. Joyce (1912), 108 L. T. 171; Liverpool & London & Globe Inscoe. v. Bennett, Brice v. Northern Assce., Brice v. Ocean Accident & Guarantee Corp., [1912] 2 K. B. 41; Drummond v. Collins, [1915] A. C. 1011; Mitchell v. Egyptian Hotels, [1916] A. C. 1022; Kensington Income Tax Comrs. v. Aramayo, [1916] 1 A. C. 215; Brooke v. I. R. Comrs., [1918] 1 K. B. 257; I. R. Comrs. v. Sansom, [1921] 2 K. B. 492; Singer v. Williams, [1921] 1 A. C. 41; Smidth v. Greenwood, [1921] 3 K. B. 683; Wankie Colliery Co. v. I. R. Comrs., [1921] 3 K. B. 344; Williams v. Singer, Pool v. Royal Exchange Assce., [1921] 1 A. C. 65; Bradbury v. English Sewing Cotton Co., [1922] 2 K. B. 569; Alliance Co. v. I. R. Comrs., [1923] 2 K. B. 760; Pickles v. Foulsham (1923), 40 T. L. R. 107.

1108. —Only where instrument contains all terms agreed upon.—Where an agreement on the face of it apparently contains all the terms agreed upon, it is a strong thing to ask the ct. to imply anything further (FARWELL, L.J.).—**DEVONALD v. ROSSER & SONS**, [1908] 2 K. B. 728; 75 L. J. K. B. 688; 95 L. T. 232; 22 T. L. R. 682; 50 Sol. Jo. 616, C. A.

Annotations:—**Mentd.** Hulme v. Ferranti, [1918] 2 K. B. 426; Meek v. Port of London Authority, [1918] 1 Ch. 415; Turpin v. Victoria Palace, [1918] 2 K. B. 639.

1109. —Contract—Not if *expressio unius* in one clause only—Charterparties not excepted.—In the construction of a contract the maxim *expressio unius exclusio alterius* is not applicable where the expression is found only in one & not in the other clauses of the same contract. There is no exception in the case of contracts of charterparty.—**WADE & SONS CO., LTD. v. COCKERLINE & CO.** (1905), 53 W. R. 420; 21 T. L. R. 296; 49 Sol. Jo. 313; 10 Com. Cas. 115, C. A.

Annotation:—**Mentd.** Calcutta S.S. Co. v. Weir (1910), 70 L. J. K. B. 401.

1110. —Lease—Power for tenant to cut trees.—**TALBOT v. WOODHOUSE** (1699), 2 Lut. 1471; 125 E. R. 811.

1111. —Payments specified.—**WEBB v. PLUMMER**, No. 1057, ante.

1112. —Mortgages—Fixtures specified.—By the grant of a house all the fixtures pass. *Secus*, where by an enumeration of particular fixtures in the conveyance, an intention is shown to exclude other fixtures of greater value & importance.

I think the mention of these fixtures excludes those in the foundery, on the principle, *Expressio unius est exclusio alterius*. Why, it may be asked, were these particular ones mentioned if the whole were intended to pass? Besides, the mention of bells & other fixtures of an inferior kind, shows that fixtures of greater value & on a larger scale were not contemplated (TAUNTON, J.).—**HARE v. HORTON** (1833), 5 B. & Ad. 715; 2 Nev. & M. K. B. 428; 3 L. J. K. B. 41; 110 E. R. 954.

Annotations:—**Consd.** Mather v. Fraser (1856), 2 K. & J. 536. **Reid**, Southport & West Lancashire Banking Co. v. Thompson (1887), 58 L. T. 143; Power v. Wells (1889), 6 T. L. R. 32.

account of the water being too deep at high tides for the dredge to work but, although both parties were aware that this interference would occur at high tides at the time the contract was made, there was no provisions made for any allowance or deduction on that account.—**Held**: a verdict for plt., returned on the construction that there was an implied covenant that the city should pay for the time lost by reason of the high tides was erroneous.—**CONNOLLY v. ST. JOHN CITY** (1904), 35 S. O. R. 186.—**CAN.**

1. —Provision for termination.—By a contract between plt. & deft. the former undertook to supply to the latter water "at a period defined in the 6th clause," & by that clause it was provided that deft. might put an end to the agreement at the

expiration of each & every term of five years: provided, however, that not less than twelve months' previous notice to that effect was given to plt.:

—**Held**: the maxim "*expressio unius est exclusio alterius*" cannot be applied to such contract for the purpose of holding plt. liable to supply the water without any limit of time, whilst deft. is at liberty to terminate the agreement by giving the notice required of him.—**UITENHAGE MUNICIPALITY v. COLONIAL GOVERNMENT** (1892), 9 S. C. 375.—**S. AF.**

a. —Grant of rentcharge—Provision for apportionment.—A tenant for life granted a rentcharge to a relative, as a suitable provision for her; with an apportionment clause on the grantee's death between two gale days. The grantor died between two

gale days, leaving the grantee surviving.—**Held**: the ct. could not imply an intention that there should be an apportionment on the death of the grantor, having regard to the express apportionment clause on the death of the grantee in the life-time of the grantor.—**LEATHLEY v. TRENCH** (1858), 8 I. Ch. R. 401.—**IR.**

b. —Provision as to issue.—Where there is an express gift of life-rent in a marriage settlement to the husband in the event of there being no issue, a gift of a life-rent to him should not be implied from the postponement of payment to the children until his decease.—**BATE'S TRUSTEES v. BATE** (1906), 8 F. (Ct. of Sess.) 861; 43 So. L. R. 660; 14 S. L. T. 95.—**SCOT.**

1113. — Company's articles of association.]—NORTH STAFFORD STEEL, ETC. CO. v. WARD, No. 1104, *ante*.

— Powers.]—See POWERS.

— Wills.]—See WILLS.

1114. Exclusion of rule—In Crown grants.]—EASTERN ARCHIPELAGO CO. v. R., No. 1079, *ante*.
Verba fortius accipiuntur contra proferentem—In Crown grants.]—See Sub-sect. 19, B. (c), *ante*.
Construction of Crown grants generally.]—See CONSTITUTIONAL LAW, Vol. XI., p. 564 *et seq.*

SUB-SECT. 22.—EXPRESSIO EORUM QUAE TACITE INSUNT NIHIL OPERATUR.

1115. Statement of rule—Expression of terms implied by law has no effect.]—BOROUGHES'S CASE (1596), 4 Co. Rep. 72 b; 76 E. R. 1048; *sub nom.* BURROUGH v. TAYLOR, Moore, K. B. 404; Cro. Eliz. 462; *sub nom.* ANON., Gouldsb. 124.
Annotation:—*Mentd.* Hassell d. Hodgson v. Gouthwaite (1744), Willes, 500.

1116. — — —.]—STUKELEY v. BUTLER (1614), Hob. 168; 80 E. R. 316; *sub nom.* STEWKEY v. BUTLER, Moore, K. B. 880.

Annotations:—*Apld.* Cardigan v. Armitage (1823), 2 B. & C. 197. *Refd.* Idle v. Cooke (1705), 2 Ld. Raym. 1144; Bradley v. Peixoto (1797), 3 Ves. 324; Ambatielos v. Anton Jurgens Margarine Works, 1923 2 A. C. 175. *Mentd.* Foote v. Berkley (1664), O. Bridg. 527; Sur Le Stat (1675), Freem. K. B. 203; Jones v. Chorney (1680), Freem. K. B. 530; Spencer v. Durant (1688), 1 Show. 8; Cudlip v. Rundall (1691), 12 Mod. Rep. 14; R. v. Larwood (1694), 1 Ld. Raym. 29; Ward v. Everard (1698), 1 Salk. 390; Fisher v. Wigg (1701), 1 Ld. Raym. 622; Bridgwater v. Bolton (1704), 1 Salk. 236; Law v. Davis (1729), 2 Stra. 849; Ryall v. Rowles (1750), 1 Ves. Sen. 348; Knight v. Preston (1767), 2 Wils. 332; Roe d. Conolly v. Vernon (1804), 5 East, 51; Burton v. Barclay (1831), 7 Bing. 745; London & Westminster Loan & Discount Co. v. Drake (1859), 5 Jur. N. S. 1407; Phillips v. Ball (1859), 6 C. B. N. S. 811; Hardwick v. Hardwick (1873), 42 L. J. Ch. 636.

1117. Application of rule—Confined to words superfluous in particular clause.]—STUKELEY v. BUTLER, No. 1116, *ante*.

1118. — Lease—Reservation to sole use & occupation of grantor.]—HAVER v. CLIFTON (1567), Ben. & D. 181; 123 E. R. 126; *sub nom.* HABER v. CLIFTON, 1 And. 52; *sub nom.* HORNEBY v. CLIFTON, 3 Dyer, 264 b.

Annotations:—*Refd.* Stukeley v. Butler (1614), Hob. 168. *Mentd.* Wilson v. Arnourer (1671), T. Raym. 307; Cudlip v. Rundall (1691), 12 Mod. Rep. 14; Idle v. Cooke (1705), 2 Ld. Raym. 1144; Cooper v. Stuart (1889), 14 App. Cas. 286.

1119. — — — Proviso for re-entry on non-payment of rent lawfully demanded—Right to re-enter without demand.]—Upon a lease reserving rent payable quarterly, with a proviso that if the rent be in arrear 21 days next after day of payment being lawfully demanded, the lessor may re-enter. Five quarters being in arrear, & no sufficient distress on the premises:—*Held*: the lessor might re-enter without a demand.

I think there was no necessity for a demand of the rent on the premises. The right to re-enter grows out of the stipulation of the parties. A demand is necessary as a consequence of land, & there was the same necessity for a demand before the statute whether the lease contained the words lawfully demanded or not. Therefore the maxim applies *expressio eorum quae tacite insunt nihil operatur* (DAMPIER, J.).—DOE d. SCHOLEFIELD v. ALEXANDER (1814), 2 M. & S. 525; 105 E. R. 477.

Annotations:—*Refd.* Doe d. Shrewsbury v. Wilson (1822), 5 B. & Ald. 363. *Mentd.* Mayor v. Croome (1823), 1 Bing. 261.

1120. — Absolute grant of trees—Express power to cut & carry away—Implied power to do

so not restricted.]—STUKELEY v. BUTLER, No. 1116, *ante*.

1121.* — Covenant to distrain.]—A covenant to distrain is idle, for a man may distrain of common right.—SWYNEBTON v. MILLS (1617), 1 Brownl. 178; 123 E. R. 740.

1122. — Continuing grant of right of drainage—With express power to make pits for repairs—Implied power to do so not restricted.]—A. & B. being severally seised of parcels of woody ground, & B. having other lands adjoining to his woody ground, & intending to make a colliery under his ground, A. granted to B. his heirs & assigns, liberty for him, his heirs & assigns, to carry up a sough or drain through A.'s woody ground into B.'s woody ground, & also liberty for B. his heirs & assigns, to make two little sough pits in A.'s woody ground, for the more easy & safe carrying up the tail of the sough, one of which was to be covered in as soon as conveniently might be after making the sough, & the other to be kept open for examining the sough so long as was necessary for that purpose:—*Held*: by the grant to B. his heirs, etc., of the liberty of making the sough in A.'s land, the liberty of making sough pits at any time afterwards, while the object of the grant remained, being necessary for the purpose of repairing the sough, passed as incident thereto; the liberty of making new sough pits for necessary repairs of the sough, after the two original sough pits had been covered in by mutual consent, was not controlled by the special liberty given for making such original sough pits, the uses of which were limited by the grant; it appearing upon the face of it that the grant of the sough was intended to have continuing operation while any coals in B.'s woody ground & adjoining lands remained to be gotten.—HODGSON v. FIELD (1806), 7 East, 613; 3 Smith, K. B. 538; 103 E. R. 238.

Annotation:—*Apld.* Cardigan v. Armitage (1823), 2 B. & C. 197.

1123. — Grant of land—Reservation of minerals to grantor & his heir—General right of assigns not restricted.]—CARDIGAN (EARL) v. ARMITAGE, No. 1062, *ante*.

1124. — Mortgage—Covenant by mortgagors to pay expenses.]—A mtge. deed for £3,000 contained a power of sale & leasing to secure the principal & all expenses, with interest. There was also a covenant to pay principal & interest, & all expenses, with interest on the amount of them:—*Held*: not a security for an uncertain & indefinite amount under Stamp Act, 1815 (c. 184), sched. part 1, & that a £9 stamp was sufficient.

The mtgee. here would have been in no worse situation if the deed had contained no stipulation for the expenses; & *expressio illorum quae tacite insunt nihil operatur* (ALDERSON, J.).—DOE d. SCRUTON v. SNAITH (1832), 8 Bing. 146; 1 Moo. & S. 230; 131 E. R. 356.

Annotations:—*Refd.* Wroughton v. Turtle (1843), 1 Dow. & L. 473. *Mentd.* Wills v. Moot (1834), 4 Tyr. 726; Doe d. Jarman v. Larder (1836), 2 Hodg. 186; Doe d. Merceron v. Bragg (1838), 8 Ad. & El. 620; Barkor v. Smart (1841), 7 M. & W. 690; Parker v. Smart (1841), H. & W. 85; Frith v. Rotherham (1846), 15 M. & W. 39; Sumfield v. I. & Co., [1908] 1 K. B. 865.

1125. — Deed by way of security—Reservation of equity of redemption.]—I take the general rule of law to be that where the purpose of a deed is security merely, the reservation of the equity of redemption will not alter the right (TURNER, L.J.).—PARKER v. HILLS (1859), 33 L. T. O. S. 46; 5 Jur. N. S. 809, L. J.J.; *on appeal*, *sub nom.* HILLS v. PARKER (1861), 4 L. T. 746, H. L.

Whether additional stamp duty necessitated by express clause.]—See REVENUE.

Sect. 3.—Rules of construction: Sub-sects. 23, 24 & 25.]

SUB-SECT. 23.—MALA GRAMMATICA NON VITIAT CHARTER.

See Sect. 5, sub-sect. 1, *post*.

SUB-SECT. 24.—REJECTION, SUPPLY AND TRANSPOSITION OF WORDS, CLAUSES, ETC.

See Sect. 5, sub-sect. 2, *post*.

SUB-SECT. 25.—SEVERAL INSTRUMENTS.

Contemporaneous execution of deeds, *see* Part I., Sect. 5, sub-sect. 8.

1126. Whether construed as one deed—General rule.]—The question, whether several deeds are part of the same transaction, or are separate & distinct transactions, depends on the surrounding circumstances, & not simply upon the fact whether the deeds are, or are not, by express reference grafted into or connected with each other.—**HARMAN v. RICHARDS** (1852), 10 Hare, 81; 22 L. J. Ch. 1086; 68 E. R. 847.

Annotations:—Mentd. Carter v. Hind (1853), 22 L. T. O. S. 116; Holmes v. Penney (1856), 3 K. & J. 90; *Re* Johnson, Golden v. Gillam (1881), 20 Ch. D. 389; Gelsse v. Taylor & Hartland, Weston, Claimant (1905), 93 L. T. 534.

1127. —.]—HEATHER v. O'NEIL, No. 672, *ante*.

1128. —.]—Instruments carrying out same transaction.]—CHEEK v. LISLE (VI' COUNT) (1673), *Cas. temp.* Finch, 98; *Freem.* Ch. 302, 303; *Freem.* K. B. 302; 23 E. R. 53.

Annotation:—Mentd. Feversham v. Watson (1677), *Freem.* Ch. 35.

PART III. SECT. 3, SUB-SECT. 25.

1128 i. Whether construed as one deed —Instruments carrying out same transaction.]—The declaration set out that the *pltf.* was assignee of a *mtgo.* made by one A. to B., containing a power of sale, under which he sold to *deft.* for less than the *mtgo.* money, & *deft.* covenanted that in case any chancery proceedings arising out of the sale payable by *pltf.*, *deft.* would pay any costs or charges incurred by *pltf.* by reason of such chancery proceedings: that afterwards R. filed a bill, to which *pltf.* & *deft.* were made parties, whereupon the sale was set aside, *pltf.* being ordered to pay his own costs of defence, etc.; & these costs *pltf.* claimed to recover. *Deft.* set out two agreements between himself & *deft.*, of the same date, which he alleged formed part of one transaction & constituted the sale. By the first the *pltf.* agreed to sell the land to *deft.* for £400, £50 to be paid down, & forfeited on non-payment of the balance within a month; a deed to be given on payment in full. By the second it was agreed that if the *pltf.* should fail to make the balance of his *mtgo.* money from A., *deft.* covenanted as above. The plea then stated the bill in chancery, & the setting aside the sale: that afterwards R. paid the money & interest to *pltf.*, who gave up to him all his interest in the land; & that in the chancery suit each party was ordered to pay his own costs; that *pltf.* never completed the sale, or gave *deft.* any title; & that the consideration for *deft.*'s covenant failed, & his agreement was done away with by the decree.—**Held:** the plea showed no ground for absolving *deft.* from his express covenant, which was independent of *pltf.*'s covenant to give the deed, & he was liable to pay *pltf.*'s costs incurred to his own solr., not merely costs given against him in favour of other parties.—**EVANS v. TURLEY** (1864), 23 U. C. R. 282.

—CAN.

1128 ii. —.]—The declaration charged that *defts.* sold & *pltf.* bought 14,000 bushels of barley at a certain price, to be delivered to *pltf.*, when called for, on board a certain vessel, to be paid for on getting a receipt; that *pltf.* then paid *deft.* \$200 on account, & called for delivery—assigning, as a breach, the non-delivery. The evidence of the contract consisted of a writing purporting to be a receipt, dated Sept. 29, 1868, signed by *defts.*, for \$200, which was therein stated to have been paid "as part margin" on a cargo of barley sold by *defts.* to *pltf.*, to be delivered when called for, & to be paid for on getting the receipt of the captain of the vessel; & also another writing signed by both parties at the same time, but before the receipt was signed, & of the same date, & being a memorandum of the sale of the barley in question, from which it appeared that the barley was to be delivered on the following Thursday, that the "margin" to be paid was \$1,000, & that the residue (\$800) was to be paid by *pltf.* on the same day that the \$200 was paid.—**Held:** the two writings must be read as incorporated the one with the other, & that the true contract was to be deduced from reading both together.—**PHIPPEN v. HYLAND** (1869), 19 C. P. 416.—CAN.

1128 iii. —.]—A lease of land for 25 years containing a covenant by the lessee not to assign without leave, was executed contemporaneously with an agreement by the lessee to purchase from the lessor a building on the land, which agreement contained a covenant by the lessee to pay the purchase money by instalments & to insure, & gave the lessor the right to cancel the agreement "upon breach of any of the covenants herein contained." The only reference to the agreement in the lease was contained in a proviso, "the first month's rent to be paid on

1129. —.]—The doctrine as to contemporaneous documents rest on this, that when documents are actually contemporaneous, that is, two deeds executed at the same moment, a very common case, & within so short an interval that having regard to the nature of the transaction the ct. comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are all treated as one deed (**JESSEL, M.R.**).—**SMITH v. CHADWICK** (1882), 20 Ch. D. 27; 51 L. J. Ch. 597; 46 L. T. 702; 30 W. R. 661, C. A.; on appeal (1884), 9 App. Cas. 187, H. L.

Annotations:—Refd. Moore v. Explosives Co. (1887), 56 L. J. Q. B. 235; Andrews v. Mockford (1896), 73 L. T. 726. **Mentd.** Bellairs v. Tucker (1884), 13 Q. B. D. 562; Edgington v. Fitzmaurice (1885), 29 Ch. D. 459; Hughes v. Twisden (1886), 55 L. J. Ch. 481; Smith v. Reed (1886), 2 L. R. 442; *Re* London & Leeds Bank, *Ex p.* Carling, Carling v. London & Leeds Bank (1887), 56 L. J. Ch. 321; Capel v. Sim's Ships Compositions Co. (1888), 57 L. J. Ch. 713; Arnison v. Smith (1889), 41 Ch. D. 348; Derry v. Peek (1889), 14 App. Cas. 337; Glasier v. Rolls (1889), 42 Ch. D. 436; Angus v. Clifford, [1891] 2 Ch. 449; Knox v. Hayman (1892), 67 L. T. 137; *Re* Metropolitan Coal Consumers Assocn., Karberg's Case (1892), 66 L. T. 700; McKeown v. Boudard-Peveril Gear Co. (1896), 65 L. J. Ch. 735; Greenwood v. Leather Shod Wheel Co., [1900] 1 Ch. 421; Cackett v. Keswick, [1902] 2 Ch. 456; Broome v. Speak, [1903] 1 Ch. 586; Calthorpe v. Trechmann (1905), 75 L. J. Ch. 90; Nash v. Calthorpe, [1905] 2 Ch. 237; Macleay v. Tait, [1906] A. C. 24; Shephard v. Bray, [1906] 2 Ch. 235; Pearson v. Dublin Corpn., [1907] A. C. 351; Tackey v. McBain, [1912] A. C. 186.

1130. —.]—Deed & fine—Two instruments forming one assurance.]—A lessor conveyed by deed indented & inrolled, & by a fine, the demised lands to his lessee & others, & their heirs, to the use of them & their heirs, to the intent that a common recovery should be had against them to the use of a third person & his heirs.—**Held:** the

the execution of an agreement of even date, etc. The lessee sub-let the premises for ten years, & did not pay the instalments of purchase money under the agreement, or insure. The action was to cancel the agreement, lease & sub-lease for such breaches. The sub-lessee set up in his defence that the lease & sub-lease were registered & that the agreement was not.—**Held:** the agreement & its covenants were independent of the lease & its covenants.—**GRIFFITHS v. CANONICA** (1896), 5 B. C. R. 67.—CAN.

1128 iv. —.]—When two or more deeds or instruments act upon the one & same subject-matter they ought to be considered & construed as one & the same instrument, & each is to be made auxiliary to the other, to come at the true sense & meaning of the whole.—**ATKINSON v. PILLSWORTH** (1787), 1 Ridg. Parl. Rep. 449; Vern. & Scr. 161.—IR.

1128 v. —.]—An eldest son, on succeeding to the estate of his father, granted, in 1814, bonds of provision to his mother, & sisters, on the narrative of onerous causes, of his father having been prevented by death from doing so, & of love & favour; thereafter the mother, in 1817, executed a deed, of the nature of a deed of settlement, conveying to the son certain rights & narrating that the bonds of 1814 were granted "on condition that I should execute the deed underwritten": & no reduction of this deed was brought.—**Held:** although not formally executed till 1817, it was to be held as connected with the bonds in 1814, so as to be parts of one agreement, & subsequent deeds made by the mother, not onerous, were reducible in so far as they were inconsistent with, & expressed or imported a revocation or alteration of the first deed.—**STEWART v. STEWART** (1842), 1 Bell Sc. App. 796.—SCOT.

term was merged & extinct until the recovery suffered; but after the recovery, the uses would be guided by the bargain & sale, & the term & rent revived.—*FERRERS v. FERMOR* (1622), Cro. Jac. 643; 79 E. R. 554.

Annotation.—*Mentd.* Doe d. Atkyns v. Horde (1777), 2 Cowp. 689.

1131. ———— *]*—*LEICESTER'S (EARL) CASE* (1675), 1 Vent. 278; 86 E. R. 186.

Annotations.—*Reid.* Fitzgerald v. Fauconberge (1729), Fitz-G. 207; Hawkins v. Kemp (1803), 3 East, 410. *Mentd.* Whelan v. Palmer (1888), 39 Ch. D. 648.

1132. ———— *]*—*MORLEY v. JONES* (1698), Show. Parl. Cas. 140; 1 E. R. 96, H. L.; *affg.* S. C. *sub nom.* JONES v. MORLEY (1697), 1 Ld. Raym. 287.

1133. ———— *]*—*FLEETWOOD v. TEMPLEMAN* (1740), Barn. Ch. 187; 2 Atk. 79; 27 E. R. 607, L. C.

1134. ———— *]*—Although it be a maxim in law, that there shall be no saving out of a deed, or a record, by any collateral deed or record, & that no deed or record, shall be construed, or ruled by any thing, except itself; yet in cases of common assurance, as fines, recoveries, & feoffments, another instrument may, by the agreement of the parties, lead their uses & create savings, limitations & conditions (ALEXANDER, C.B.).—*DAVIES v. BUSH* (1824), M'Cle. & Yo. 58; 148 E. R. 324.

Annotations.—*Reid.* Doe d. Bruno v. Martyn (1828), 8 B. & C. 497. *Mentd.* Alexander v. Mills (1870), 6 Ch. App. 126, n.

1135. ———— *Deed recovery & fine.*—*CROMWELL'S (LORD) CASE, CROMWELL (LORD) v. ANDREWS* (1601), 2 Co. Rep. 69 b; Jenk. 252; Moore, K. B. 471; 76 E. R. 574.

Annotations.—*Reid.* Drury's Case (1608), 6 Co. Rep. 73 a; Adeson v. Otway (1677), Freem. K. B. 227; Jones v. Morley (1697), 12 Mod. Rep. 159; Doe d. Odiarne v. Whitehead (1759), 2 Burr. 704; Davies v. Bush (1824), M'Cle. & Yd. 158; Doe d. Bruno v. Martyn (1828), 7 L. J. O. S. K. B. 60. *Mentd.* Harvy v. Thomas (1591), Cro. Eliz. 216; Frances's Case (1609), 8 Co. Rep. 89 b; Bowles's Case (1615), 11 Co. Rep. 79 b; R. v. Zakar (1615), 3 Bulst. 88; Allen v. Wedgewood (1616), 3 Bulst. 168; Havergill v. Hare (1616), 3 Bulst. 250; Eaton v. Butler (1628), W. Jo. 180; Smith v. Farnaby (1666), Cart. 52; Dixon v. Harrison (1669), Vaugh. 36; Davies v. Kempe (1676), Cart. 2; Ratcliffe's Case (1719), 1 Stra. 267; Roe d. Wrangham v. Hersey (1771), 3 Wils. 274; Clifford v. Turrell (1845), 14 L. J. Ch. 390; Crofts v. Middleton (1856), 8 De G. M. & G. 192; Gilbertson v. Richards (1860), 5 H. & N. 453; Berkeley Peerage (1861), 8 H. L. Cas. 21.

1136. ———— *Deed & recovery.*—If there be a parish & a vill within the parish of the same name, & a recovery is suffered of lands in the vill, & in the deed to lead the uses the parish is not named, yet, as they make but one conveyance, the lands in the parish do pass.—*ADDISON v. OTWAY* (1677), 2 Mod. Rep. 233; 86 E. R. 1044.

Annotation.—*Mentd.* Ridgdon v. Hedges (1698), 12 Mod. Rep. 246.

1137. ———— *Lease, release & fine.*—Deeds of lease & release, & a fine levied in pursuance by tenant in tail discontinue remainders in tail.

The intention of the parties here plainly was to bar the estate tail, & remainders & that was a lawful intention. The whole of the uses in the release were meant by the parties to arise out of the fine, & they had no idea that it would do without it. The lease, release & fine were intended altogether to fulfil the parties' intention (LORD MANSFIELD, C.J.).—*DOE d. ODIARNE v. WHITEHEAD* (1758), 2 Keny. 346; 2 Burr. 704; 96 E. R. 1205.

Annotations.—*Reid.* Tyrrell v. Marsh (1825), 3 Bing. 31; Moulst v. Massey (1830), 1 B. & Ad. 636.

1138. ———— *Marriage settlement & memorandum signed by husband.*—A settlement will control a writing executed after, but the parties refusing to execute the settlement without it, they

must be construed as one entire agreement, & both consistent.—*TYRRELL v. HOPE* (1743), 2 Atk. 558; 26 E. R. 735.

Annotations.—*Reid.* Blacklow v. Laws (1842), 2 Hare, 40. *Mentd.* Shaw v. Jakeman (1803), 4 East, 201; Dye v. Dye & Beloe (1883), 47 J. P. 520.

1139. ———— *Marriage settlement followed by second settlement.*—*Re GUNDRY, MILLS v. MILLS*, [1898] 2 Ch. 504; 67 L. J. Ch. 641; 79 L. T. 438; 47 W. R. 137.

1140. ———— *Absolute conveyance & covenant for redemption.—Executed at same time.*—Where there was an absolute conveyance & a covenant for redemption by a separate instrument, executed at the same time:—*Held*: the two instruments must be taken together & constitute a common mtge.—*WILLIAMS v. OWEN* (1839), 10 Sim. 386; 9 L. J. Ch. 70; 3 Jur. 1186; 59 E. R. 664; *on appeal* (1840), 5 My. & Cr. 303, L. C.

Annotations.—*Reid.* Newton v. Chorlton (1853), 2 Drew. 333; Farebrother v. Wodehouse (1856), 23 Beav. 18; Gossip v. Wright (1863), 2 New Rep. 152; Forbes v. Jackson (1882), 19 Ch. D. 615. *Mentd.* Alderson v. White (1857), 30 L. T. O. S. 206; Drew v. Lockott (1863), 32 Beav. 499; Dawson v. Bank of Whitehaven (1877), 4 Ch. D. 639; Nicholas v. Ridley, [1904] 1 Ch. 192.

1141. ———— *Though bearing date of four consecutive days.*—Four deeds, though bearing date on four consecutive days, held to be necessarily connected together, & to form one transaction.—*FORD v. STUART* (1852), 15 Beav. 493; 21 L. J. Ch. 514; 51 E. R. 629.

Annotations.—*Mentd.* Kelson v. Kelson (1853), 10 Hare, 395; Clarke v. Wright (1861), 7 Jur. N. S. 1032.

1142. ———— *By a deed of 1815, estates were settled upon the husband for life, remainder to the wife for life, remainder to the right heirs of the survivor of them; & there was a joint power of revocation & new appointment to the husband & wife. By an indenture of June 30, 1817, the husband & wife revoked the uses of the last deed & appointed to such uses as the husband alone should appoint. By a deed poll of July 1, 1817, the husband re-settled the estates to such uses as he & his wife should jointly appoint, & subject thereto, to the use of himself for life, remainder to his wife for life, remainder to their son W. in fee; & by an indenture dated July 2, 1817, the husband & wife, under their joint power contained in the deed poll of the previous day, mortgaged the premises. In a contest between W. & a purchaser from the husband, who survived his wife:—*Held*: the deed poll of July 1, 1817, was not a voluntary deed, alterations in the deed of July 2 showing to the satisfaction of the ct. that the three deeds formed but one transaction.—*WHITBREAD v. SMITH* (1854), 3 De G. M. & G. 727; 2 Eq. Rep. 377; 23 L. J. Ch. 611; 23 L. T. O. S. 2; 18 Jur. 475; 2 W. R. 177; 43 E. R. 286, L. C. & L. J.*

Annotations.—*Mentd.* Sharshaw v. Gibbs (1854), Kay. 333; Heather v. O'Neill (1858), 2 De G. & J. 399.

1143. ———— *Absolute licence to use patent.—Contemporaneous deed restraining exercise.*—Declaration by assignee of a patent for improvements in machinery, for its infringement by deft., by making, selling & counterfeiting the patented machines. Plea, that the patentee died intestate while the patent was vested in him; that his administrator granted by deed to S. & A., & to such persons as they should from time to time license, empower, or authorise, exclusive liberty & license to make, use & vend the invention throughout England & Wales, Berwick-upon-Tweed, Scotland & Ireland; that S. & A. granted & assigned to deft., the exclusive liberty & licence; & that the alleged infringement was an exercise of that liberty, & licence. Replication, that, by

Sect. 3—Rules of construction: Sub-sect. 25. Sect. 4: Sub-sect. 1.]

a certain other deed of the same date as the deed of licence to S. & A. It was agreed that S. & A. should not manufacture machines, under or by virtue of the licence, for sale out of Great Britain & Ireland. Of all which deft. before the granting & assignment of the licence by S. & A., to him, had notice. Averment of breaches by deft. by manufacturing the patented machines in England for sale out of England:—*Held*: the replication was bad, as the licence to S. & A. & the contemporaneous deed were not to be read as one deed, & therefore the absolute terms of the former were not qualified by the covenants in the latter.—*SCHLUMBERGER v. LISTER* (1860), 2 E. & E. 870; 80 L. J. Q. B. 3; 3 L. T. 549; 6 Jur. N. S. 1336; 9 W. R. 138; 121 E. R. 320.

SECT. 4.—ADMISSION OF EXTRINSIC EVIDENCE.

SUB-SECT. 1.—TO SHOW INTENTION OF PARTIES.

Admission of evidence of custom & usage.]—See CUSTOM & USAGES.

1144. Evidence inadmissible.]—A husband in his lifetime gave a bond in trust to secure to his wife £400 in case she survived; parol evidence to show it was intended at the time of lieu of dower & that the wife acknowledged it to be so cannot be allowed, being within the Stat. of Frauds.—*TINNEY v. TINNEY* (1743), 3 Atk. 8; 26 E. R. 807, L. C.

1145. —.]—*DORAN v. ROSS* (1789), 3 Bro. C. C. 27; 1 Ves. 57; 29 E. R. 388, L. C.

1146. —.]—Evidence to prove the intention of the parties to a settlement refused.—*BRYDGES*

v. CHANDOS (DUCHESS) (1794), 2 Ves. 417; 80 E. R. 702, L. C.; *affd. sub nom. CHANDOS (DUCHESS) v. BRYDGES (LADY)* (1795), 7 Bro. Parl. Cas. 505, H. L.

Annotations:—*Mentd. Williams v. Owens* (1785), 2 Ves. 595; *Cave v. Holford* (1798), 3 Ves. 650; *Harwood v. Oglander* (1803), 8 Ves. 106; *Rawlins v. Burgis* (1814), 2 Ves. & B. 382; *Andrew v. Andrew* (1855), 25 L. T. O. S. 30; *Grant v. Bridger* (1866), L. R. 3 Eq. 347.

1147. —.]—By the rule of law, independent of the statute, parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry that the rule of law was adopted. Though the written instrument does not contain the terms it must in contemplation of law be taken to contain the agreement, as furnishing better evidence than any parol can supply (*SIR WILLIAM GRANT, M.R.*).—*WOOLLAH v. HEARN* (1802), 7 Ves. 211; 32 E. R. 86.

Annotations:—*Reid. Squire v. Campbell* (1836), 1 My. & Cr. 459; *Olley v. Fisher* (1886), 34 Ch. D. 367; *Henry v. Smith* (1895), 39 Sol. Jo. 559; *Fowler v. Sugden* (1916), 85 L. J. K. B. 1090; *Forgione v. Lewis*, [1920] 2 Ch. 326. *Mentd. Garrard v. Grinling* (1818), 2 Swan. 244; *Flight v. Gray* (1857), 3 C. B. N. S. 320; *May v. Platt*, [1900] 1 Ch. 618; *Thompson v. Hickman*, [1907] 1 Ch. 550; *Craddock v. Hunt*, [1923] 2 Ch. 136.

1148. —.]—A. executed a release to B., in which, after mentioning certain sums she expressed that she had agreed to release B. from those sums, & of & from all or any other sum or sums of money, thereby secured:—*Held*: no extrinsic evidence could be admitted to explain the intention of A. as to the release.—*BUTCHER v. BUTCHER* (1804), 1 Bos. & P. N. R. 113; 127 E. R. 401.

1149. —.]—If a written contract for the sale of goods specifies no time for delivering them, in an action for not delivering them, it is not competent for deft. to give parol evidence that it was a condition of sale that the goods should be taken away

PART III. SECT. 4, SUB-SECT. 1.

1144 i. Evidence inadmissible.]—On a motion for an injunction to restrain a mortgagee from selling certain mortgaged premises, of which he had taken possession for breach of covenants contained in a mortgage & a bill of sale, extrinsic evidence was tendered to show the nature of the transaction:—*Held*: in the absence of fraud such evidence was not admissible to interpret the deeds, & that by strict interpretation it must be assumed that the advance was made as alleged.—*MEISKIN v. MIKLEJOHN* (1870), 2 Q. S. C. R. 59.—*AUS.*

1144 ii. —.]—Parol evidence cannot be received that a deed absolute in its terms was intended only as a security.—*GILMOUR v. HAYES* (1844), 6 O. S. 631.—*CAN.*

1144 iii. —.]—The ots., in order to ascertain the intention of the parties, must look to the writing alone, & not to the statement of the parties themselves or their witnesses.—*ODIT NARAIN v. MAHRSHUR BUX SINGH* (1866), *Agra*. F. B. 52.—*IND.*

1144 iv. —.]—A deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The deeds were followed by transfer of possession to the vendee & his receipt of the profits. The vendor did not exercise his right of re-purchase; but after many years gave notice of his intention to redeem, & brought this suit to enforce his right of redemp-

tion as upon a mtge. by conditional sale:—*Held*: oral evidence for the purpose of ascertaining the intention of the parties to the deeds was not admissible.—*PAIKISHEN DAS v. LEGGE* (1899), L. L. R. 22 All. 149; L. R. 27 Ind. App. 58; 4 C. W. N. 153.—*IND.*

1144 v. —.]—By a written agreement, A. agreed to let to B. a slip of ground, bounded on the north by a road dividing lot from T.'s holding. At the corner of the agreement, under the signatures, was the following memorandum, signed with B.'s initials: The little angle at the road, opposite to T.'s, to be added to the road. The little angle was at the south side of T.'s road. The lease executed, in pursuance of the agreement, stated the lot to be bounded, on the north by a road dividing lot from T.'s holding; & referred to a map, which erroneously described T.'s road as a straight line, instead of a curve, & did not contain the memorandum at foot of the agreement:—*Held*: parol evidence was not admissible to show that it was intended that the angle should be excluded from the lease.—*GRAY v. BOSWELL* (1863), 13 I. Ch. R. 77.—*IR.*

1144 vi. —.]—Evidence is not admissible to prove that the meaning of the parties to an agreement was different from what it appears to be by the written terms of such agreement, taken in their usual & ordinary sense.—*NEWPORT v. THOMAS & PURCELL* (1823), 1 Nfld. L. R. 373.—*NFLD.*

1144 vii. —.]—The ct. will not infer an agreement to employ where a con-

tract to do so does not appear on the face of the agreement, although both parties may have contemplated an employment. Parol evidence is inadmissible to explain the intention of the parties in making such agreement.—*SENIOR v. SCAIFE* (1854), 3 N. Z. L. R. 69.—*N.Z.*

1144 viii. —.]—While parties to a deed may be allowed to prove a clerical error, they will not be allowed to prove intention for the purpose of affecting the construction of the deed.—*NORTH BRITISH INSURANCE CO. v. TUNNOCK & FRASER* (1864), 3 Macph. (Ct. of Sess.) 1.—*SCOT.*

1144 ix. —.]—Evidence of statements made by the parties at the time of entering into a written agreement or thereafter is not admissible to explain the meaning of words used in such written agreement or the intention of the parties.—*BURGER v. SCHEARTZ* (1907), 24 S. C. 650.—*S. AF.*

e. — On failure to show any ambiguity.]—*MATHEWS v. HOLMES* (1855), C. R. 2 A. C. 230; 3 Gr. 379; 5 Gr. 1; 9 Moo. P. C. C. 413.—*CAN.*

d. Evidence admissible.]—*HILLOCK v. FRIZZLE & SALTER* (1863), 5 All. 655.—*CAN.*

e. —.]—Although collateral evidence is admissible to show that notwithstanding the plain terms of an absolute transfer of property, it was intended that the transferor should have a right of redemption, the evidence must be of the clearest & most conclusive character to overcome the presumption that the deed of transfer truly states the transaction.—

immediately.—**GREAVES v. ASHLIN** (1813), 3 Camp. 426, N. P.

Annotations.—**Fidd. Ford v. Yates** (1841), 2 Man. & G. 549. **Reid. Startup v. Macdonald** (1841), 2 Man. & G. 395; **Spartali v. Bencke** (1850), 10 C. B. 212; **Harnor v. Groves** (1855), 3 W. R. 188.

1150. —.]—In coming to this conclusion, I have been bound to exclude all parole evidence of intention. The effect of a grant must be learnt from the deed itself; & in construing it, the policy of the law does not permit a reference to extrinsic facts (**LEACH, V.-C.**).—**STEWART v. STUART, STUART & STREET v. STEWART** (1823), as reported in 1 L. J. O. S. Ch. 61.

1151. —.]—On motion to set aside a warrant of attorney, on the ground of its amounting to a charging of the benefice, contrary to 13 Eliz. c. 20, s. 1, the ct. will not travel out of the warrant; therefore, affidavits *dehors* the instrument cannot be read to show what was the intention of the parties.—**BISHOP v. HATCH** (1840), 7 Dowl. 763; 4 Jur. 318.

1152. —.]—A written contract for the sale of hops for 78s. sufficiently shows that the payment is to be on delivery, & in an action for non-delivery evidence is not admissible on the part of pltf. to show that it was the intention of the parties that pltf. should have six months' credit.—**FORD v. YATES** (1841), 2 Man. & G. 549; **Drinkwater**, 109; 2 Scott, N. R. 645; 10 L. J. C. P. 117; 133 E. R. 866.

Annotations.—**Consd. Lockett v. Nicklin** (1848), 2 Exch. 93. **Reid. Spartali v. Bencke** (1850), 10 C. B. 212; **Muttilloll Seal v. Dent** (1853), 5 Moo. Ind. App. 328; **Brown v. Byrne** (1854), 18 Jur. 700; **Humfrey v. Dale** (1858), 5 Jur. N. S. 191; **Fild v. Lelean** (1861), 6 H. & N. 617; **Howard v. Sheward** (1866), 15 W. R. 45.

1153. —.]—**SHORE v. WILSON**, No. 688, *ante*.

1154. —.]—You cannot explain the contents of a written document by evidence of what the parties said or intended at the time, if not contained in the writing itself (**DR. LUSHINGTON**).—**THE GLASGOW PACKET** (1844), 2 Wm. Rob. 306; 3 Notes of Cases, 107; 3 L. T. O. S. 263; 8 Jur. 674.

1155. —.]—The intention of the parties to the instrument is to be the criterion; but that is in general to be ascertained from the words of the instrument. We may indeed look at the circumstances which occurred at the time, in order to understand what the parties were about; but when, as here, a bond has an express meaning in

the words which it contains, we are not to admit any evidence to diminish or enlarge its meaning (**COLEBRIDGE, J.**).—**LONDON ASSURANCE CO. v. BOLD** (1844), 6 Q. B. 514; 14 L. J. Q. B. 50; 4 L. T. O. S. 112; 8 Jur. 1118; 115 E. R. 192.

Annotations.—**Reid. Montefiore v. Lloyd** (1863), 15 C. B. N. S. 203. **Mentd. Mills v. Alderbury Union** (1849), 3 Exch. 590.

1156. —.]—Where a written agreement had been entered into, to perform a certain specified service for a specified reward, such agreement not being alleged to be fraudulent, or to have been cancelled by mutual consent, the ct. refused to interpret the agreement with reference to verbal contemporaneous conditions.—**THE REPULSE** (1845), 2 Wm. Rob. 306; 4 Notes of Cases, 141; 7 L. T. 225; 9 Jur. 738.

Annotations.—**Reid. The Tecumseh** (1850), 3 Wm. Rob. 144; **The Macgregor Laird**, [1867] W. N. 308; **The Waverley** (1871), L. R. 3 A. & E. 369.

1157. —.]—**SOTILICHOS v. KEMP** (1848), 3 Exch. 105; 18 L. J. Ex. 36; *sub nom.* **PROTHELIKOS v. KEMP**, 12 L. T. O. S. 222.

Annotation.—**Reid. Macdonald v. Longbottom** (1860), 6 Jur. N. S. 724.

1158. —.]—In construing a contract or conveyance, the ct. cannot, where the terms are clear, look to extrinsic circumstances to discover the intention of the parties, but can look only at those terms, & (if necessary, by reason of any ambiguity) to the nature of the thing conveyed, or the subject of the contract; & they are bound by the construction thus arrived at, even although it plainly appears from the facts that it is contrary to the intention of the parties.—**LOUGHOR COAL & RY. CO. v. WILLIAMS** (1854), 24 L. T. O. S. 116; 3 C. L. R. 158.

1159. —.]—On a question of construction of a deed, parole evidence is inadmissible to show the intention of the parties thereto.—**PALMER v. NEWELL** (1855), 20 Beav. 32; 24 L. J. Ch. 424; 25 L. T. O. S. 41; 1 Jur. N. S. 924; 3 W. R. 333; 52 E. R. 514; *affd.* (1856), 8 De G. M. & G. 74, L. J.J.

Annotations.—**Reid. Re Goulding's Settltmt.**, **Dobell v. Dutton** (1899), 48 W. R. 183. **Mentd. Charles v. Burke** (1888), 43 Ch. D. 223, n.; **Re Brace, Welch v. Colt**, [1891] 2 Ch. 671; **Re Hall, Rawlings v. Hall** (1903), 19 T. L. R. 420.

1160. —.]—**GRAHAM v. STEWART** (1855), 26 L. T. O. S. 29, H. L.

1161. —.]—Evidence to prove the intention or circumstances with or under which re-settlements were executed is inadmissible after the death

McLEOD v. WELDON (1895), 1 N. B. Eq. Rep. 181.—CAN.

f. —.]—**BOARDMAN v. HANDLEY** (1899), 4 Terr. L. R. 267.—CAN.

g. —.]—Deft. can show by oral evidence that the real intention of the parties to the agreement has not been correctly expressed in the written document.—**VISHVANATH ATMARAM v. BAPU NARAYAN** (1864), 1 Bom. 262.—IND.

h. —.]—**RAMABAI SAHES PATWARDHAN v. BABAJI** (1891), 1 L. R. 15 Bom. 704.—IND.

k. —.]—*For purposes of construction*—*When sufficient to justify relief in equity.*—A widow, by writing duly signed, sealed, & attested, released to her son W. a sum of \$14,477.95, "standing to my account in my son W.'s books at this date, & which I intended to give him; I hereby give it to him & release him from all claim in respect thereof." W. subsequently went into a somewhat hazardous business, & afterwards, becoming insolvent, made an assignment under the Insolvent Acts. In a suit instituted by the official assignee claiming this money for W.'s creditors, the ct. allowed parole evidence to be given, showing that such release, though absolute in form, was,

as to one-half of the amount transferred, intended to create a trust in favour of another son, A., his wife & children; & the ct. being satisfied of the truthfulness of such evidence refused the relief asked, & dismissed the bill with costs.—**KERR v. READ** (1876), 23 Gr. 525.—CAN.

l. —.]—Property was conveyed by a deed absolute in form. Pltf. sought to show by parole evidence that it was in reality subject to a trust.—**Held**: the trust must be enforced.—**BOWKER v. LAUMEISTER** (1891), 20 S. C. R. 175.—CAN.

m. —.]—Direct evidence of intention of parties to a written contract is admissible in an action at law under an equitable plea setting up facts which, if proved, would be sufficient to justify reformation of the contract in equity.—**McKEAN v. DALHOUSIE LUMBER CO.** (1910), 40 N. B. R. 218.—CAN.

n. —.]—Parole evidence is always admissible when its object is to show that the transactions is one of loan, & that the conveyance, though absolute in form, is intended to be security only.—**McKEAN v. BLACK** (1921), 68 D. L. R. 84; 62 S. C. R. 290.—CAN.

o. —.]—In an action on a contract for the purchase & sale of goods on a certain day deft. pleaded that the contract was a wagering contract; that the parties never intended to give or take delivery of the cotton, & that the contract was therefore void.—**Held**: oral evidence was admissible to prove the defence set up by deft.—**ANUPHAND HEMCHAND v. CHAMPSI UGERCHAND** (1888), 1 L. R. 12 Bom. 585.—IND.

p. —.]—Parole evidence is admissible to support an equitable replication alleging that a deed on which deft. relies, was by mistake expressed in language different from the understanding & agreement of the parties to it.—**GRAHAM v. EALES** (1868), 5 Nfld. L. R. 251.—NFLD.

q. —.]—*Uncertainty incurable by election.*—Lands being resettled, £2,500 was charged for younger children by a deed reciting that estates were charged with £1,000 for them under a previous settlement which really charged the lands with £3,000. Those children claimed both sums.—**Held**: not a case for election between the deeds, but a mere misrecital; & the real intention, if it had been to

Sect. 4.—Admission of extrinsic evidence: Sub-sects. 1 & 2.]

of the settlor, one of the parties interested, & the execution of the uses under the last deed.—**WALKER v. ARMSTRONG** (1856), 21 Beav. 284; 25 L. J. Ch. 402; 27 L. T. O. S. 10; 2 Jur. N. S. 221; 4 W. R. 280; 52 E. R. 868; *on appeal*, 8 De G. M. & G. 531, L. J.J.

Annotations:—*Reid. Re Hayes, Turnbull v. Hayes*, [1901] 2 Ch. 529. *Mentd. Cowper v. Mantell* (No. 1), *Cooper v. Mantell* (No. 1) (1858), 22 Beav. 223; *A.-G. v. Cambridge Consumers Gas Co.* (1868), L. R. 6 Eq. 282; *Bonhote v. Henderson*, [1895] 1 Ch. 742; *Rake v. Hooper* (1900), 83 L. T. 669; *Re Walton's Settlement, Walton v. Pearson*, [1922] 2 Ch. 509.

1162. ——*]*—A bill filed, praying the rectification of a settlement, but leaving it ambiguous whether the case was to be treated as one of the construction or of the reformation of the settlement:—*Held*: regarding the case as one of construction. No evidence of the intention of the parties to the instrument was admissible, but only that which showed their position, the state of the settled funds, & the rights & interests of the parties in them.—**BRADFORD (EARL) v. ROMNEY (EARL)** (1862), 30 Beav. 431; 31 L. J. Ch. 497; 6 L. T. 208; 8 Jur. N. S. 403; 10 W. R. 414; 54 E. R. 950.

Annotations:—*Reid. Harris v. Pepperell* (1867), L. R. 5 Eq. 1; *Clark v. Girdwood* (1877), 7 Ch. D. 9.

1163. ——*]*—Pltf. entered the service of defts. under a memorandum in writing, as follows: "Apr. 13, 1871. I hereby agree to accept the situation as foreman of the works of Messrs. Roe & Co., & to do all that lays in my power to serve them faithfully, & promote the welfare of the firm, on my receiving a salary of £2 per week, & house to live in from Apr. 19, 1871":—*Held*: a weekly hiring from Apr. 19, 1871; & evidence of a conversation at the time of signing the contract, tending to show that a hiring for a year was intended, was not admissible.—**EVANS v. ROE** (1872), L. R. 7 C. P. 138; 26 L. T. 70.

Annotation:—*Mentd. Chichester v. Sheldon* (1823), Turn. & R. 245.

1164. ——*]*—What the intentions of pltf's. were, what they thought or believed, or what conversations took place, seem to me to be utterly inadmissible when once we have got a written document, & have got the facts which were existing at the time when that written document was entered into (**JAMES, L.J.**).—**MCCLEAN v. KENNARD** (1874), 9 Ch. App. 336; 43 L. J. Ch. 323; 30 L. T. 186; 22 W. R. 382, L. J.J.

1165. ——*]*—**MARSHALL v. BERRIDGE**, No. 981, *ante*.

1166. ——*]*—Goods were insured by an open policy "at and from" T. to L. The policy contained these clauses: "beginning the adventure upon the said goods . . . from the loading there-

of"; shipments held covered . . . from November 1 to December 31, 25s.; & the following warranty was written in the margin of the policy: "in as many voyages as may be required until 31/12/94." Goods were loaded on Dec. 31, 1894, & the ship having sailed on Jan. 1, 1895, was totally lost with her cargo. In an action by the assured against the underwriters:—*Held*: evidence to the effect that from the description of the note on the slip it was meant that the ship was to sail before Dec. 31, 1894, was not admissible.—**JOHNSON & CO., LTD. v. BRYANT** (1896), 1 Com. Cas. 363.

1167. ——*]*—A widow, being about to marry her deceased husband's brother, executed a settlement by which her real estate was conveyed to trustees to hold to her use in fee "until the intended marriage" & "from & after the solemnisation of the intended marriage." She shortly afterwards went through the form of marriage with her deceased husband's brother, & subsequently died intestate:—*Held*: the words "solemnisation of marriage" could be construed only as meaning a valid marriage, & that extrinsic evidence was not admissible to show that this was not the intention of the parties.—**NEALE v. NEALE** (1898), 79 L. T. 629; 15 T. L. R. 20, C. A.

1168. ——*]*—**LOVELL & CHRISTMAS, LTD. v. WALL**, No. 579, *ante*.

1169. ——*]*—By the 20th art. of the Treaty of Union made between England & Scotland in 1707, "all heritable offices . . . and offices for life" were "reserved to the owners thereof as rights of property in the same manner as they are now enjoyed by the laws of Scotland, notwithstanding this treaty."

Resp. held the office of Usher of the White Rod within the Kingdom of Scotland, which was admitted to be an office within the art. of the treaty & in right of such office claimed fees from the recipients from the Crown of honours, titles, & dignities of the United Kingdom, by virtue of certain patents & charters of the Scottish Kings, & statutes of the Scottish Parliament before the Treaty of Union:—*Held*: the art. of the treaty being in itself unambiguous, the fact that fees have been paid in respect of post Union titles for 150 years was not admissible in evidence to explain the meaning of the article.—**LORD ADVOCATE v. WALKER TRUSTEES**, [1912] A. C. 95; 106 L. T. 194; 28 T. L. R. 101, H. L.

1170. ——*]*—Where you have a contract which has a plain natural meaning, & which is not impeached upon the ground of common mistake or upon the ground of fraud & misrepresentation, it is not permissible to alter its effect according to the intention of one of the two contracting parties, or to duce evidence in order to show such an intention (**KENNEDY, L.J.**).—**RELIANCE MARINE**

charge £2,500, besides only £1,000, should have been proved by parol evidence.—**RUBY v. FOOT & BEAMISH**, [1817] Beat. 581.—*IR.*

r. — *To prove document is not fraudulent.*—Where the only inference to be drawn from a document implies fraud practised by the parties thereto on a third party, evidence is admissible to explain the document & to show that the intention of the parties was not fraudulent.—**RADLOFF v. HEIDENREICH**, [1910] O. F. S. 110.—*S. AF.*

s. — *As against a non-party to the deed.*—A. by a deed purporting to be a deed of absolute sale, conveyed certain property to B. The deed was registered. C. claimed a right of pre-emption:—*Held*: the acts of the original parties or their statements could be admitted as against a third

party to prove that their intention was different from that which their written deed expressed & was intended by them to express.—**MALUK CHAND SURMA v. KARLU CHANDRA SURMA** (1866), B. L. R. Sup. Vol. 399; 5 W. R. 76.—*IND.*

t. — *To show whole instrument not the contract.*—The law is that, notwithstanding a paper writing which purports to be a contract may be produced, it is still competent to the ct. to find, upon sufficient evidence, that this writing is not really the contract; & the risk of groundless defence does not affect the rule itself, though it suggests caution in acting on it.—**UDGALUR RUTHNA MUDALI v. KUNNATTUR ARUMUGA MUDALI** (1872), 7 Mad. 185.—*IND.*

a. ——*]*—When a conveyance has been duly executed & registered by a competent person, it requires strong & clear evidence to justify a ct. in holding that the parties did not intend that any legal effect should be given to it. It needs to be proved that both parties had it in their minds that the deed should be a mere sham, & in order to establish the proof, it needs to be shown for what purpose other than the ostensible one the deed was executed.—**RANGA AYYAR v. SRINIVASA AYYANGAR** (1897), 1 L. R. 21 Mad. 56.—*IND.*

b. ——*]*—Parol evidence is admissible to prove that a written document which purports to be a contract was not intended by the parties to be a contract.—**ROBERTS v. CURRIE** (1911), T. P. D. 336.—*S. AF.*

INSURANCE CO. v. DUDER, [1913] 1 K. B. 265; 81 J. K. B. 870; 106 L. T. 936; 28 T. L. R. 469; 7 Com. Cas. 227; 12 Asp. M. L. C. 223, C. A.

Annotations:—*Consd.* Janson v. Poole (1915), 84 L. J. K. B. 1543. *Mentd.* Norwich Union Fire Insee. Soc. v. Colonial Mutual Fire Insee. (1922), 128 L. T. 121.

1171. — Document unambiguous.]—Parol evidence that the demise of a room does not include the external walls is not admissible where the document itself is unambiguous.

Having arrived at what I think to be the true construction of the agreement, I am of opinion that no evidence to contradict it was admissible (EVE, J.).—GOLDFOOT v. WELCH, [1914] 1 Ch. 218; 33 L. J. Ch. 360.

Annotation:—*Reid.* Phelps v. London Corp., [1916] 2 Ch. 255.

1172. Evidence admissible—Rectification of deeds—No written instructions for preparation.]—In suits for the rectification of deeds, where no written instructions were given by the parties preparatory to the preparation of the deeds, parol evidence will be received as to the intention of the parties.—LACKERSTEEN v. LACKERSTEEN (1860), 30 L. J. Ch. 5; 3 L. T. 581; 6 Jur. N. S. 1111.

1173. As to nature of transaction—Absolute conveyance—Whether security for money.]—An absolute conveyance decreed to be only a security on parol evidence; it being clear on the written evidence, & the accounts of the parties, that the agreement was not what the deed purported it to be.—CRIPPS v. JEE (1793), 4 Bro. C. C. 472; 29 E. R. 994.

Annotations:—*Consd.* Leman v. Whitley (1828), 4 Russ. 423. *Mentd.* Clay v. Willis (1823), 1 L. J. O. S. K. B. 144.

1174. — Relationship of mortgagor & mortgagee.]—MUTTYLOIL SEAL v. ANNUNDOCH-UNDER SANDLE (1849), 5 Moo. Ind. App. 72; 18 E. R. 822, P. C.

1175. — — — — —.]—Where applt. had deposited with resp. bank his title-deeds to certain

property in order to secure a cash credit, & afterwards executed an absolute conveyance thereof to the bank in pursuance of an agreement recited therein to the effect that the price paid should be by deducting £400 from the amount due:—*Held*: although collateral evidence was admissible to show that notwithstanding the plain terms of the deed the relationship of mtgor. & mtgee. still subsisted between the parties, yet in this case it was wholly insufficient to overcome the presumption that the deed of conveyance truly stated the transaction.

Now, undoubtedly, the terms of the conveyance may be qualified by collateral evidence; but in order to set aside the arrangement which the parties have assented to by executing & receiving the deed, very cogent evidence is required in a case like the present. When there is simply a conveyance & nothing more, the terms upon which the conveyance is made not being apparent from the deed itself, collateral evidence may easily be admitted to supply the considerations for which the parties interchanged such a deed; but where in the deed itself the reasons for making it, & the considerations for which it is granted, are fully & clearly expressed, the collateral evidence must be strong enough to overcome the presumption that the parties in making the deed had truly set forth the causes which led to its execution (*per* O'UR.).—BARTON v. BANK OF NEW SOUTH WALES (1890), 15 App. Cas. 379, P. C.

SUB-SECT. 2.—TO VARY OR CONTRADICT TERMS.

Admission of evidence of custom & usages. *See* CUSTOM & USAGES.

1176. Evidence inadmissible.]—SUFFOLK (EARL) v. GREENVILL, No. 577, *ante*.

PART III. SECT. 4, SUB-SECT. 2.

1176 i. Evidence inadmissible.]—The declaration & admission of a party filling the character of surviving partner & administrator, & also of another party as heir of a person through whom defts. claimed title, were offered by plff. in evidence:—*Held*: such admissions went to contradict the terms of a deed between the parties who made the admissions & should be rejected.—MALONEY v. PURDON (1847), 7 Kerr. 515.—CAN.

1176 ii. —.]—In 1857 a patent issued for "the north-westerly quarter" of a 200-acre lot, the side lines of which ran N. 45° W., & S. 45° E. (or north-west & south-east); & in 1859 another patent was issued for "the S.E. ¼ of the N.W. ¼ of the same lot:—*Held*: assignments to the respective patentees by the original purchaser from the Crown of the N.W. ¼ of the lot could not be resorted to to aid in interpreting the patent.—DAVIS v. MCPHERSON (1873), 33 U. C. R. 376.—CAN.

1176 iii. —.]—Plff. claimed under deed from C. of a parcel of land described by metes & bounds, which set a small strip at the south end of the lot uncovered:—*Held*: evidence of what took place between the parties when C. afterwards conveyed the small strip to deft., & as to deft.'s possession hereunder, & the acquiescence therein of the person through whom plff. claimed, was properly rejected.—HILLEN v. HAYNES (1873), 33 U. C. R. 16.—CAN.

1176 iv. —.]—FORSYTH v. BOYLE (1877), 28 C. P. 26.—CAN.

1176 v. —.]—Parol testimony ought not to be admitted as evidence

to vary the character of a deed.—FRASER v. POULIOT (1879), 4 S. C. R. 515.—CAN.

1176 vi. —.]—Extrinsic evidence of monuments & actual boundary marks is inadmissible to control the deed.—GRASSETT v. CARTER (1883), 10 S. C. R. 105.—CAN.

1176 vii. —.]—BEAM v. MERNER (1887), 14 O. R. 412.—CAN.

1176 viii. —.]—BURY v. MURRAY (1894), 24 S. C. R. 77.—CAN.

1176 ix. —.]—Verbal evidence as to boundaries is not admissible where plan referred to is not in deed.—FOWLER v. HENRY (1902), 10 B. C. R. 212.—CAN.

1176 x. —.]—Parol evidence cannot be introduced to vary the terms of the written document.—GUIOU v. THIBEAU (1904), 36 N. S. R. 542.—CAN.

1176 xi. —.]—NIMMONS v. GILBERT (1907), 6 W. L. R. 531.—CAN.

1176 xii. —.]—DUFFY v. MATHIESON & McDONALD (1913), 13 E. L. R. 73.—CAN.

e. — Unless mistake is pleaded.]—Where parties to an agreement have deliberately put their agreement into formal & written terms, so that the ct. can infer an intention that it should contain the whole agreement, then parol testimony to contradict directly an express term of the written agreement is not admissible in evidence, unless some question of mistake is raised.—BIBLE v. CROSSLAND (1915), 8 W. W. R. 497; 24 D. L. R. 763.—CAN.

1176 xiii. —.]—An oral agreement in direct contravention & defiance of

the mtge. deed is inadmissible in evidence.—MORAN v. MITTU BIBEE (1876), 1 L. R. 2 Calc. 58.—IND.

1176 xiv. —.]—Evidence cannot be admitted to prove a contemporaneous oral stipulation varying adding to, or subtracting from, the terms of a written contract.—DAIMODDEE PAIK v. KAIM TARIDAR (1878), 1 L. R. 5 Calc. 300; 4 C. L. R. 419.—IND.

1176 xv. —.]—A registered lease, renewable at the former rent at the expiration of the period fixed thereby, having been granted, it appeared that the lessors were entitled to a 6 annas share only instead of to the whole property leased. It was alleged by the lessee that it was then verbally arranged that the rent should be reduced in proportion, & the lessee in fact did pay the rent during the term in proportion to the interest of the lessors. On the expiration of the term, he sued for specific performance of the contract, as modified, for a renewal of the lease of the 6 annas:—*Held*: evidence of the parol variation of the contract was not admissible.—DWARKA NATH CHATTOPADHYA v. BHOGOBAN PANDA (1880), 7 C. L. R. 577.—IND.

1176 xvi. —.]—The question whether an unambiguous written contract for the sale & purchase of Government paper is a contract or agreement by way of wager must be decided on the expressed terms of the contract itself, & parol evidence is not admissible to vary or contradict those terms.—JUGGERNATH SEW BUX v. RAM DYAL (1883), 1 L. R. 9 Calc. 791.—IND.

1176 xvii. —.]—COWASJI RUTTONJI LIMBOOWALLA v. BURJORJI RUTTONJI

Sect. 4.—Admission of extrinsic evidence: Subsect. 2.]

1177. —.]—Parol evidence shall not be admitted to contradict an agreement in writing.—**MERES v. ANSELL** (1771), 3 Wils. 275; 95 E. R. 1058.

Annotations:—Consd. *Pym v. Campbell* (1856), 25 L. J. Q. B. 277. *Reid. Powell v. Edmunds* (1810), 12 East, 8; *Cuff v. Penn* (1813), 1 M. & S. 21; *Greaves v. Ashlin* (1813), 3 Camp. 426; *Hope v. Atkins* (1814), 1 Price, 143; *Meyer v. Everth* (1814), 4 Camp. 22; *Bainbridge v. Wade* (1850), 16 Q. B. 89; *Macdonald v. Longbottom* (1860), 6 Jur. N. S. 724. *Mentd. Milbourn v. Ewart* (1793), 5 Term Rep. 381.

1178. —.]—**JACKSON v. CATOR** (1800), 5 Ves. 688; 31 E. R. 806. L. C.

Annotations:—*Mentd. Swaine v. G. N. Ry.* (1864), 33 L. J. Ch. 399; *Willmott v. Barber* (1880), 15 Ch. D. 96; *McManus v. Cooke* (1887), 35 Ch. D. 681; *Civil Service Musical Instrument Assn. v. Whiteman* (1899), 68 L. J. Ch. 484.

1179. —.]—**WOOLAM v. HEARN**, No. 1147, ante.

1180. —.]—**SMITH v. DOE d. JERSEY**, No. 724, ante.

1181. —.]—**DAVIES v. BUSH**, No. 1134, ante.

1182. —.]—The parol evidence offered was properly rejected. It was not intended to explain any thing which could be called a latent ambiguity, but obviously to contradict the simple meaning of the words used in the agreement (*BAYLEY, J.*).—**HUGHES v. STATHAM** (1825), 4 B. & C. 187; 6 Dow. & Ry. K. B. 219; 3 Dow. & Ry. M. C. 124; 3 L. J. O. S. K. B. 179; 107 E. R. 1029.

1183. —.]—Evidence may be offered to explain, though not to contradict a fine.—**DENN d. BULKELEY v. WILFORD** (1826), 2 C. & P. 173; 8 Dow. & Ry. K. B. 549; 4 L. J. O. S. K. B. 295.

1184. —.]—Promissory note on the face of it payable on demand. Evidence, that at the time it was made, the parties agreed it should not be payable until the payee gave up possession of certain premises; held to be inadmissible.—**MOSELEY v. HANFORD** (1830), 5 Man. & Ry. K. B. 607; L. & Welsh. 176; 8 L. J. O. S. K. B. 261.

1185. —.]—If there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from or in any manner to vary or qualify the written contract (*LORD DENMAN, C.J.*).—**Goss v. NUGENT (LORD)** (1833), 5 B. & Ad. 58; 2 Nev. & M. K. B. 28; 2 L. J. K. B. 127; 110 E. R. 713.

Annotations:—*Reid. Stowell v. Robinson* (1837), 3 Bing. N. C. 328; *Pontifex v. Wilkinson* (1845), 2 C. L. 349; *Giraud v. Richmond* (1846), 2 C. B. 835; *Tyers v. Rosedale & Ferryhill Iron Co.* (1873), L. R. 8 Exch. 305; *Stewart v.*

Eddowes, Hudson v. Stewart (1874), L. R. 9 C. P. 311; *Sanderson v. Graves* (1875), L. R. 10 Exch. 234; *Morra v. Studd & Millington*, [1913] 2 Ch. 648; *Williams v. Mow Empires*, [1915] 3 K. B. 242; *Morris v. Baron*, [1918] A. C. 1; *North v. Loomes*, [1919] 1 Ch. 378. *Mentd. Alexandre v. Gardner* (1835), 1 Hodg. 147; *Harvey v. Grabham* (1836), 5 Ad. & El. 61; *Palmer v. Temple* (1836), 1 Har. & W. 702; *Stead v. Dawber* (1839), 10 Ad. & El. 57; *Marshall v. Lynn* (1840), 6 M. & W. 109; *Thames Haven Dock & Ry. v. Brymer* (1850), 5 Exch. 696; *Emmet v. Dewhurst* (1851), 3 Mac. & G. 587; *Noble v. Ward* (1866), L. R. 1 Exch. 117; *Ogle v. Vane* (1867), L. R. 2 Q. B. 375; *Young v. Austen* (1869), L. R. 4 C. P. 553; *Hickman v. Haynes* (1875), L. R. 10 C. P. 598; *Hartley v. Hymans*, [1920] 3 K. B. 475; *British & Benington's v. North Western Cachar Tea Co.*, [1923] A. C. 48.

1186. —.]—**CLIMO v. PEARCE**, No. 1573, post.

1187. —.]—*Assumpsit* upon a guarantee, given by deft. to pltf. in 1833, for goods to be furnished to J. Breach, delivery of goods to the amount of £90 9s. 11d., & non-payment by deft. The plea alleged a subsequent agreement between J. & pltf. & deft. & others, embodied in the following note: "1836, we jointly & severally promise to pay to Messrs. J. M'Clure & Son, or order, the sum of £44 4s. 11d., which is to constitute a discharge in full, for a debt of £90 9s. 11d. due by J. to Messrs. M'Clure & Son." Signed by deft. & J. & four others, & delivered to pltf., & received by him. Upon the trial pltf. proposed to prove by parol, that at the time he took this note it was expressly agreed that he was still to be at liberty to sue deft. upon his guarantee:—*Held*: this evidence was rightly rejected.—**McCLURE v. FRASER** (1840), 9 L. J. Q. B. 60.

1188. —.]—In an action on a charterparty, which purported to be made by B., "owner of the ship Ann," etc., it is not competent to give parol evidence that B. acted not as owner, but as agent for the real owner in making the charterparty.—**HUMBLE v. HUNTER** (1848), 12 Q. B. 310; 17 L. J. Q. B. 350; 11 L. T. O. S. 265; 12 Jur. 1021; 116 E. R. 885.

Annotations:—Consd. *Killick v. Price & Linsfield S.S. Co.* (1896), 12 T. L. R. 263. *Apprvd. Formby v. Formby* (1910), 102 L. T. 116. Consd. *Dunlop Pneumatic Tyre Co. v. Selfridge*, [1915] A. C. 817; *Roderlakt. Argonaut v. Haml*, [1918] 2 K. B. 247. *Distd. Drughorn v. Roderlakt. Trans-Atlantic*, [1919] A. C. 203. *Reid. Schmaltz v. Avery* (1851), 16 Q. B. 655; *Wake v. Harrop* (1862), 1 H. & C. 202. *Mentd. Muttlyoll Seal v. Dent* (1853), 5 Moo. Ind. App. 328; *British Waggon Co. v. Lea* (1880), 5 Q. B. D. 149; *Tolhurst v. Associated Portland Cement Manufacturers* (1900), *Associated Portland Cement Manufacturers* (1900) v. *Tolhurst*, [1902] 2 K. B. 660.

1189. —.]—By a contract in writing made between R., hereinafter called the proprietor, & pltf., it was agreed that pltf. should build two houses for the "proprietor," that the "Proprietor" should pay them the agreed price, & that all work & materials brought upon the ground

LIMBOOWALLA (1888), 1 L. R. 12 Bom. 335.—IND.

1176 xviii. —.]—Where a written acknowledgment bears a date which has been altered, oral evidence to prove the date is inadmissible.—**SAYAD GULAMALI DALUMIA v. MIYABHAI MAHOMADBHAI** (1901), 1 L. R. 26 Bom. 128.—IND.

1176 xix. —.]—**BLAKE v. MARNELL** (1811), 2 Ball & B. 47.—IR.

1176 xx. —.]—A plot of ground was demised with a covenant by the lessor that the lessee should enjoy vistas through the adjoining trees as on the map, with a note that between two points a vista was to be maintained. A hedge, & a space on adjacent lands of the lessor, were marked on the map with a note—"This hedge to be maintained by the grantor." This note was not signed, nor was it incorporated in the lease by a reference.—*Held*: parol evidence was not admissible to prove that the contract was that the hedge

should be maintained as an ornament.—**ARMSTRONG v. COURTNEY** (1863), 15 L. Ch. R. 138.—IR.

1176 xxi. —.]—**EAGAN v. WARREN** (1854), 4 Nfld. L. R. 40.—NFLD.

1176 xxii. —.]—Where a contract has been reduced into writing, verbal evidence will not be admitted, except to establish fraud, of what passed between the parties to the contract either before the written instrument was made or during the time it was in a state of preparation, so as to add to, subtract from, or in any manner vary or qualify.—**PROWSE v. WINGFIELD** (1854), 4 Nfld. L. R. 51.—NFLD.

1176 xxiii. —.]—**MALFROY v. RAYMOND** (1906), 26 N. Z. L. R. 563.—N.Z.

1176 xxiv. —.]—A conveyance referring to letters of a preceding treaty, but not specifying what letters, is too uncertain to incorporate the letters, & they cannot be used in evidence to explain the contract by showing what

was intended to be part of the sale & purchase, although not expressed in the conveyance.—**HUGHES & HAMILTON v. GORDON** (1819), 1 Bli. 287.—SCOT.

1176 xxv. —.]—Evidence of parol representations made at a sale, & not indorsed upon transfer deeds, is not admissible to vary the deeds.—**HORMEYR'S EXECUTOR v. DE WAAL** (1880), 1 S. C. 424.—S. AF.

1176 xxvi. —.]—Where a written contract has been entered into the ct. will allow evidence to explain that contract, so far as such evidence is consistent with the written contract itself, but will not allow evidence to vary such written contract.—**VAN DER WESTHUIZEN v. VELENSKI** (1898), 15 S. C. 237.—S. AF.

1176 xxvii. —.]—Where there is a written contract complete on the face of it, parol evidence cannot be admitted to contradict or vary its terms.—**CLARK v. MULLER** (1914), 35 N. L. R. 18.—S. AF.

should "at once become the property of the proprietor." The "proprietor" was referred to throughout the contract, which was signed by R. after the words "signed by the proprietor":—*Held*: parol evidence was not admissible to prove that this contract was made by R., an agent for an undisclosed principal, for the purpose of charging the principal, inasmuch as such evidence would contradict the written contract.—*FORMBY BROTHERS v. FORMBY* (1910), 102 L. T. 116; 54 Sol. Jo. 269, C. A.

Annotations.—*Mentd. Rederiakt. Argonaut v. Hanl.* [1918] 2 K. B. 247; *Drughorn v. Rederiakt. Trans-Atlantic*, [1919] A. C. 203.

See, further, AGENCY, Vol. I., p. 637, Nos. 2591 et seq.

1190. — As distinct from evidence to show no agreement.]—In an action on an agreement of sale, *pltf.* produced an agreement signed by *deft.* *Deft.* gave evidence that *pltf.* & *deft.*, having negotiated as to the purchase, agreed on the terms, & it was arranged that they & a third person, A., should meet, when, if A. approved of the property, they would make a bargain on these terms. At the meeting *pltf.* did not attend till A. had gone. It was then arranged that *pltf.* & *deft.* should draw up & sign a memorandum of an agreement of sale, but that it should not be a bargain until A., on being consulted, approved. A. did not approve. The jury were directed to find for *deft.* if satisfied that it was arranged that the writing should be no agreement until A. approved:—*Held*: this was a right direction.

The parties may not vary a written agreement; but they may show that they never came to an agreement at all, & that the signed paper was never intended to be the record of the terms of the agreement (*CROMPTON, J.*).—*PYM v. CAMPBELL* (1856), 6 E. & B. 370; 25 L. J. Q. B. 277; 2 Jur. N. S. 641; 4 W. R. 528; 119 E. R. 903; *sub nom.* *PIM v. CAMPBELL*, 27 L. T. O. S. 122.

Annotations.—*Consd. Furness v. Meek* (1857), 27 L. J. Ex. 34; *Wallis v. Littell* (1861), 11 C. B. N. S. 369; *Lindley v. Lacey* (1864), 17 C. B. N. S. 578; *Young v. Austen* (1869), 38 L. J. C. P. 233; *Pattle v. Hornbrook*, [1897] 1 Ch. 26. *Reid. Wake v. Harrop* (1861), 6 H. & N. 768; *Lister v. Smith* (1863), 3 Sw. & Tr. 282; *Rogers v. Hadley* (1863), 2 H. & C. 227; *Guardhouse v. Blackburn* (1866), L. R. 1 P. & D. 109; *Clever v. Kirkman* (1875), 33 L. T. 672.

1191. —]—*Deft.*, at the request of M., signed the following order, which M. also signed: "Insert my advertisements for one year in *Hotson's*, *pltf.'s*, local time-tables, "The Great Northern," etc. Charge per insertion to be ten shillings each monthly book." *Pltf.'s* time-tables consisted of separate books, published monthly, one for each of the seven railways. M. was not employed by *pltf.* to obtain orders for him, but upon such orders as he obtained, provided they were approved of by *pltf.* & the advertisements inserted, the latter allowed him a commission. M. brought *deft.'s* order to *pltf.*, who approved of it, & allowed M. his commission, & having inserted the advertisements for one year in each of the seven books, brought his action to recover from *deft.* 70s. per month. At the trial it was proposed to ask *deft.* what representations M. had made to him to induce him to enter into the written contract; the defence being that *deft.* was liable only for 10s. per month as for one advertisement in one book, not for 70s. as for seven advertisements in seven books:—*Held*: the order having been adopted in terms by *pltf.*, the effect of the evidence was to vary a written contract, & was inadmissible.—*HOTSON v. BROWNE* (1860), 9 C. B. N. S. 442; 30 L. J. C. P. 106; 9 W. R. 233; 142 E. R. 174; *sub nom.* *BROWN v. HOTSON*, 7 Jur. N. S. 633.

1192. —]—It should be borne in mind that

a written contract, not under seal, is not the contract itself, but only evidence—the record of the contract. When the parties have recorded their contract, the rule is that they cannot alter or vary it by parol evidence. They put on paper what is to bind them, & so make the written document conclusive evidence between them. But it is always open to the parties to show whether or not the written document is the binding record of the contract (*BRAMWELL, B.*).—*WAKE v. HARROP* (1861), 6 H. & N. 768; 30 L. J. Ex. 273; 4 L. T. 555; 7 Jur. N. S. 710; 9 W. R. 788; 1 Mar. L. C. 81; 158 E. R. 317; *affd.* (1862), 1 H. & C. 202, Ex. Oh.

Annotations.—*Reid. Clever v. Kirkman* (1875), 33 L. T. 672. *Mentd. Nicoll v. Ball* (1835), 32 L. T. 815; *Reid & Glasgow v. Draper* (1861), 4 L. T. 850; *Rogers v. Hadley* (1863), 11 W. R. 1074; *Bowman v. Rosal* (1864), 3 New Rep. 471; *Guardhouse v. Blackburn* (1866), L. R. 1 P. & D. 109; *Druff v. Parker* (1868), L. R. 3 Eq. 131; *Cowie v. Witt* (1874), 23 W. R. 76; *Gadd v. Houghton* (1876), 33 L. T. 811; *Universal Steam Navigation Co. v. McKelvie*, [1923] A. C. 492.

1193. —]—Where parties have put down in writing the agreement between them, we cannot add to it, or subtract from it, or vary it in any way (*BRAMWELL, B.*).

I see no reason why, where documents are signed which purport to amount to a contract upon the face of them, a jury if they can see their way to a conclusion that both parties thought there was not to be a contract by which their rights were to be interfered with, might not find there was no such agreement between them (*CHANNELL, B.*).—*ROGERS v. HADLEY* (1863), 2 H. & C. 227; 32 L. J. Ex. 241; 9 L. T. 292; 9 Jur. N. S. 898; 11 W. R. 1074; 159 E. R. 94.

Annotations.—*Consd. Clever v. Kirkman* (1875), 33 L. T. 672. *Reid. Bolokow v. Seymour* (1864), 17 C. B. N. S. 107; *Kempson v. Boyle* (1865), 3 H. & C. 763.

1194. —]—A co. being about to be formed, *pltf.* addressed a letter to *defts.* "on behalf of" the proposed co., offering certain goods for sale; *defts.*, in reply, signed a document "on behalf of" the proposed co., accepting the terms proposed. The co. never being completely formed, *pltf.* sued *defts.* to recover the price of the goods, & obtained a verdict. A rule having been obtained to set aside the verdict & enter a non-suit:—*Held*: evidence of a conversation, between *pltf.* & *defts.*, at the time the agreement was signed, offered to show that the intention of the parties was that *defts.* should not be personally liable was inadmissible as contradicting the written documents.—*KELNER v. BAXTER* (1866), L. R. 2 C. P. 174; 36 L. J. C. P. 94; 15 L. T. 213; 15 W. R. 278; *sub nom.* *KELMER v. BAXTER*, 12 Jur. N. S. 1016.

Annotations.—*Mentd. Scott v. Ebury* (1867), L. R. 2 C. P. 255; *Melhado v. Porto Alegre Ry.* (1874), L. R. 9 C. P. 503; *Spiller v. Paris Skating Rink Co.* (1878), 7 Ch. D. 368; *McCaul v. Strauss* (1883), Cab. & El. 108; *Hollman v. Pullin* (1884), Cab. & El. 254; *Re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 15; *Re Patent Ivory Manufacturing Co.*, *Howard v. Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156; *Hugill v. Masker* (1889), 58 L. J. Q. B. 171; *Blyth v. Fladgate*, *Morgan v. Blyth*, *Smith v. Blyth*, [1891] 1 Ch. 337; *Nichols v. Regent's Canal Co.* (1894), 63 L. J. Q. B. 641; *Hume v. Record Reign Jubilee Syndicate* (1899), 80 L. T. 404; *Thompson v. L. C. C.*, [1899] 1 Q. B. 840; *Keighley, Maxsted v. Durant*, [1901] A. C. 240; *Natal Land & Colonisation Co. v. Pauline Colliery & Development Syndicate*, [1904] A. C. 120; *Hickman v. Kent or Romney Marsh Sheep Breeders' Assocn.*, [1915] 1 Ch. 881.

1195. —]—Written agreements relating to the working of some quarries contained the following provisions: "That *defts.* should allow & pay to *pltf.* for two years, from Dec. 7, 1870, the sum of £400 for each year, by equal quarterly sums of £100; that the sums of money which should be paid to *pltf.* under that clause should be added to a debt of £7,035 then due from *pltf.*, & that the

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whole amount of such debt should bear interest from time to time at the rate of 25 per cent. *per annum*; that the said sum of £7,035 & all additions thereto, whether by means of the two sums of £400 above mentioned, & all interest upon the debt, should be a first charge upon the purchase-money which should become payable to plffs." Defts. had advanced the above sum of £7,035 & other moneys to plffs. on their personal account & also on the security of the working of the quarries which were managed by plffs. Defts. considered the workings were not successful; & in June, 1872, they sued plffs. at law for their debt. Plffs. then filed their bill in this suit for the specific performance of the agreements, an account & an injunction to restrain the action. A motion for the injunction was made on Aug. 1, but refused mainly on the grounds that there was no implied covenant by defts. not to sue for their debt before the expiration of the two years from the date of the agreements, & that a parol understanding to the contrary, relied on by plffs., could not be allowed to control the written contract.—*CURTEIS v. FENNING* (1872), 41 L. J. Ch. 791; *reversd.* on other grounds, 41 L. J. Ch. 795, L. C.

1196. —[An agreement which, by its heading, purported to be made between the T. Co. of the one part & pltf. of the other part, was signed by defts., three directors of the co., but was not sealed with the seal of the co., nor countersigned by the secretary, as required by the articles of assocn. in the case of agreements intended to bind the co. The agreement was for a loan of £500 by pltf. to defts., to be secured as therein mentioned. In an action by pltf. against defts. for the repayment of the loan, judgment was entered for pltf.:—*Held*: the agreement being, on the face of it capable of more than one construction, extrinsic evidence of what took place during the negotiations for the agreement was admissible for the purpose of enabling the ct. to arrive at the true meaning of the agreement.

Where a written agreement entered into between two parties, does contain the agreement between them no evidence can be given to contradict it. But where, by some mistake, the document does not represent the agreement between the two parties, but between one of them & a third party with whom, in fact, no such agreement was made, that matter may be proved, where the action is to fix that person or persons with whom the agreement was really made (*BRAMWELL, L.J.*).—*MCCOLLIN v. GILPIN* (1881), 6 Q. B. D. 516; 44 L. T. 914; 45 J. P. 828; 29 W. R. 408, C. A.

1197. —[Pltf., a spinster, having signed an agreement for the lease of a house to her by deft., deft. subsequently signed it, & handed it to his solr. with instructions not to part with it except on condition that pltf. obtained some responsible person to join in the lease—a condition which pltf. declined to fulfil:—*Held*: evidence was admissible to show that no agreement was come to between the parties, & the true effect of the transaction was that deft. declined to enter into an agreement on the terms of the written document, but at the same time made a counter offer which was rejected, & there was no agreement.—*PATTLE v. HORN BROOK*, [1897] 1 Ch. 25; 66 L. J. Ch. 144; 75 L. T. 475; 45 W. R. 123; 41 Sol. Jo. 81.

1198. —If instrument speaks sufficiently for itself—Although not free from possible ambiguity.]—Parol evidence is not admissible to explain an imperfectly worded written contract, even where

some parts of it were difficult to be understood alone.

The contract spoke sufficiently for itself to exclude evidence to alter or explain it (*THOMSON v. O. B.*).—*HALLILEY v. NICHOLSON* (1815), 1 Price 404; 145 E. R. 1444.

1199. —Annuity deed.]—A. granted annuity for his own life to B., to secure which, bond & warrant were given, & judgment entered B. died. After his death, the ct. would not admit evidence of a parol agreement between the parties that A. should be at liberty to redeem the annuity on certain terms, especially if it be the evidence of the attorney concerned, as a ground to order the securities to be given up.—*HAYNES v. HARE* (1791) 1 Hy. Bl. 659; 126 E. R. 376.

1200. —[In an action for money had & received, brought by the administratrix of an intestate to recover the consideration money for an annuity deed, alleged to have been executed to him when of unsound mind:—*Held*: his acts and conduct after the execution of the deed in question, which must be taken *prima facie* to have been duly executed, could not be given in evidence by plf. for the purpose of avoiding that instrument.—*MOULTON v. CAMEROUX* (1846), 8 L. T. O. S. 278 *subsequent proceedings, sub nom. MOLTON CAMROUX* (1848), 2 Exch. 487; (1849), 4 Exch. Ex. Ch.

Annotations:—*Mentd.* Price v. Berrington (1851), 3 Mac. G. 486; Beavan v. McDonnell (1854), 8 Exch. 309; Jacob v. Richards, Jacobs v. Porter (1854), 18 Beav. 30; Campbell v. Hooper (1855), 3 Sm. & G. 153; Elliot Ince (1857), 7 De G. M. & G. 475; Moss v. Tribe (1862), F. & F. 297; Matthews v. Baxter (1873), L. R. 8 Exch. 132; Re London Celluloid Co. (1888), 39 Ch. D. 19; Imperial Loan Co. v. Stone, [1892] 1 Q. B. 599.

1201. —Agreement for composition.]—Where a creditor signed an agreement to accept a composition of so much in the pound in full of his demand on having a joint note from the debtor and his father, & accordingly received a joint note for the composition on his debt:—*Held*: parol evidence was inadmissible to show that pltf. had been induced to sign the composition deed by a misrepresentation of its legal effect.—*LEWIS v. JONES* (1825), B. & C. 506; 6 Dow. & Ry. K. B. 507; L. J. O. S. K. B. 270; 107 E. R. 1148.

Annotations:—*Refd.* Roay v. Richardson (1835), 2 Cr. M. & J. 422. *Mentd.* Kearsley v. Cole (1846), 16 M. & W. 128; Wyke v. Rogers (1852), 21 L. J. Ch. 611; Re Westrope v. Underwood (1859), 32 L. T. O. S. 395; Re Barn (1861), 4 L. T. 60; Bateson v. Gosling (1871), L. R. 7 Ch. 9; Croydon Commercial Gas & Coke Co. v. Dickinson Pollard (1876), 35 L. T. 943; Hirschfeld v. L. B. & S. C. R. (1876), 2 Q. B. D. 1; Hirschand Punamchand v. Temp [1911] 2 K. B. 330.

1202. —Assignment of premises—Purchase money stated to be paid.]—Pltf., by deed, had assigned certain premises to deft. for a sum of money therein mentioned. The deed stated the sum to have been well & truly paid, & released deft. therefrom. Parol evidence was given to show that, in fact, part of the purchase-money had not been paid, but that it was agreed by parol between the parties at the time of the execution of the deed that that part of the purchase-money should be retained by deft., & that he should do work for pltf. to that amount.

There is no principle more clearly established than that when a party has executed a deed by which he declares that he has received a certain sum of money he is for ever estopped from saying the deed is false (*BAYLEY, J.*).

The parol evidence was inconsistent with the deed & ought not to have been received. The deed states the whole purchase-money to be well & truly paid. The parol evidence is that it never was paid but a great part of it kept back & the

is wholly inconsistent with the statement in deed, & therefore ought not to have been ved in evidence (BEST, J.).—**BAKER v. DEWEY**, 1 B. & O. 704; 3 Dow. & Ry. K. B. 99; 1 O. S. K. B. 193; 107 E. R. 259.

13. — **Agreement to employ servant—primary method of payment by employer.**—An agreement whereby A. undertakes to pay B. & pay him a salary at the rate of so much a year, nothing is recoverable as a rateable portion for part of a year; nor is evidence that it has been customary between the parties for payments to be made quarterly admissible in support of a claim for salary *pro rata*.

A contract is quite clear without parol explanation & the parol evidence is offered only to vary this, however, cannot be allowed (ERLE, J.).—**UD v. RICHMOND** (1846), 2 C. B. 835; 15 C. P. 180; 10 Jur. 360; 135 E. R. 1172; *om. GERAUD v. RICHMOND*, 1 New Pract. Cas. 7 L. T. O. S. 85.

Annotations:—**Consd. Williams v. Moss' Empires**, [1915] 3 K. 242. **Reid. Evans v. Roe** (1872), L. R. 7 C. P. 138; **tris v. Baron**, [1918] A. C. 1.

14. — **Agreement for work & labour.**—Contracted with deft., the returning officer for parliamentary election, to erect the hustings before, with alterations, by receiving the wood again," for a specific sum:—**Held**: deft. was bound to put pltf. in peaceable possession of the hustings after the election, & was liable, as upon breach of the contract to return the wood, for acts of the mob, who tore down & destroyed the hustings the moment the election was over, & whose acts were not admissible to show that on previous occasions the hustings had been removed by persons constructing them.—**FULLER v. WICK** (1849), 18 L. J. Q. B. 236; 13 L. T. O. S. 13 Jur. 561.

5. — **Bill of lading.**—Pltfs. having purchased goods to be shipped from a foreign port on terms that payment of the price was to be made by change for shipping documents, the bill of lading signed upon the shipment was, upon payment of the price, indorsed to them. The bill of lading, which contained the usual exception of sea perils, stated that the goods were shipped for export at Dunkirk on board a vessel lying at anchor & bound for Dunkirk, with liberty to call at any ports in any order. The ship, instead of proceeding direct for Dunkirk, sailed for Glasgow, & was lost, with her cargo, off the mouth of the Forth by perils of the sea. In an action brought by the goods, evidence was given to show that the bill of lading was given, knew that the vessel was intended to proceed via Glasgow:—**Held**: such evidence was admissible to vary the terms of the bill of lading, which imported a voyage direct from Fiume to Dunkirk, subject to the liberty to call at any of or call substantially within the course of the voyage.—**LEDUC v. WARD** (1888), 20 Q. B. D. 57 L. J. Q. B. 379; 58 L. T. 908; 36 W. R. 4 T. L. R. 313; 6 Asp. M. L. C. 290, C. A.

Annotations:—**Reid. Margaretson v. Glynn**, [1892] 1 Q. B. 337. **d. Lecky v. Ogilvy, Gillanders** (1897), 3 Com. Cas. 29; **ison v. Shaw, Savill & Albion Co.**, [1916] 2 K. B. 783.

— **Bond.**—Dft. agreed by deed upon pltfs. assigning to him a policy for £5,000, he would pay £1,000; & in suing dft. for the policy, averred that the policy was to receive was one for £5,000 not £5,000, as dft. well knew: the written contract could be varied by parol.—**BANK OF CANADA v. BOULTON** (1850),

7 U. C. R. 235.—**CAN.**

d. — Declaration.—An action was brought by L. & R. to recover the amount of an accident policy. After the policy was issued pltfs. signed & registered a declaration to the effect that the partnership of McL. Bros. & Co. had been dissolved by mutual consent, & they also signed & regis-

1206. — **Bond.**—**MEASE v. MEASE** (1774), 1 Cowp. 47; 98 E. R. 959.

Annotations:—**Reid. Milbourn v. Ewart** (1793), 5 Term Rep. 381; **Davis v. Gyde** (1835), 3 Ad. & El. 623. **Montd. Baker v. Walker** (1845), 14 M. & W. 465.

1207. — **Cognovit.**—Where the language of a cognovit is clear & free from all ambiguity the ct. will not permit its effect to be altered upon an affidavit that at the time of executing the cognovit other terms were agreed upon, even though those terms depended on a subsequent contingency.—**ANON.** (1825), 4 L. J. O. S. K. B. 57.

1208. — **Contract of carriage.**—The owner of some marble chimney pieces desired to send them to London. Messages & notes passed between him & the agent of a railway co. on the subject of the terms on which they were to be carried. The agent stated, as a condition, that the co. would not be responsible for damage to goods sent by the railway, unless their value was declared & they were insured, the rate of insurance being fixed at 10 per cent. on the declared value. After some delay the agent received a note requesting that the marbles might be forthwith sent to London "not insured." They were sent, & suffered damage:—**Held**: the note could not be connected with the other communications so as to constitute the required contract, & the words "not insured" could not be made the subject of explanation by parol evidence.—**PEEK v. NORTH STAFFORDSHIRE RY. CO.** (1863), 10 H. L. Cas. 473; 3 New Rep. 1; 32 L. J. Q. B. 241; 8 L. T. 768; 9 Jur. N. S. 914; 11 W. R. 1023; 11 E. R. 1109, H. L.; *reversg.* S. C. **sub nom. NORTH STAFFORDSHIRE RY. CO. v. PEEK** (1860), E. B. & E. 986, Ex. Ch.

Annotations:—**Reid. Oliver v. Hunting** (1890), 44 Ch. D. 205; **Wade v. L. & N. W. Ry.**, [1921] 1 K. B. 582. **Montd. McManus v. L. & Y. Ry.** (1859), 4 H. & N. 327; **Wilton v. Royal Atlantic Mail Steam Navigation Co.** (1861), 8 Jur. N. S. 231; **Harrison v. L. B. & S. C. Ry.** (1862), 2 B. & S. 152; **Aldridge v. G. W. Ry.** (1864), 15 C. B. N. S. 582; **Beal v. South Devon Ry.** (1864), 3 H. & C. 337; **Gregory v. West Midland Ry.** (1864), 2 H. & C. 944; **Hodgman v. West Midland Ry.** (1864), 5 B. & S. 173; **Robinson v. G. W. Ry.** (1865), Bar. & Ruth. 97; **Root v. N. E. Ry.** (1867), 15 L. T. 624; **Alexander v. Malcolmson** (1869), 20 L. T. 930; **Gann v. Johnson** (1871), L. R. 6 C. P. 461; **Glenister v. G. W. Ry.** (1873), 29 L. T. 423; **Cohen v. G. E. Ry.** (1876), 45 L. J. Q. B. 292; **Harris v. G. W. Ry.** (1876), 1 Q. B. D. 515; **Doolan v. Mid. Ry.** (1877), 2 App. Cas. 792; **Lewis v. G. W. Ry.** (1877), 3 Q. B. D. 195; **Stevens v. L. B. & S. C. Ry.** (1877), 42 J. P. 70; **Foreman v. G. W. Ry.** (1878), 38 L. T. 851; **Ashenden v. L. B. & S. C. Ry.** (1880), 5 Ex. D. 190; **Hill v. L. & N. W. Ry.** (1880), 42 L. T. 513; **M. S. & L. Ry. v. Brown** (1883), 8 App. Cas. 703; **Dickson v. G. N. Ry.** (1886), 18 Q. B. D. 176; **G. W. Ry. v. McCarthy** (1887), 12 App. Cas. 218; **Shaw v. G. W. Ry.**, [1894] 1 Q. B. 373; **Wilkinson v. L. & Y. Ry.**, [1907] 2 K. B. 222; **Williams v. Mid. Ry.** (1907), 98 L. T. 81; **Re North Western Rubber Co. & Hüttenbach**, [1908] 2 K. B. 907; **Marriott v. Yeoward**, [1909] 2 K. B. 987; **Sutcliffe v. G. W. Ry.**, [1910] 1 K. B. 478; **Belfast Ropework Co. v. Bushell**, [1918] 1 K. B. 210; **G. N. Ry. v. L. E. P. Transport & Depository**, [1922] 2 K. B. 742.

1209. — —.—**A.**, by parol, made arrangements with defts., a railway co., to convey cattle for him to K. station. He at the same time, without noticing its contents, signed a consignment note, by which the cattle were directed to be taken to E., an intermediate station on the line to K.:—**Held**: parol evidence was admissible to show that defts. had agreed to carry on the cattle to K., as it did not contradict but only supplemented the written contract.—**MALPAS v. LONDON & SOUTH**

tered a declaration of a new partnership under the same name, comprising pltfs. only. At the trial pltfs. tendered oral evidence to prove that these declarations were incorrect:—**Held**: such evidence was inadmissible.—**CALDWELL v. ACCIDENT INSURANCE CO. OF NORTH AMERICA** (1895), 24 S. C. R. 263.—**CAN.**

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WESTERN RY. CO. (1866), L. R. 1 C. P. 336; Har. & Ruth. 227; 85 L. J. C. P. 166; 13 L. T. 710; 12 Jur. N. S. 271; 14 W. R. 391.

*Annotations:—*Reid, Johnson v. Appleby (1874), 43 L. J. C. P. 146. *Mentl.* Lord v. Mid. Ry. (1867), L. R. 2 C. P. 339.

1210. — *Contract for publishing.*—At the request of M., deft., the proprietor of certain railway time-tables, signed an order in these terms, M. also signing: "Insert my advertisements for one year in H.'s Local Time Tables, the Great Northern," & six others named; "Charge for insertion to be 10s. each monthly book." Pltf.'s, H.'s, time-tables consisted of separate books, published monthly, one for each of the seven railways. Pltf. did not employ M. to obtain orders for him, but on such as he obtained allowed him a commission. M. brought deft.'s order to pltf., who approved it, & allowed M. his commission & having inserted the advertisements for a whole year in each of the seven separate books brought his action against deft. to recover at the rate of 70s. a month. At the trial it was proposed on the part of pltf., to ask deft. what representations M. had made to him to induce him to enter into the written contract deft.'s contention being that he was only liable for 10s. per month in respect of one advertisement in one book:—*Held*: the effect of the evidence would be to vary a written contract & therefore it was inadmissible.—HOTSON v. BROWN (1860), 9 C. B. N. S. 442; 30 L. J. C. P. 106; 9 W. R. 233; 142 E. R. 174; *sub nom.* BROWN v. HOTSON, 7 Jur. N. S. 633.

1211. — *Deed to lead uses.*—A deed to lead the uses of a fine cannot be controlled except by matter in writing, but if the fine varies from the deed parol evidence may be given that it was intended to be to other uses.—RUTLAND (COUNTESS) v. RUTLAND (EARL) (1604), Cro. Jac. 29; 79 E. R. 23; *sub nom.* RUTLAND'S (COUNTESS) CASE, 5 Co. Rep. 25 b.

*Annotations:—*Consd. Houghton v. Tate (1829), 3 Y. & J. 486; Cooke v. Nash (1832), 9 Bing. 341. *Reid.* Dodd v. Ellington (1815), 1 Roll. Rep. 41; Haverhill v. Hare (1816), 3 Bulst. 250; Stapilton v. Stapilton (1739), 1 Atk. 2; Doe d. Odienne v. Whitehead (1759), 2 Burr. 704.

1212. — *Where there is a deed to lead the uses of a recovery, a parol averment that the recovery was suffered to other uses, is inadmissible.*—TREGANY v. FLETCHER (1697), 1 Ld. Raym. 154; 2 Salk. 676; 91 E. R. 1000.

1213. — *Deed of revocation.*—SHALES v. BARRINGTON (1718), 1 P. Wms. 481; 24 E. R. 481, L. C.

*Annotation:—*Mentl. Leman v. Alle (1753), Amb. 163.

1214. — *Deed of trust.*—LAKE v. PHILIPS & LAKE (1637), 1 Rep. Ch. 110; 21 E. R. 522.

1215. — *Founding a charity.*—By an indenture, dated Dec. 3, 1751, nineteen trustees were appointed of a Methodist chapel at Birstal, then recently erected & built by subscription, & described as being in the possession of one J. N., to hold the same upon trust to permit John Wesley during his life, & after his death to permit Charles Wesley, & after his death to permit W. G. to appoint the preacher, & after the death of the survivor, upon trust, "that the trustees, or the major part of them, should at all times thereafter, monthly or oftener, at their discretion, nominate & appoint one or more fit person or persons to preach & expound God's Holy Word in the said house in the same manner as near as might be as God's Holy Word was then preached & expounded therein." In 1782 the then trustees of the charity executed a deed, purporting to vary the trusts

already declared by the deed of 1751 relating to the appointment of preachers. The mode of appointment of preachers prescribed by the deeds of 1751 & 1782 was, it was alleged, contrary to the general rules & regulations & systems of Methodism, as founded & always adopted by John Wesley, whereby the appointment of preachers was absolutely vested in a body called the Conference. On an information filed by relators in 1853, to have the deeds of 1751, 1782, & subsequent deeds corrected, on the ground that they did not sufficiently declare or adequately provide for the paramount objects of the charity, & to have the trusts declared upon the footing of & consistently with the present system of Methodism, which gave the right of appointment of preachers to the Conference:—*Held*: the terms of the trust deed of 1751 were sufficiently clear & unambiguous, & extrinsic evidence could not be let in to show that they were inconsistent with the general system of Methodism.

Where parol evidence is tendered for the purpose of varying or contradicting the terms of a written deed, it will not be admitted. But where such is tendered to enable the ct. to understand in what sense certain words are used in a deed, it is admissible.—A.-G. v. CLAPHAM (1855), 4 De G. M. & G. 591; 3 Eq. Rep. 702; 24 L. J. Ch. 177; 24 L. T. O. S. 245; 19 J. P. 54; 1 Jur. N. S. 505; 3 W. R. 158; 43 E. R. 638, L. C.

*Annotation:—*Reid, G. W. Ry. & Mid. Ry. v. Bristol Corp'n. (1918), 87 L. J. Ch. 414.

1216. — *Settling land.*—A. by will dated Dec. 31, 1904, gave £500 to trustees upon trust to purchase land to be added to glebe of parish church. The will stated that the bequest was made "in pursuance of the express wish of my wife," his wife having died in 1896. In 1905, he purchased a piece of land in the parish for £375, & had it conveyed to trustees to be added to the glebe. The deed recited that the land was so bought & conveyed in memory of testator's wife. In 1911 testator made a codicil which gave certain additional legacies & in all other respects confirmed his will. He died in 1913:—*Held*: both will & deed clearly expressed the motive & object of the respective gifts, & they were not the same. Parol evidence was not admissible to vary their construction.—*Re* AYNLEY, KYRLE v. TURNER, [1915] 1 Ch. 172; 84 L. J. Ch. 211; 112 L. T. 433; 31 T. L. R. 101; 59 Sol. Jo. 128, C. A.

1217. — *Lease.*—LAWSON v. LAUDE (1761), Dick. 346; 21 E. R. 303.

1218. — *CRAWFORD v. WHITE CITY RINK (NEWCASTLE-ON-TYNE), LTD.* (1913), 29 T. L. R. 318; 57 Sol. Jo. 357; 77 J. P. Jo. 111.

1219. — *Marine insurance policy.*—Pltf., who had purchased a cargo which was ready to be loaded at Quebec, effected an insurance in the usual form at & from New York to Quebec, during her stay there, & thence to a home port "on profit on cargo," beginning the adventure on the goods from the loading thereof aboard the said ship. The ship, which was at the time of effecting the policy on the voyage from New York to Quebec, was lost before she reached that port. The declaration set out certain correspondence, showing that pltf. intended to insure the loss of his profit by the ship being lost before arriving at Quebec, & alleged that the correspondence & the nature of the risk intended to be covered were explained to defts. before they subscribed the policy, & that the premium was at a higher rate than would have been charged for an insurance from Quebec homewards, or on goods for the

voyage:—*Held*: these facts could not be looked at to alter the nature of the contract.

Extrinsic evidence cannot be adduced to show that what purports to be an insurance on goods is an insurance on the ship, there being no ambiguity in the words of the policy, & no reference in it to any such extrinsic evidence.—*HALHEAD v. YOUNG* (1856), 6 E. & B. 312; 25 L. J. Q. B. 290; 2 Jur. N. S. 970; 4 W. R. 530; 119 E. R. 880.

Annotation:—*Mentd.* *Chope v. Reynolds* (1859), 5 C. B. N. S. 642.

1220. — *Prenuptial agreement.*—On Apr. 1, 1845, J. wrote as follows to H.: "I will still adhere to my last proposition, viz., to allow E. (J.'s daughter) £100 *per annum*, & if you like the situation, one of my houses to reside in, & at my decease she shall be entitled to her share in whatever property I may die possessed of." H. married the daughter, & received the £100 *per annum* during the life of J., who died in 1859, leaving his widow, one son & the daughter surviving. By his will he devised & bequeathed certain real & personal property upon trusts, giving his daughter a life-interest in one-third of all the property, & a contingent interest only in the other two-thirds. By a codicil he bequeathed her an annuity, but less than those which he gave to his son & widow. A bill was filed by the daughter & her husband, praying a declaration that, by virtue of the letter of Apr. 1, 1845, she was entitled to one equal third of the testator's real & personal estate:—*Held*: inasmuch as the testator had used a *videlicet* in the letter, parol evidence as to it was inadmissible.—*LAVER v. FIELDER* (1862), 32 Beav. 1; 1 New Rep. 188; 32 L. J. Ch. 365; 7 L. T. 602; 9 Jur. N. S. 190; 11 W. R. 245; 55 E. R. 1.

Annotations:—*Mentd.* *Keays v. Gilmore* (1874), 22 W. R. 465; *Re Allen, Hincks v. Allen* (1880), 49 L. J. Ch. 563; *Re Fickus, Farina v. Fickus*, [1900] 1 Ch. 331.

1221. — *Release of debt.*—To an action of debt on bond against one of two obligors, deft. pleaded that pltf., by a deed of release under seal, released his co-obligor. Pltf. replied that the release was executed by him with the consent & at the request of deft., & on an express promise & undertaking by him that the release should not operate to discharge deft. from, or in any way prejudice pltf.'s rights or remedies against deft. in respect of, the bond:—*Held*: the replication was bad, as pltf. could not by a parol averment vary the terms of an instrument under seal.—*COCKS v. NASH* (1832), 9 Bing. 341; 2 Moo. & S. 431; 2 L. J. C. P. 17; 131 E. R. 643.

Annotation:—*Mentd.* *Teode v. Johnson* (1856), 11 Exch. 840.

1222. — *Sale of goods.*—*TIDCOMBE v. CHOLMLEY* (1701), Colles, 166; 1 E. R. 232, H. L.

1223. — — *Deft.*, by a written contract, agreed to sell pltf. 60 tons of "Ware potatoes," at £5 a ton. It appeared in evidence that in the

neighbourhood three qualities of potatoes were known, "Wares, Middlings, & Chats," Wares being the largest & best:—*Held*: evidence was not admissible to show that pltf. had in fact contracted for the sale to him of a particular kind of Ware potatoes, viz. "Regent's Wares," while those offered to him by deft. were of an inferior kind, viz. "Kidney Wares."—*SMITH v. JEFFRYES* (1846), 15 M. & W. 561; 15 L. J. Ex. 325; 7 L. T. O. S. 231; 153 E. R. 972.

Annotations:—*Refd.* *McDonald v. Longbottom* (1859), 5 Jur. N. S. 1102. *Mentd.* *Kirchner v. Venus* (1859), 12 Moo. P. C. C. 361.

1224. — — *A. agreed by parol with B.'s agent to purchase flour from B. to be of the same quality as certain flour which B. had previously sold to M. Shortly after a "bought note" was sent to A., which described the flour as XS. A. tried the flour, found it bad, & complained of it, but subsequently used some more of it. The flour was XS flour, but inferior to that sold to M., which was XSS flour. A. paid under protest for the flour delivered to him & brought his action against B. for not delivering to him flour of the quality of that sold to M. but worse flour:—*Held*: the contract having been reduced into writing, parol evidence could not be given to show that the flour bought was any other than XS flour.—*HARNOR v. GROVES* (1855), 15 C. B. 887; 24 L. J. C. P. 52; 24 L. T. O. S. 215; 3 W. R. 168; 3 C. L. R. 406; 139 E. R. 587.*

1225. — — *On a sale of goods, a sale note having been given, with a certain description, relied on as a warranty, evidence is not admissible to show that they were to be bought as they were.*—*SCHWEIR v. THORNS* (1862), 3 F. & F. 243, N. P.

1226. — — *Neither a pltf. nor a deft. can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, & required so to be by the Stat. Frauds.*—*HICKMAN v. HAYNES* (1875), L. R. 10 C. P. 598; 44 L. J. C. P. 358; 32 L. T. 873; 23 W. R. 872.

Annotations:—*Consd.* *Levey v. Goldberg*, [1922] 1 K. B. 688. *Refd.* *Plevins v. Downing* (1876), 1 C. P. D. 220; *Morrell v. Studd & Millington*, [1913] 2 Ch. 648; *British & Beningtons v. North Western Cachar Tea Co., etc.*, [1923] A. C. 48. *Mentd.* *Morris v. Baron*, [1918] A. C. 1; *Hartley v. Hymans*, [1920] 3 K. B. 475.

1227. — — *MERCANTILE AGENCY CO., LTD. v. FLITWICK CHALYBEATE CO.* (1807), 14 T. L. R. 90, H. L.

1228. — *Sale of land.*—By a written agreement between pltf. & deft., pltf. agreed to sell, & deft. agreed to purchase, upon the terms stated, a certain property called the L. estate; & by the same agreement deft. agreed to sell, & pltf. agreed to purchase another estate, called the H. estate; & it was not expressed that the two contracts were to be dependent on each other. Deft. was eventually unable to make a good title to the H. estate:—*Held*: evidence *aliunde* was not

1222 i. — *Sale of Goods.*—Evidence tending to vary a written contract cannot be received where the defts. are seeking a remedy in damages, by reduction in price, for breach of condition or warranty, & the remedy was a purely common law one. The authorities which would permit such evidence to be given in an action for specific performance, or to rescind a contract, are not applicable.—*HOWARD v. CHRISTIE* (1900), 33 N. S. R. 367.—CAN.

1222 ii. — — *WILSON v. WINDSOR FOUNDRY CO.* (1900), 33 N. S. R. 21; *affd.*, 31 S. C. R. 381.—CAN.

1222 iii. — — *Defts. agreed to purchase 3,000 maunds of copper,*

July shipment, & on Aug. 13, defts. entered into a contract with pltf. to sell to them 750 maunds out of this copper. The bought-&-sold notes, forming the contract between pltf. & defts., corresponded one with the other, & constituted a contract for delivery of 750 maunds conditional on arrival within four months. Fifteen hundred maunds or thereabouts of this copper arrived within the time mentioned in the contract between pltf. & defts. Defts. delivered to pltf. 375 maunds & 6 chttacks of copper within time, & made no further delivery to pltf., no other shipment of the copper contracted for arriving within time. In a suit brought by pltf. to recover damages for breach of

contract to deliver, defts. sought to show by oral evidence that the contract was for delivery of 750 maunds, if one-fourth of each of the successive arrivals should, in the aggregate, amount to 750 maunds:—*Held*: such evidence was inadmissible.—*JADU RAI v. BHUSOTARAN NUNDY* (1889), 1 L. R. 17 Cal. 173.—IND.

1228 i. — *Sale of land.*—Pltf. paid money to defts. under a written contract for the purchase of land from defts. upon terms & conditions set out in writing. Pltf. sought the return of his money alleging that he was one of a number of persons, called a syndicate, who were to buy a tract of land from defts. & it was a condition of the

Sec. 4.—Admission of extrinsic evidence: Sub-sects. 2 & 3.]

admissible to show that it was the real intention of the parties that the agreement should take effect on the basis of a mutual exchange.—*CROOME v. LEDIARD* (1834), 2 My. & K. 251; 3 L. J. Ch. 98; 39 E. R. 940, L. C.

Annotation:—*Mentd.* Mainland v Upjohn (1889), 41 Ch. D. 126.

1229. ———.]—T. agreed to sell to C. certain freehold houses, & to make a good marketable title. On investigation of the title it appeared the houses were part of a property which had been sold by a building society in lots, subject to stringent restrictive covenants which were admitted to make the title not a marketable one. T. having declined to procure a release of the covenants, C. brought an action to recover back his deposit. T. adduced evidence that C. knew of the restrictions at the time of the contract, & the jury found that he did:—*Held*: this evidence could not be admitted to modify the terms of the express contract.—*CATO v. THOMPSON* (1882), 9 Q. B. D. 616; 47 L. T. 491, C. A.

Annotations:—*Reid.* Ellis v. Rogers (1885), 29 Ch. D. 661; May v. Platt, [1900] 1 Ch. 618; Alderdale Estate Co. v. McGrory, [1917] 1 Ch. 414. *Mentd.* Ashburner v. Sowell, [1891] 3 Ch. 405; Rudd v. Lascelles, [1900] 1 Ch. 815; Halkett v. Dudley, [1907] 1 Ch. 590; Simpson v. Gilley (1922), 92 L. J. Ch. 194.

1230. Where fraud alleged.]—IRNHAM (LORD) v. CHILD (1781), 1 Bro. C. C. 92; Dick. 554; 28 E. R. 1006, L. C.

Annotations:—*Consd.* Townshend v. Stangroom (1801), 6 Ves. 328; *Re* Marlborough, Davis v. Whitehead, [1894] 2 Ch. 133. *Reid.* Cripps v. Joe (1773), 4 Bro. C. C. 472; Squire v. Campbell (1836), 1 My. & Cr. 459. *Mentd.* Bonnett v. Sadler (1808), 14 Ves. 526; Fowler v. Fowler (1859), 4 De G. & J. 250; Jervis v. Berridge (1873), 8 Ch. App. 351.

1231. ———.]—There is only one case, that of fraud, where a deed can be avoided by parol testimony (*BEST, J.*).—*DOE d. ROBERTS v. ROBERTS* (1819), 2 B. & Ald. 367; 106 E. R. 401.

Annotations:—*Mentd.* Doe d. Garons v. Knight (1826), 5 B. & C. 671; Prole v. Wiggins (1836), 3 Bing. N. C. 230; Doe d. Williams v. Lloyd (1839), 5 Bing. N. C. 741; Bessey v. Windham (1844), 6 Q. B. 166; Philippotts v. Philippotts (1850), 10 C. B. 85; Bowes v. Foster (1858), 2 H. & N. 779.

1232. ———.]—The terms of a written undertaking cannot be varied by parol, unless there is fraud.—*HILLS v. WARNER* (1833), 1 Dowl. 680.

1233. ———.]—The rule of law is clear, that where a contract between parties had been reduced to writing, you cannot add to or diminish from its terms by evidence of what took place at the time it was entered into. If, however, any fraudulent representation had been made by pltf. as an inducement to deft. to enter into the agreement, such evidence might then be admissible in order to lay a ground for relieving deft. from its terms on the score of fraud. But no parol evidence can be given to establish a warranty not expressed in the instrument itself (*PARKE, B.*).—*CHANTER v. HOPKINS* (1838), 4 M. & W. 399; 1 Horn & H. 377; 8 L. J. Ex. 14; 3 Jur. 58; 150 E. R. 1484.

Annotations:—*Reid.* Lloyd v. Sturgeon Falls Pulp Co. (1901), 85 L. T. 162. *Mentd.* Shepherd v. Pybus (1842),

3 Man. & G. 868; *Oliphant v. Bayley* (1843), Dav & Mer. 373; *Camac v. Warriner* (1845), 1 C. B. 356; *Pacific Steam Navigation Co. v. Lewis* (1847), 16 M. & W. 783; *Parsons v. Sexton* (1847), 4 C. B. 899; *Pott v. Flather* (1847), 11 Jur. 735; *Hall v. Conder* (1857), 2 C. B. N. S. 22; *Prideaux v. Bunnett* (1857), 1 C. B. N. S. 613; *Ripley v. Lorden* (1860), 2 L. T. 164; *Bannerman v. White* (1861), 31 L. J. C. P. 28; *Emmerton v. Mathews* (1862), 7 H. & N. 586; *Studley v. Baily* (1862), 1 H. & C. 405; *Turner v. Mucklow* (1862), 6 L. T. 690; *Asenmar v. Casella* (1867), L. R. 2 C. P. 677; *Chalmers v. Harding* (1868), 17 L. T. 571; *Jones v. Just* (1868), L. R. 3 Q. B. 197; *Redhead v. Mid. Ry.* (1869), 9 B. & S. 519; *Osborn v. Hart* (1871), 23 L. T. 851; *R. v. Middleton* (1873), L. R. 2 C. C. R. 38; *Watts v. Stevens*, [1906] 2 K. B. 323; *Bristol Tram., etc., Carriage Co. v. Fiat Motors*, [1910] 2 K. B. 831; *Manchester Liners v. Rea*, [1922] 2 A. C. 74.

1234. Where illegality alleged.]—It is an inflexible rule, not to admit parol evidence to contradict a written instrument, unless the consideration be illegal.—*WOODBIDGE v. SPOONER* (1819), 3 B. & Ald. 233; 1 Chit. 661; 106 E. R. 647.

Annotations:—*Apld.* Stott v. Fairlamb (1883), 52 L. J. Q. B. 420. *Reid.* Moseley v. Hanford (1830), 5 Man. & Ry. K. B. 607; *Solly v. Hinds* (1834), 4 Tyr. 305; *Abbot v. Hondricks* (1840), 2 Scott, N. R. 183; *Brown v. Langley* (1842), 12 L. J. C. P. 62. *Mentd.* Fletcher v. Fletcher (1844), 4 Hare, 67; *Hulse v. Hulse* (1856), 17 C. B. 711.

1235. ———.]—The general rule of evidence, that parol evidence cannot be admitted to contradict or vary a written document does not apply to a bond apparently legal, & when it is suggested that the bond itself is colourable only, & that the real agreement between the parties was illegal, facts are clearly admissible to show what the real transaction was.—*GREVILLE v. ATKINS* (1829), 9 B. & C. 462; 4 Man. & Ry. K. B. 372; 109 E. R. 172.

1236. When document forms no part of contract—Rule as to admissibility not applicable.—Evidence of circumstances attending signature admissible.]—Parol evidence cannot be said to be improperly admitted as contradicting or varying a written agreement, when it relates to the circumstances under which pltf.'s name was appended to a document which was no part of the agreement, but which was placed before him for signature by deft. after the agreement was concluded.—*BANK OF AUSTRALASIA v. PALMER*, [1897] A. C. 540; 66 L. J. P. C. 105, P. C.

Collateral documents.]—See Sub-sect. 11, G., *post*.

Showing status of contracting party—Whether principal or agent.]—See AGENCY, Vol. I., p. 637, Nos. 2591–2612.

Statements by auctioneers.]—See AUCTION & AUCTIONEERS, Vol. III., p. 17, Nos. 124–127.

Where terms ambiguous.]—See Sub-sect. 4, *post*.

SUB-SECT. 3.—TO ADD TERMS.

Whether evidence of usage admissible to add terms.]—See CUSTOM & USAGES, pp. 40–42, Nos. 444–469, *ante*.

1237. Whether evidence admissible.]—To add anything to an agreement in writing by admitting parol evidence, which would affect land, is not

agreement that "if the syndicate failed to fill," that is if there were not a sufficient number of persons procured to enter into the agreement to purchase the whole tract, "we should get our money back at once."—*Held*: oral evidence of such agreement could not be given as it contradicted a distinct term of the written instrument.—*CARTER v. CANADIAN NORTHERN RY. CO.* (1911), 18 O. W. R. 43; 1 O. W. N. 893; 2 O. W. N. 639; 34 O. L. R. 370.—*CAN.*

PART III. SECT. 4, SUB-SECT. 3.

1237 i. Whether evidence admissible.]—To a legal mtge. pltf. endeavoured to add a charge made by means of a memorandum in a bill book & parol evidence that it was to be added to the security.—*Held*: this could not be done.—*CATLEY v. McDONELL* (1851), 8 U. C. R. 454.—*CAN.*

1237 ii. ———.]—Evidence of an agree-ment is not admissible if it would add

to a written agreement, & is not collateral thereto.—*MCKENZIE v. MCGLAUGHLIN* (1885), 8 O. R. 111.—*CAN.*

1237 iii. ———.]—Evidence cannot be admitted to prove a contemporaneous oral stipulation varying, adding to, or subtracting from, the terms of a written contract.—*DAIMODDEE PAIR v. KAIM TARIDAR* (1879), 1 L. R. 5 Calc. 300; 4 C. L. R. 419.—*IND.*

1237 iv. ———.]—By a release the

only contrary to Stat. Frauds, but to the rule of common law before that statute was in being (LORD HARDWICKE, C.).—*PATERICHE v. POWLET* (1742), 2 Atk. 383; 26 E. R. 632, L. C.

Annotations.—*Refd.* Stowell v. Robinson (1837), 3 Bing. N. C. 928. *Mentd.* Hudson v. Carmichael (1854), Kay, 613; Powys v. Blagrave (1854), 4 De G. M. & G. 448; Powys v. Blagrave (1854), 2 W. R. 700.

1238. —[—]—You cannot by parol add anything to what was the real agreement at the time, after that has been correctly reduced into writing (GRAHAM, B.).—*OMEROD v. HARDMAN* (1801), 5 Ves. 722; 31 E. R. 825.

Annotations.—*Mentd.* Scarisbrick v. Skelmersdale (1840), 4 Y. & C. Ex. 78; Wilbraham v. Scarisbrick (1847), 1 H. L. Cas. 167.

1239. —[—]—It has been frequently held to be a settled rule that nothing parol shall be received in addition to any agreement which has been reduced into writing (THOMSON, C.B.).—*HOPE v. ATKINS* (1814), 1 Price, 143; 145 E. R. 1358.

1240. —[—]—*SMITH v. DOE d. JERSEY*, No. 724, ante.

1241. —[—]—*ROGERS v. HADLEY*, No. 1193, ante.

1242. — **Evidence must be clear & precise.**—Where an oral statement is attempted to be super-added to a written contract the evidence as to such statement must be clear & precise.—*THOMSON v. SIMPSON* (1870), 5 Ch. App. 659; 39 L. J. Ch. 857; 22 L. T. 898; 18 W. R. 1090, L. C. & L. J.J. *Annotation*.—*Mentd.* Citizens' Bank of Louisiana v. National Bank of New Orleans (1873), L. R. 6 H. L. 352.

1243. — **Hire of animal—Note of agreement stating time & price.**—At the time of hiring a horse a note of the agreement was made stating the time & the price. Pltf. was not precluded from proving by parol evidence additional terms of agreement.—*JEFFERY v. WALTON* (1816), 1 Stark. 267, N. P.

Annotations.—*Refd.* Ford v. Yates (1841), 2 Man. & G. 549; Malpas v. L. & S. W. Ry. (1866), L. R. 1 C. P. 336. *Mentd.* Baillie v. Jay (1859), 7 W. R. 283.

— **Purchase of animals—Parol evidence of warranty when written memorandum.**—See ANIMALS, Vol. II., p. 264, Nos. 422-424.

1244. — **Date of letter.**—A person, after he became bkpt., & before he had got his certificate, called at the office of his attorney to whom he was indebted, & wrote there, the attorney not being at home, a letter promising to pay him a sum of £100. The only signature was a flourish of the pen, which it was contended by pltf. formed the letter M., the initial letter of deft.'s name:—*Held*: if it was an M., it was not a sufficient signature under 6 Geo. 4, c. 16, s. 131. *Semle*: if such a letter be without date, the time when it was written cannot be proved by parol evidence.—*HUBERT v. MOREAU* (1827), 2 C. & P. 528; 12 Moore, C. P. 216; 5 L. J. O. S. C. P. 56.

Annotations.—*Refd.* Lobb v. Stanley (1844), 5 Q. B. 574; Grant v. Maddox (1846), 15 L. J. Ex. 104.

1245. —[—]—In an action for work & labour, where it appears that the work was done under a written agreement, which is inadmissible in

evidence for want of a stamp, parol evidence is not receivable to show that there was extra work done, not included in the original agreement; nor will the judge look at the contract for this purpose.—*BUCKSTONE v. CORNISH* (1844), 8 Jur. 46.

1246. —[—]—L. wrote a letter to the owner, offering to take a farm on certain terms stated, nothing being said as to game. The letter was not signed by either party, but a copy was exchanged, & L. entered into possession. L. having afterwards shot a hare on the farm, was summoned by the landlord; but the justices held that as the lease was in writing, nothing could be added to it by parol evidence, & refused to hear evidence as to other terms alleged by the landlord to have been agreed upon:—*Held*: as there was some evidence of an agreement in writing, the effect of which was to leave the tenant the right of sporting, the decision of the justices could not be interfered with.—*BUTLER v. LORD* (1860), 24 J. P. 390.

1247. — **Sale of land.**—*Goss v. NUGENT* (LORD), No. 1185, ante.

1248. —[—]—The law prohibits generally if not universally the introduction of parol evidence to add to a written agreement whether respecting or not respecting land, or to vary it (KNIGHT BRUCE, L.J.).—*MARTIN v. PYCROFT* (1852), 2 De G. M. & G. 785; 22 L. J. Ch. 94; 20 L. T. O. S. 135; 16 Jur. 1125; 1 W. R. 58; 42 E. R. 1079, L. J.J.

Annotations.—*Consd.* Price v. Ley (1863), 4 Giff. 235. *Refd.* North v. Loomes, [1919] 1 Ch. 378. *Mentd.* Jervis v. Berridge (1873), 8 Ch. App. 351.

1249. — **Sale of goods.**—*CHANTER v. HOPKINS*, No. 1233, ante.

1250. —[—]—Pltf. sent two pipes of wine to a customer on a written order, & by a specified conveyance; but the order did not state the price; one pipe, the subject of that action, was lost by the negligence of deft., the carrier:—*Held*: the price could not be supplied by parol evidence.—*MORGAN v. SYKES* (*temp.* 1834-42), cited in 3 Q. B. at p. 486.

1251. —[—]—*HICKMAN v. HAYNES*, No. 1226, ante.

1252. — **Agreement inter partes—To show other persons parties to it.**—It is questionable whether in the case of an agreement *inter partes* parol evidence is ever admissible for the purpose of showing other persons to be parties to it.—*ROBINSON v. RUDKINS* (1856), 26 L. J. Ex. 56.

1253. — **Lease—Addition of restrictive covenant.**—T. agreed in writing to take an underlease of two of six houses, held under one lease subject to existing tenancies, the covenants to be similar to those in the original lease. T. died before the underlease was executed, but there was some evidence to show that he had seen & approved of a draft of the underlease which contained a covenant, not in the original lease, against carrying on the business of a grocer in either of the houses. The tenant of one of the other four houses had an agreement for a lease to contain the restrictive covenant.

exors. of R. released the partners from all claims whatever in respect of R.'s share, & all consideration for that release was stated in the document to be a lump sum, on payment of which, under the writing, all claims arising out of the old partnership ceased & determined. An oral agreement was sought to be proved which added another term to the consideration for release in respect of the past accounts, the continuance of a one-anna share in the partnership:—*Held*: such agreement was not a purely collateral or additional agreement, but was an addition to the terms of a contract

that had been reduced to writing, & was inconsistent with those terms & inadmissible.—*COWASJI RUTTONJI LIMBOOWALLA v. BURJORJI RUSTOMJI LIMBOOWALLA* (1888), 17 L. R. 12 Bom. 335.—*IND.*

e. — **Certificate of registrar.**—A certificate of the registrar is sufficient even though he does not certify that he was the registrar of the county in which the lands lie, & it can be shown by extrinsic evidence that he was the registrar of the county.—*DOE d. MCKENZIE v. MOSHER* (1874), 2 Pug. 355.—*CAN.*

f. —[—]—A certificate of the acknowledgment of a deed taken before a notary public was headed Province of N. B., & stated that the notary had set his hand & affixed his seal thereto at J., in the province:—*Held*: if the certificate was defective in not stating that the notary was resident in the province at the time, that fact could be supplied by evidence.—*DOE d. SEELY v. HERRINGTON* (1888), 27 N. B. R. 525.—*CAN.*

g. — **Power of attorney.**—*SERRE DIT ST. JEAN v. METROPOLITAN BANK* (1876), 21 L. C. J. 207.—*CAN.*

Sect. 4.—Admission of extrinsic evidence: Sub-sects. 3 & 4.]

On bill filed against T.'s administrator for specific performance of the agreement, & a declaration that T. had accepted the underlease in the form of the draft:—*Held*: the administrator could not be compelled to accept an underlease containing the restrictive covenant.—*SNELLING v. THOMAS* (1874), L. R. 17 Eq. 303; 43 L. J. Ch. 506.

To prove real or additional consideration.]—*See* Sub-sect. 11, D., *post*.

To prove payment of consideration.]—*See* Sub-sect. 11, D., *post*.

SUB-SECT. 4.—TO EXPLAIN AMBIGUITIES—PATENT AND LATENT.

Admission of evidence of custom & usages.]—*See* CUSTOM & USAGES.

1254. General rule.]—WATCHAM v. EAST AFRICA PROTECTORATE, No. 923, *ante*.

1255. —.]—Parol evidence is admissible to explain the terms of an ambiguous written agreement, but not to extend it.—STOKES v. MOORE (1786), 1 Cox, Eq. Cas. 219; 29 E. R. 1137.

Annotations:—Mentd. Ellis v. Smith (1754), 1 Ves. 11; Ogilvie v. Foljambe (1817), 3 Mer. 53; Thornbury v. Bevil (1842), 1 Y. & C. Ch. Cas. 554; Caton v. Caton (1867), L. R. 2 H. L. 127.

1256. —.]—It is a well-known general rule, that extrinsic evidence is admissible to explain a written instrument, though not to vary or contradict it (BAGLEY, B.).—MEGGINSON v. HARPER (1833), 2 Cr. & M. 322; 4 Tyr. 94; 3 L. J. Ex. 50; 149 E. R. 784.

PART III. SECT. 4, SUB-SECT. 4.

h. Necessity for ambiguity before admission of extrinsic evidence.]—Where a covenant is joint in unambiguous terms, it will be construed as joint, though the interests of the covenantees be several. Where its language admits of more than one interpretation & the other covenants or stipulations, if any, of the deed do not give the solution, extrinsic evidence may be admitted to show which interpretation was intended by the parties.—HENDERSON v. WOODBURN (1881), 7 V. L. R. 413.—AUS.

k. —.]—Where a deed is free from ambiguity it neither demands nor will admit extrinsic aid to construction, but must speak for itself.—MCDONALD v. BLOIS (1873), 9 N. S. R. 298.—CAN.

l. —.]—A license to cut timber on lands traversed by a watercourse described the portion on which the timber was to be cut as "bounded on the south" by the river. The river crossed the width of the land almost entirely at a point about seven arpents from its northerly boundary, & again crossed it completely at another point about nineteen arpents further south:—*Held*: there was no ambiguity in the description, but, even if any doubt existed, the language of the instrument must be construed literally, & the party bound thereby could not be allowed to give evidence of extraneous circumstances to show a different intention.—*MOORE v. LEFRANCOIS* (1906), 27 O. L. T. 137; 38 S. C. R. 75.—CAN.

m. —.]—When the language in which an agreement is embodied is clear & susceptible of only one meaning, that meaning must be given to it, even although it may not be that which the parties intended; but where the

language is capable of more than one meaning, the circumstances surrounding the contract may be looked at to see in what sense the parties were using the words.—*BURRITT v. STONE*, [1917] 3 W. W. R. 978; 38 D. L. R. 240.—CAN.

n. —.]—If the language of a written contract has a definite & unambiguous meaning, parol evidence is not admissible to show that the parties meant something different from what they have said. But if the description of the subject-matter is susceptible of more than one interpretation parol evidence of the surrounding circumstances is admissible to help in determining what the subject-matter of it is.—*MCLEAY v. BURNS*, [1919] 3 W. W. R. 917.—CAN.

o. —.]—When a document is so obscurely worded as to leave a doubt as to the intention of the parties, it may be open to the ct. to inquire into & speculate upon that intention; but when the language of the instrument is clear, & the intention manifest, the ct. cannot hold anything immaterial, that other party, & more especially a party under no original liability, thinks fit to stipulate for in his contract.—*BARRY v. CAMBIE* (1843), 6 I. L. R. 49.—IR.

p. —.]—A. contracted to do certain pitching at the rate of 1s. 6d. per lineal yard. There was nothing on the face of the contract to show the breadth of the work to be done, but the evidence showed that the work was of a uniform breadth of 18 ft.; but the plans were not produced:—*Held*: there was no latent ambiguity in the contract, & the "lineal yard" meant 1 yard in length by 18 ft. in breadth, & not "square yard."—*FORD v. OAMARU CORPN.* (1881), 1 N. Z. L. R. 97.—N.Z.

1257. —.]—In order to warrant the admission of evidence to explain a written instrument, the ambiguity must be latent.

Where there is a latent ambiguity, the intention of the parties to the contract may be explained by evidence of the surrounding circumstances (*WILLIAMS, J.*).—*WAY v. HEARN* (1862), 13 C. B. N. S. 292; 32 L. J. C. P. 34; 6 L. T. 751; 143 E. R. 117.

1258. Patent ambiguity—Evidence inadmissible.]—ALTHAM'S CASE (1610), 8 Co. Rep. 150 b; 77 E. R. 701.

Annotations:—Reid. Green v. Horne (1693), 1 Salk. 197; Miller v. Travers (1832), 8 Bing. 244. *Mentd.* Lampet's Case (1612), 10 Co. Rep. 46 b; Whitton v. Bye (1618), Cro. Jac. 486; Trenchard v. Hoskins (1624), Win. 92; Wiseman v. Cotten (1662), 1 Sid. 185; Austin v. Lippen-cott (1673), 1 Mod. Rep. 99; Brice v. Smith (1737), Willes. 1; Goodridge v. Goodridge (1742), 7 Mod. Rep. 453; Walpole v. Cholmondeley (1797), 7 Term Rep. 138; Doe d. Ellis v. Ellis (1808), 9 East, 382; Smith v. Jersey (1821), 3 Bl. N. S. 290; Doe d. Gord v. Needs (1836), 2 Gale, 245; Bradlaugh v. Clarke (1883), 8 App. Cas. 354.

1259. —.]—This is a case of *ambiguitas patens*, &, according to the rules of law evidence to explain such an ambiguity is not admissible. Where there is doubt on the face of the instrument the law admits no extrinsic evidence to explain it (*TINDAL, C.J.*).—*SAUNDERSON v. PIPER* (1839), 5 Bing. N. C. 425; 132 E. R. 1163; *sub nom.* SANDERSON v. PIPER, 7 Dowl. 632; 2 Arn. 58; 7 Scott, 408; 8 L. J. C. P. 227; 3 Jur. 773.

Annotations:—Reid. Garrard v. Lewis (1882), 10 Q. B. D. 30. *Mentd.* Baker v. Jubber (1840), 1 Man. & G. 212.

1260. —.]—Of intention.]—By a written agreement, pltf. undertook to do work for deft. on the houses "in South Street and Southampton, Street." It appeared that, at the date of the agreement, deft. had land & houses in South

a. —.]—An agreement to deliver a book in forty-two parts at 5s. each, to begin the delivery in 1889 or 1890, & to complete the delivery of the series as soon after publication as possible, is unambiguous, & oral evidence will not be admitted to show what the agreement means.—*BOWERMAN v. GRIEVE* (1890), 9 N. Z. L. R. 157.—N.Z.

b. —.]—Parol evidence is not admissible to ascertain the meaning of a term in a contract unless the ct. is satisfied that there is an ambiguity. It is not sufficient that one party only suggests that there is an ambiguity.—*LAWRENCE v. HANDLEY*, [1920] N. Z. L. R. 169.—N.Z.

c. —.]—A written document will be construed according to its grammatical sense & only when that sense is ambiguous will oral evidence in explanation be allowed.—*GORDON v. BAIN*, [1902] T. H. 210.—S. AF.

d. —.]—In a written agreement of sale the vendor sold "his portion" of a certain farm. In an action instituted on the contract the vendor sought to lead evidence to show that at the time of the sale the purchasers knew that "his portion" did not refer to his whole portion:—*Held*: the words "his portion" were not ambiguous, but clearly meant "his registered portion," & no parol evidence could be allowed to vary the meaning of such words.—*CELLIERS v. PAPERFUS*, [1904] T. S. 73.—S. AF.

e. —.]—*Semble*: when a written contract is expressed in unambiguous language, oral evidence of surrounding circumstances not in proof of a custom is not admissible to explain the unexpressed intentions of the parties in order to add a condition limiting, not suspending, the operation of the contract.—*TEUBES v. WIKER*, [1919] W. L. D. 148.—S. AF.

Street, but had nothing in Southampton Street :—*Held*: the agreement being unambiguous, evidence was not admissible to show that the word "and" was inserted by mistake; & that it was a misdirection to leave it to the jury to say what was the intention of the parties.—*HITCHIN v. GROOM* (1848), 5 C. B. 515; 17 L. J. C. P. 145; 10 L. T. O. S. 346; 136 E. R. 979.

1261. ———.—]—*WATERPARK (LORD) v. FENNELL*, No. 1338, *post*.

1262. ———.—]—If there be, as I think there is here, an ambiguity which is not latent but patent, according to the old distinction, that is not a matter to be solved by evidence as to the meaning of the parties it is to be solved by the ct. as a matter of construction (WRIGHT, J.).—*LONDON CLEARING BANKERS COMMITTEE v. INLAND REVENUE COMRS.*, [1896] 1 Q. B. 222; 65 L. J. Q. B. 253; 74 L. T. 55; 12 T. L. R. 139; 40 Sol. Jo. 214, D. C.; *on appeal*, [1896] 1 Q. B. 542, C. A.

1263. Latent ambiguity—Evidence admissible—*Parcels in lease*.—If a lease be made of meadow, pasture, & arable lands, in which two parcels are described as "Lane's Meadows," & an action be brought against the lessee for ploughing up "Lane's Meadows" contrary to covenant, *deft.* may show that the lands thus described were arable & not meadow lands, for the words in the lease are descriptive of the locality, & not of the quality of the lands.—*SKIPWITH v. GREEN* (1724), 11 Mod. Rep. 388; 8 Mod. Rep. 311; 1 Stra. 610; 88 E. R. 1106.

Annotation:—*Mentd.* Palmer v. Ekins (1728), 2 Stra. 817.

1264. ———.—]—*EDEN v. BUTE (EARL)* (1776), 3 Bro. Parl. Cas. 679; 1 E. R. 1572, H. L.

1265. ———.—]—A. being tenant to B. under a lease containing covenants, it was agreed between them that the lease should be surrendered up, & a new one granted, omitting those covenants. A new lease was accordingly executed, & at the same time

an agreement was entered into :—*Held*: no parol evidence could be admitted to explain the agreement, there being no latent ambiguity.—*COKER v. GUY* (1801), 2 Bos. & P. 565; 126 E. R. 1441.

1266. ———.—]—D. & W. being general partners under the firm of D. & Co. & D. & Co. taking a share with three others in a particular adventure which D. & Co. manage & insure for the account of D. & Co., it is a latent ambiguity to be explained by evidence whether the D. & Co. for whose account the insurance is made means D. & W. only or all who are partners of D. in that particular adventure.—*CARRUTHERS v. SHEDDON* (1815), 6 Taunt. 14; 1 Marsh. 416; 128 E. R. 937. *Annotation*:—*Refd.* Ebsworth v. Alliance Marine Insee. (1873), L. R. 8 C. P. 596.

1267. ———.—]—Where a deed purported to grant all the coal mines in the lands in the occupation of K. & son, & the grantor had not at that time any lands in the occupation of K. & son, & the deed was founded upon a contract of sale executed some months before, to which the grantor's land steward was the subscribing witness :—*Held*: for the purpose of explaining the latent ambiguity in the deed, letters written by the latter to the grantees, respecting the sale to them by the grantor of the coal mines in the deed, & purporting to be written by his directions, were admissible evidence, without showing an express authority from the grantor to write them.—*BEAUMONT v. FIELD* (1818), 1 B. & Ald. 247; 106 E. R. 91. *Annotation*:—*Mentd.* Doe d. Norton v. Webster (1840), 12 Ad. & El. 442.

1268. ———.—]—It is the opinion of all the ct. that there was in the guarantee an ambiguity that might be explained by evidence so as to make it a valid contract (*per CUR.*).—*BROOKS v. HAIGH* (1840), 10 Ad. & El. 323; 4 Per. & Dav. 288; 113 E. R. 124, Ex. Ch.; *affg.* S. C. *sub nom.* HAIGH v. BROOKS (1839), 10 Ad. & El. 309.

Annotations:—*Apld.* Goldshede v. Swan (1847), 1 Exch. 154. *Expld.* Way v. Hearn (1862), 13 C. B. N. S. 292.

1265 i. Latent ambiguity—Evidence admissible.—An expression in a written contract may, if the whole of the contract is looked at, be found to be ambiguous, & therefore explainable by extrinsic evidence, although from its collocation & the heading of the clause in which it is contained it appears to be susceptible of only one meaning.—*BUSBY v. CLARKE* (1914), 14 S. R. N. S. W. 189.—*AUS.*

1265 ii. ———.—]—Where there is a latent ambiguity, parol evidence, is admissible to ascertain what was intended by the parties.—*BURGESS v. DENISON* (1858), 16 U. C. R. 457.—*CAN.*

1265 iii. ———.—]—The description of a lot by metes & bounds, from the Crown lands department, is admissible in evidence to explain the patent for the lot, in which it is described only by the number & concession.—*HAGARTY v. BRITTON* (1870), 30 U. C. R. 321.—*CAN.*

1265 iv. ———.—]—Where extrinsic evidence showed that there was no lot I disclosed a mistake in the description of the lots reserved, & a latent ambiguity, parol evidence might be received to explain it.—*KEAN v. DROFF* (1874), 35 U. C. R. 415.—*CAN.*

1265 v. ———.—]—D. sold to the predecessor in title of *pltf.* certain lands under the description of "Bellevue square".—*Held*: parol evidence was admissible to show what was meant by "Bellevue square," no plan or description being incorporated in the deed.—*VAN KOUGHNET v. DENISON* (1884), 11 A. R. 699.—*CAN.*

1265 vi. ———.—]—*BRADY v. SADLER* (1890), 17 A. R. 365.—*CAN.*

1265 vii. ———.—]—*SCOTTEN v. BARTHEL* (1894), 21 A. R. 965; *reversd.*, 24 S. C. R. 367.—*CAN.*

1265 viii. ———.—]—Where the construction of the mtge. depended upon the state of the property at the time it was made, parol evidence would be admitted to explain the ambiguity in the description of the lands intended to be affected.—*IMHIE v. ARCHIBALD* (1895), 25 S. C. R. 368.—*CAN.*

1265 ix. ———.—]—*ABELL v. MC-LAREN* (1901), 13 Man. L. R. 463.—*CAN.*

1265 x. ———.—]—Where Crown lands were granted "in trust for the purposes of the congregation of the Greek Catholic Church at Limestone Lake," N.W.T., & it appeared that this description was ambiguous & might mean either the Greek Orthodox Church or the Greek Church in communion with the Church of Rome :—*Held*: the construction of the grant should be determined by the facts & circumstances antecedent to & attending the issue of the grant.—*POLUSHIE v. ZACKLYNSKI* (1906), 37 S. C. R. 177; *on appeal*, [1908] A. C. 65.—*CAN.*

1265 xi. ———.—]—The ambiguity in the description was a latent one, only becoming patent when evidence was given of the irregular shape of the land, & therefore extrinsic evidence was admissible to show the intention of the parties.—*OLESON v. JONASSON* (1906), 18 Man. L. R. 94; 3 W. L. R. 466.—*CAN.*

1265 xii. ———.—]—*OWEN v. MERCIER* (1907), 14 O. L. R. 491.—*CAN.*

1265 xiii. ———.—]—*CHUTE v. ADNEY* (No. 2) (1909), 39 N. B. R. 93;

7 E. L. R. 36.—*CAN.*

1265 xiv. ———.—]—*ONTARIO WIND ENGINE & PUMP CO. v. MALFAIRE* (1910), 14 W. L. R. 264; 3 Sask. 315.—*CAN.*

1265 xv. ———.—]—In ambiguous contracts the domicile of the parties the place of execution, the purpose, & the various provisions & expressions of the instrument are material to be considered in the construction.—*LANDSDOWNE v. LANDSDOWNE* (1820), 2 Bill. 60.—*IR.*

1265 xvi. ———.—]—Parol evidence of user was rightly received to explain the extent of the denomination called the "Freestone Quarry," there being in the deed no specification of its boundaries or situation, & there being a latent ambiguity in the deed, inasmuch as there were more freestone quarries than one.—*BOYD v. MCCURDIE* (1825), Sm. & Bat. 425.—*IR.*

1265 xvii. ———.—]—When there is a latent ambiguity in a deed, such as there being two lands of the same name, evidence may be given to remove or explain it; but parol evidence to construe the deed cannot be given, until by parol evidence the existence of such latent ambiguity is shown. If a word used in a deed have a double meaning, & evidence be given of its having that double meaning, parol evidence may be given to show the sense in which the word was intended to be used.—*WATERPARK v. FENNELL* (1855), 5 I. C. L. R. 120; 8 Ir. Jur. 45.—*IR.*

1265 xviii. ———.—]—*RICHTER v. BLONFONTEIN TOWN COUNCIL*, [1922] App. D. 57.—*S. AF.*

Sect. 4.—Admission of extrinsic evidence: Sub-sects. 4 & 5, A.]

Refd. Allnutt v. Ashenden (1843), 5 Man. & G. 392; Meinertzhagen v. Davis (1844), 1 Coll. 335; Chapman v. Sutton (1846), 2 C. B. 634; Kearns v. Durell (1848), 6 C. B. 596; Curlewis v. Clark (1849), 3 Exch. 375; Edwards v. Jevons (1849), 8 C. B. 436; Bainbridge v. Wade (1850), 16 Q. B. 89; Bell v. Welch (1850), 9 C. B. 154; Colbourn v. Dawson (1851), 10 C. B. 765; Broom v. Batchelor (1856), 1 H. & N. 255; Mather v. Maidstone (1856), 27 L. T. O. S. 261; Hall v. Conder (1857), 2 C. B. N. S. 22; Cheale v. Kenward (1858), 3 De G. & J. 27; Hart v. Miles (1858), 4 C. B. N. S. 371. **Mentd.** Steele v. Hoe (1849), 14 Q. B. 431; Southall v. Riggs (1851), 11 C. B. 481; Money v. Jordan (1852), 2 De G. M. & G. 318; R. v. Watts (1854), 18 J. P. 87; Westlake v. Adams (1858), 5 C. B. N. S. 248.

1269. ———.]—A., by an agreement in writing, agreed to win stones, etc., "for the purpose of building" certain cottages:—**Held:** parol evidence could not be given, to explain the sense in which the word "building" was used.—**CHARLTON v. GIBSON** (1844), 1 Car. & Kir. 541, N. P.; *subsequent proceedings*, 4 L. T. O. S. 96.

1270. ———.]—By an agreement in writing, A. agreed to take an underlease from B., at a rent of £340, A. "paying all taxes, land tax & insurance." A lease was granted, reserving the rent of £340, stated to include the land tax. It had, however, been redeemed by the superior landlord. The lessee having refused to pay the amount of the land tax redeemed, the lease was ordered to be reformed by making him liable for the land tax, though redeemed:—**Held:** parol evidence was admissible to explain the meaning of the parties by "land tax."—**MURRAY v. PARKER** (1854), 19 Beav. 305; 52 E. R. 367.

1271. ———.]—Parol evidence may be given to show, as between the two co-obligors in a bond that one of them was only a surety for the other.

A. & B. join in a bond to secure money, borrowed by B. for the use of a third person; as between A. & B. A. is only a surety.—**BOLTON v. COOKE** (1825), 3 L. J. O. S. Ch. 87.

1272. ———.]—**WAY v. HEARN**, No. 1257, *ante*.

1273. ———.]—Parcel or no parcel is a question of fact for the jury, but the judge is bound to tell the jury what is the proper construction of any documents necessary to be considered in the decision of that question.

In this case, it being ascertained that the house itself was incorrectly laid down in the map, it was impossible to know by an examination of the deeds, or by their construction alone from what corner of the house the boundary line was to be drawn; that consequently there was a latent ambiguity, which was to be determined by evidence, & was not dependent on construction.

It was the duty of the judge to explain to the jury the true meaning of this deed; & in construing the deed the judge was bound to look at the map as forming part of the deed (**LORD CRANWORTH, C.**).—**LYLE v. RICHARDS** (1866), L. R. 1 H. L. 222; 35 L. J. Q. B. 214; 15 L. T. 1; 30 J. P. 659; 12 Jur. N. S. 947, H. L.

1274. ———.]—Pltf., being desirous of obtaining a transfer of the lease of a public-house from the deft., who was a public-house broker, signed an agreement in the following terms: "Mr. H. now informs me he is in possession of £60 cash, & such being the case, I hereby agree to get the lease & everything, for such sum of £60 cash." Deft. had no interest in the public-house himself:—**Held:** parol evidence was admissible to show what the lease was to which the agreement referred.—**HORSEY v. GRAHAM** (1869), L. R. 5 C. P.

9; 39 L. J. C. P. 58; 21 L. T. 530; 18 W. R. 141.

1275. ———.]—Pltf. granted by deed licence & authority to use an invention, of which the patent was vested in him, for breechloading rifles, to defts., yielding & paying unto the licencor the royalty of one shilling for every gun, rifle, or breech action manufactured, produced, or sold under the powers hereby granted.

The exemption of the Crown from royalties for the use of patents was at that time generally believed to extend to govt. contractors; but when this exemption was limited to the use of the immediate servants of the Crown, pltf. brought this action to recover royalties under the deed for the rifles manufactured by defts. for the govt.

Held: the words of the *reddendum* suggested a latent ambiguity which admitted extrinsic evidence to show the intentions of the parties.—**RODEN v. LONDON SMALL ARMS CO., LTD.** (1876), 46 L. J. Q. B. 213; 35 L. T. 505; 25 W. R. 269.

1276. ———.]—**Voting paper.**—**SUMMERS v. MOORHOUSE** (1884), 13 Q. B. D. 388; 51 L. T. 290; 48 J. P. 424; 32 W. R. 826; *sub nom.* **SUMMERS v. MOORHOUSE**, WAKEFIELD MUNICIPAL ELECTION PETITION, 53 L. J. Q. B. 564, D. C.

1277. ———.]—**Where ambiguity raised by extrinsic evidence.**—**SMITH v. DOE d. JERSEY**, No. 724, *ante*.

1278. ———.]—**Prima facie**, the construction of written documents is for the judge; but, where it is shown by extrinsic evidence that the terms are ambiguous, evidence is admissible to explain the ambiguity; & then it is for the jury to say in which sense the ambiguous expressions were used.—**SMITH v. THOMPSON** (1849), 8 C. B. 44; 18 L. J. C. P. 314; 137 E. R. 424.

Annotations:—**Refd.** Stuckey v. Baily (1862), 1 H. & C. 405; Bank of New Zealand v. Simpson, [1900] A. C. 182. **Mentd.** Horton v. McMurtry (1860), 5 H. & N. 667; Addis v. Gramophone Co., [1909] A. C. 488.

1279. ———.]—In the conditions of sale the vendor was described as "legal personal representative of D." At the date of the contract the vendor was not D.'s legal personal representative; there was no person filling that character. But the vendor was the only person in a position to become "legal personal representative," & he subsequently took out letters of administration to D.'s estate. The purchaser objected to the title on this ground:—**Held:** the latent ambiguity being raised by parol evidence could be got rid of by parol evidence.—**TOWLE v. TOPHAM** (1877), 37 L. T. 308.

1280. ———.]—In an action on a policy of insurance, if the evidence discloses a latent ambiguity in the policy requiring a resort to parol evidence, the question at issue ceases to be one of construction for the ct., & becomes one of fact for a jury.—**HORDERN v. COMMERCIAL UNION INSURANCE CO.** (1887), 56 L. J. P. C. 78; 56 L. T. 240, P. C.

1281. ———.]—**Interpretation of evidence admitted—Whether by court or jury.**—**SMITH v. THOMPSON**, No. 1278, *ante*.

1282. ———.]—When evidence, legitimately admitted in the course of a cause, raises a latent ambiguity, evidence to explain that is properly admissible; but if there were, in truth, no latent ambiguity, & the evidence to explain were consequently inadmissible, still the improper admission of such evidence would not be a ground for a new trial, because the writing would then be for the ct. to construe without regard to the evidence.—**BRUFF v. CONYBEARE** (1862), 13 C. B. N. S. 263; 6 L. T. 647; 9 Jur. N. S. 78; 143

E. R. 105; *reversd.* on other grounds (1868), 17 L. T. 664, Ex. Ch.

Annotation:—*Consol. London Corpn. v. Sandon, London Corpn. v. Met. Ry., Met. Ry. v. London Corpn.* (1872), 26 L. T. 86.

1283. ————.]—(1) Horses sent from Shipton by deft.'s railway to Wolverhampton, to be delivered there, were sent to a station called Herbert Street station; if booked through to Manchester (as they might be), they were sent to Bushbury Junction, a mile beyond Wolverhampton, to meet a train on another railway, to be carried to Manchester. Horses might be sent either by horse-boxes & passenger train, when the co. charged more money & took more risk, or by cattle-trucks & goods train, when they charged less & took less risk. Pltf. went to the station-master at Shipton, & required twelve horses to be carried to Manchester by the latter method; the station-master told him he could not book through, but would telegraph to Wolverhampton to have the horses sent on to meet the train on the other railway. Pltf. paid the fare to Wolverhampton, & signed a contract, on which was the direction "Shipton to Wolverhampton," & a declaration that the horses were carried "at owner's risk." The trucks were directed to Wolverhampton; the horses were taken to Herbert Street station, & it was clear that if they ought, under the contract, to have been carried to Bushbury Junction, there was a delay of twenty-four hours, & consequent injury to the horses:—*Held*: there was some evidence that "Wolverhampton" meant "Bushbury Junction."

(2) Pltf., in order to prove a contract to carry six horses from Shipton to Manchester, relied on a conversation at Manchester with the station-

master there, in which he, pltf., said he was going to send the horses, & the station-master said he would telegraph about them; on the fact of the arrival of the horses; & on the station-master conducting himself as if there were such a contract; but pltf. did not put in any written contract, though it was clear there was one:—*Held*: there was no evidence to go to the jury of a contract to carry the horses.—*ROBINSON v. GREAT WESTERN RY. CO.* (1865), Har. & Ruth. 97; 35 L. J. C. P. 123; 14 W. R. 206.

Annotations:—*As to* (2) *Refd. Malpas v. L. & S. W. Ry.* (1866), Har. & Ruth. 227. *Generally, Mentd. D'Arc v. L. & N. W. Ry.* (1874), L. R. 9 C. P. 325; *Lewis v. G. W. Ry.* (1877), 3 Q. B. D. 195.

1284. ————.]—*HORDERN v. COMMERCIAL UNION INSURANCE CO.*, No. 1280, *ante*.

SUB-SECT. 5.—TO EXPLAIN SURROUNDING CIRCUMSTANCES.

A. In General.

1285. General rule.]—*THE GLASGOW PACKET*, No. 1154, *ante*.

1286. Circumstances affecting subject-matter of document—& position of parties—At time of execution.]—*SMITH v. DOE d. JERSEY*, No. 724, *ante*.

1287. ————.]—*BRADFORD (EARL) v. ROMNEY (EARL)*, No. 1162, *ante*.

1288. ————.]—Where an agreement in writing respecting a work to be prepared by one party & to be published by the other, is expressed in short & incomplete terms, parol evidence is

PART III. SECT. 4, SUB-SECT. 5.—A.

f. General rule.]—Where written documents are intended by the parties to be the final & complete repository of their contractual intentions the surrounding circumstances cannot be used for the purpose of varying the contract, but merely for the purpose of explaining it.—*COOPER & SONS v. NELSON & MAXWELL, LTD.*, [1919] V. L. R. 66.—*AUS.*

g. ————.]—Where there is any ambiguity, the construction may be aided by looking at the surrounding circumstances.—*Mewa KUWAR v. HULAS KUWAR* (1874), 13 B. L. R. 312.—*IND.*

h. ————.]—The circumstances under which the instrument is made may show the intention with sufficient certainty to enable the cts. to construe it.—*AZIZ-UN-NISSA v. TASSADUQ HUSAIN KHAN* (1901), I. L. R. 23 All. 324; 5 C. W. N. 569; L. R. 28 Ind. App. 65.—*IND.*

j. ————.]—Parol evidence is admissible to show in what circumstances a bond or deed was executed.—*STRATFORD v. POWELL* (1807), 1 Ball & B. 14.—*IR.*

k. ————.]—It is a settled rule of law that, in construing a deed or written instrument, the ct. is at liberty to inquire into all the surrounding circumstances which may have acted upon the minds of the persons by whom the deed was executed.—*A.-G. v. DRUMMOND* (1842), 1 Dr. & War. 353; 1 Con. & Law. 210.—*IR.*

l. ————.]—The rule that a word of doubtful import may be interpreted by parol evidence of the surrounding facts applies in all cases.—*MELTON v. JOLLY* (1913), 32 N. Z. L. R. 624.—*N.Z.*

m. ————.]—Evidence may be given of the circumstances in which a contract was made, but not to explain

the terms of a written contract.—*MACLEOD v. MACLEOD* (1824), 3 Morr. 431.—*SCOT.*

n. ————.]—*In absence of ambiguity.*—*Seem*: when a written contract is expressed in unambiguous language, oral evidence of surrounding circumstances not in proof of a custom is not admissible to explain the unexpressed intentions of the parties in order to add a condition limiting, not suspending, the operation of the contract.—*TEUBES v. WIEBE*, [1912] W. L. D. 148.—*S. AF.*

o. ————.]—Where a contract is made, partly in writing & partly oral, all the circumstances may be proved & considered in order to ascertain the terms of the contract, the construction & effect of the writing, & even to vary the contents of the writing.—*LEGATE v. PRAAGH & LLOYD* (1906), 27 N. L. R. 413.—*S. AF.*

1286 i. Circumstances affecting subject matter of document—& position of parties—At time of execution.]—The point of commencement in front on lake Eric, at the south-east angle of the lot, means the south-east angle as it stood at the time the grant issued, & not a point shifting with the encroachment of the lake.—*ILER v. NOLAN* (1861), 21 U. C. R. 309.—*CAN.*

1286 ii. ————.]—*NORQUAY v. GRAND TRUNK PACIFIC TOWN & DEVELOPMENT CO., LTD.* (1915), 32 W. L. R. 756; 9 W. W. R. 347; 25 D. L. R. 59.—*CAN.*

1286 iii. ————.]—Deft., in answer to a suit by pltf. for possession of certain land, alleged that the kobala, which purported to be an out-&-out sale in favour of pltf. & on which the pltf. based his title to the property, was intended by the parties to operate only as a mtge., & to prove such allegations tendered evidence of the circumstances under which the kobala was executed, & of the conduct of the parties

to show that the document had all along been treated as a mtge. & intended to operate as such:—*Held*: such evidence was admissible.—*HEM CHUNDER SOOR v. KALLY CHURN DASS* (1883), I. L. R. 9 Calc. 528; 12 C. L. R. 287.—*IND.*

1286 iv. ————.]—A case has to be decided on a consideration of the documents themselves, with only such extrinsic evidence of circumstances as might be required to show the relation of the written language to existing facts.—*BALKISHEN DAS v. LEGGE* (1899), I. L. R. 22 All. 149; L. R. 27 Ind. App. 58; 4 C. W. N. 153.—*IND.*

1286 v. ————.]—*WALKER v. TURNBULL* (1843), 5 Dunl. (Ct. of Sess.) 1334; 15 Sc. Jur. 580.—*SCOT.*

1286 vi. ————.]—In discovering the intention of a contract, the circumstances under which it was entered into, as the prevailing opinion (though erroneous) as to the law on a particular point at the date of the contract, are material.—*STEWART v. SCOTTISH N.E. RY. CO.* (1859), 21 Dunl. (Ct. of Sess.) 5; 3 Macq. 382; 31 Sc. Jur. 445.—*SCOT.*

1286 vii. ————.]—*CORBET v. WADDELL* (1879), 7 R. (Ct. of Sess.) 200; 17 Sc. L. R. 106.—*SCOT.*

1286 viii. ————.]—*Existence of ambiguity.*—The ct. allowed a proof *habili modo* on the ground that the documents were ambiguous & could not safely be construed without knowledge of the facts to which they related.—*M'ADAM v. SCOTT* (1912), 50 Sc. L. R. 264.—*SCOT.*

p. Gift.]—The ct. or jury is entitled to look at all surrounding circumstances to decide whether a document amounts to a gift.—*R. v. HOOP* (1915), 158 R. N. S. W. 362; 32 N. S. W. N. 115.—*AUS.*

q. Boundaries & descriptions.]—In questions relating to boundaries & descriptions, & generally of parcel or

Sect. 4.—Admission of extrinsic evidence: Sub-sect. 5, A. & B.]

admissible to explain that which is *per se* unintelligible, such explanation not being inconsistent with the written terms.

You may show by extrinsic evidence the situation of the parties at the time the contract is made (TINDAL, C.J.).—*SWINERT v. LEE* (1841), 3 Man. & G. 452; 4 Scott, N. R. 77; 5 Jur. 1134; 133 E. R. 1220.

Annotations:—*Mentd.* Dobson v. Collis (1856), 25 L. J. Ex. 287; K. Snowman v. Bluet (1874), L. R. 9 Exch. 30; Davey v. Shannon (1879), 4 Ex. D. 81; Monnikendam v. Leese (1923), 39 T. L. R. 445.

1289. ————.]—SHORE v. WILSON, No. 888, ante.

1290. ————.]—A grant by lease of premises last held under the grantor as bleach works, implies a licence to use the same as such. In considering what is the extent of the grant, we are entitled to take into consideration all the circumstances connected with the property conveyed (MARTIN, B.).—*HALL v. LUND* (1863), 1 H. & C. 676; 32 L. J. Ex. 113; 7 L. T. 692; 9 Jur. N. S. 205; 11 W. R. 271; 158 E. R. 1055.

Annotations:—*Reid.* Thomas v. Owen (1887), 20 Q. B. D. 225; Birmingham, Dudley & District Banking Co. v. Ross (1889), 38 Ch. D. 295; Pwllbach Colliery Co. v. Woodman, [1915] A. C. 634; Schwann v. Cotton, [1916] 2 Ch. 120. *Mentd.* Polden v. Bastard (1865), 7 B. & S. 130.

1291. ————.]—In order to prove the agreement stated in the plea, deft. put in a letter from one of the pltf's., containing the terms of the agreement for the composition:—*Held*: evidence of a previous conversation when pltf made inquiries as to what the other creditors were likely to do was admissible to show the motive which induced him to write the letter, & the intention with which the agreement was entered into.

The evidence was not given for the purpose of adding to or qualifying the terms of the agreement, but to show with what view the paper was written—*viz.* to be shown to the other creditors. There are two objects for which it might have been given; either to bind pltf's. to the composition, or for the purpose of being shown to the other creditors. Then is not the conversation evidence to show the intention with which the paper was given & the object for which the agreement was made? (PARKE, B.).—*REAY v. RICHARDSON* (1835), 2 Cr. M. & R. 422; 1 Gale, 219; 5 Tyr. 931; 4 L. J. Ex. 236; 150 E. R. 182.

Annotation:—*Mentd.* Clapham v. Atkinson (1864), 4 B. & S. 723.

1292. ————.]—The first question is, whether the letters formed between themselves a perfect & concluded contract. That must be decided by the language of the letters themselves, aided only by such extrinsic evidence as in such cases was always admissible, with reference to the position in which the parties to the alleged contract stood at the

time, & with reference to the subject-matter (KNIGHT-BRUCE, V.-C.).—*Re OXFORD & WORCESTER EXTENSION & CHESTER JUNCTION RY. CO., Ex p. BARBER* (1851), 20 L. J. Ch. 146; *sub nom. Re BARBER, & OXFORD & WORCESTER EXTENSION & CHESTER JUNCTION RY. CO.*, 18 L. T. O. S. 338; 15 Jur. 51.

Annotations:—*Reid.* *Re Brighton, Lewes & Tunbridge Wells Ry., Ex p. Conway* (1851), 21 L. J. Ch. 461; *Brittain's Case* (1851), 1 Sim. N. S. 281.

1293. ———— So as to place court in position of parties.]—Prior & contemporaneous enjoyment of a privilege which may be attached to land & subsequent enjoyment are evidence admissible to explain the terms of a deed.

Although parol evidence cannot be used to add to or detract from the description in the deed or to alter it in any respect, it is admissible to show the condition of the property & all other circumstances necessary to place the ct., when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument.—*BAIRD v. FORTUNE* (1861), 5 L. T. 2; 25 J. P. 691; 7 Jur. N. S. 926, H. L.

Annotations:—*Reid.* Francis v. Hayward (1882), 20 Ch. D. 773. *Mentd.* Martyn v. Lawrence (1864), 10 L. T. 188; Magee v. Lavell (1874), L. R. 9 C. P. 107; Mowats v. Hudson (1911), 105 L. T. 400.

1294. ————.]—MAGEE v. LAVELL, No. 965, ante.

1295. ————.]—The doctrine that in construing a will the circumstances & intention of testator may be considered in order to ascertain his meaning, applies likewise to deeds.—*SIDEBOTHAM v. KNOTT* (1872), 26 L. T. 700; 20 W. R. 415.

1296. ————.]—I apprehend that the parol testimony must be at all events limited, as it is limited in other cases of a like character, where an instrument in writing is sought to be varied; that is to say, the evidence must be confined to facts, & must not go to statements of intention. Parol testimony of a person saying, "I intended it so," or "I intended this, that, or the other," is inadmissible, & there must be some fact, something *in pais*, for a ct. to proceed upon (WOOD, V.-C.).—*HARRISON v. BARTON* (1860), 1 John. & H. 287; 30 L. J. Ch. 213; 3 L. T. 614; 7 Jur. N. S. 19; 9 W. R. 177; 70 E. R. 756.

1297 Of facts of a transaction.]—*Re RICKETTS & JAMES, Ex p. FLIGHT* (1847), 10 L. T. O. S. 350.

1298. ———— Ownership of goods demanded.]—Where goods have been seized, & a demand made in writing, it is not to be taken as conclusive evidence of property; parol evidence is admissible to explain it.—*HOLSTEN v. JUMPSON* (1803), 4 Esp. 189, N. P.

1299. ———— At date of agreement.]—MCCLEAN v. KENNARD, No. 1164, ante.

1300. ———— Guarantee.]—Deft. executed a bond as a surety to an insurance co. for the fidelity

no parcel, parol evidence is admissible to show the situation of the land, & the marking out of the boundaries on the land itself, & this evidence is entitled to prevail over the descriptions in the written instruments.—*JOHNSTON v. CLARKE* (1884), 1 B. C. R., Pt. II., 56, 81.—CAN.

r. ————.]—Although a road alleged to run over a farm was not marked on the diagram annexed to the grant:—*Held*: the existence of such road at the time of the grant might be proved by evidence *aliunde*.—*NIEKERK v. WAKEFIELD* (1903), 20 S. C. 530.—S. AF.

a. Lease—Time in which covenant to be performed.]—Pltf. had under

several leases been in occupation of a farm of the deft.'s for about twenty-five years. In consequence of the dwelling on the lot having become unfit for occupation by the lessee he notified the lessor of his intention to give up the premises at the end of his term. Thereupon it was agreed that the lessor should put up a new house, pltf. agreeing to accept a new lease for six years & pay an increase in his rent of \$150 a year. Pltf. also agreed to perform some work in connection with the building in the summer of the first year of the term, & a written lease was executed containing a covenant by the lessor to build a new house "during the said term." The lessor insisted that he had the whole term within which to put up

the house:—*Held*: the circumstances attending the execution of the lease, as also the corroboration afforded by the lease itself, warranted the ct. in permitting parol evidence to show that the first year of the term was the year in which the house was to be erected.—*BULMER v. BRUMWELL* (1886), 13 A. R. 411.—CAN.

t. ————.]—Upon a reference to settle the form of lease, under a contract by a municipal corpn. to demise land owned by it to a railway co. for a long term of years with perpetual right of renewal, evidence of surrounding circumstances & the practice & usage of conveyancers is admissible to enable the referee to decide whether the lease

of A., who was appointed an agent of the co., & who was about to & afterwards did enter into partnership with B., also an agent of the co. The condition of the bond was that, if A., his heirs, exors., etc., should well & truly pay an account for all moneys received by him, the obligation should be void:—*Held*: the surrounding or "co-existing" circumstances were admissible for the purpose of explaining what might be ambiguous in the condition.—*MONTEFIORE v. LLOYD* (1863), 15 C. B. N. S. 203; 3 New Rep. 82; 83 L. J. C. P. 49; 9 L. T. 330; 12 W. R. 83; 143 E. R. 761.

Annotation:—*Folld. Leathley v. Spyer* (1870), L. R. 5 C. P. 595.

1301. ———.]—*LEATHLEY v. SPYER* (1870), L. R. 5 C. P. 595; 39 L. J. C. P. 299; 22 L. T. 821.

1302. ———.]—In construing all instruments you must know what the facts were when the agreement was entered into (*JESSEL, M.R.*).—*CANNON v. VILLARS* (1878), 8 Ch. D. 415; 47 L. J. Ch. 597; 38 L. T. 939; 42 J. P. 516; 26 W. R. 751.

Annotations:—*Mentd. Baxendale v. North Lambeth Liberal & Radical Club*, [1902] 2 Ch. 427; *Milnor's Safe Co. v. Great Northern & City Ry.*, [1907] 1 Ch. 208; *Petty v. Parsons*, [1914] 1 Ch. 704.

1303. ———.]—The ct. has a right to know, & is bound to know, all the material facts which were known to the parties at the time when the agreement, deed, will, or whatever it may be, was entered into or made (*KAY, J.*).—*HART v. HART* (1881), 18 Ch. D. 670; 50 L. J. Ch. 697; 45 L. T. 13; 30 W. R. 8.

Annotations:—*Reid. Wood v. Wood* (1891), 64 L. T. 586. *Mentd. Bradley v. Bradley* (1882), 51 L. J. P. 87; *Harrison v. Harrison* (1887), 12 P. D. 130.

1304. ———.]—The deed must be construed according to the ordinary rules of construction, one of which is, that you are entitled to look at the circumstances existing at the date of the deed (*ESHER, M.R.*).—*ROE v. SIDDONS* (1888), 22 Q. B. D. 224; 60 L. T. 345; 53 J. P. 246; 37 W. R. 228, C. A.

Annotations:—*Reid. Acton L. B. v. North & South Western Ry.* (1893), 37 Sol. Jo. 357. *Mentd. Derry v. Sanders*, [1919] 1 K. B. 223.

1305. ———.]—Evidence is admissible to explain the circumstances under which an instrument was executed, including the facts known to the parties.—*BUTTERLEY CO., LTD. v. NEW HUCKNALL COLLIERY CO., LTD.*, [1909] 1 Ch. 37; 78 L. J. Ch. 63; 99 L. T. 818; 25 T. L. R. 45; 53 Sol. Jo. 45, C. A.; *affd.*, [1910] A. C. 381, H. L.

Annotations:—*Apld. Locker-Lampson v. Staveley Coal & Iron Co.* (1908), 25 T. L. R. 136. *Reid. Beard v. Moira Colliery Co.*, [1915] 1 Ch. 257; *Jones v. Consolidated Anthracite Collieries & Dynevor*, [1916] 1 K. B. 123; *Broken Hill Proprietary Co. v. Peninsular & Oriental Steam Navigation Co.*, [1917] 1 K. B. 688; *Davies v. Powell Duffryn Steam Coal Co.*, [1917] 1 Ch. 488; *Weldon v. Butterley Co.*, [1920] 1 Ch. 130; *Consett Industrial & Provident Soc. v. Consett Iron Co.*, [1922] 2 Ch. 135. *Mentd. Thomson v. St. Catharine's College, Cambridge, etc.*, [1919] A. C. 468.

1306. ———.]—*LOCKER-LAMPSON v. STAVE-*

LEY COAL & IRON CO., LTD. (1908), 25 T. L. R. 136.

1307. Only if document ambiguous.]—Before extrinsic evidence of the surrounding circumstances can be admitted the ct. must find in the written instrument words which have not a fixed meaning, but are, in the connection in which they are used, ambiguous, susceptible of more than one meaning. If there are no such words in the agreement, then the evidence as to the circumstances surrounding its making is inadmissible. Moreover, if the particular sense in which the parties to a written instrument used any ambiguous words found in it, is to be ascertained by having regard to the particular circumstances in reference to which these words were used, it necessarily follows that the matter which induced the parties to use the words in a special sense is their own view or conception of those surrounding circumstances (*LORD ATKINSON*).—*GREAT WESTERN RY. & MIDLAND RY. v. BRISTOL CORPN.* (1918), 87 L. J. Ch. 414; 82 J. P. 233; 16 L. G. R. 393, H. L.

1308. Ascertainment of surrounding circumstances—Functions of court & jury.]—The province of the jury is to assist the judge with reference to the circumstances under which a deed is executed, & when those circumstances are ascertained, it is the duty of the judge to construe the deed (*WILLIAMS, J.*).—*SKULL v. GLENISTER* (1864), 16 C. B. N. S. 81; 3 New Rep. 389; 33 L. J. C. P. 185; 9 L. T. 763; 12 W. R. 554; 143 E. R. 1055.

Annotations:—*Reid. Williams v. James* (1867), L. R. 2 C. P. 577; *Finch v. G. W. Ry.* (1879), 5 Ex. D. 254; *Harris v. Flower* (1904), 74 L. J. Ch. 127. *Mentd. Royal v. Yaxley* (1872), 26 W. R. 903.

Identity of parties.]—*See* Sub-sect. 6, A., *post*.

B. Particular Instances.

1309. Recital of disputes in deed—Evidence of disputes.]—When it is said in a deed that certain disputes subsisted, it is competent to the parties to produce evidence to show what such disputes were (*LORD ELDON, C.*).—*Re POST, Ex p. BANGLAY* (1811), 1 Rose, 168, L. C.

Annotation:—*Mentd. Long v. Storie* (1852), 9 Hare, 542.

1310. Domicile of parties—Place of execution—Purpose provisions and expressions of instrument.]—*LANSDOWNE v. LANSDOWNE*, No. 567, *ante*.

1311. Hire of vessel—Readiness for voyage.]—On a written agreement for the hire of a vessel to be made ready to take on board "forthwith" evidence is inadmissible to show that the parties agreed that the vessel should be ready in two days. But evidence of the known circumstances of the vessel is admissible to show how soon she might reasonably be expected to be ready.—*SIMPSON v. HENDERSON* (1829), Mood. & M. 300, N. P.

1312. Character of vessel—Seaworthiness.]—Declaration on a policy by which *plffs.* were assured "at & from all or any ports & places in the Clyde, or from Liverpool, to Kurrachee or Calcutta, & for the space of thirty days after her

should contain a covenant by the lessee to pay municipal taxes.—*Re CANADIAN PACIFIC RY. CO. & TORONTO CITY* (1899), 27 A. R. 54.—CAN.

a. Release—Badly drawn.]—Where a release was badly drawn & failed to express in clear & distinct terms the nature of the transaction between the parties, the ct. gave effect to the inference to be drawn from the documentary evidence & the surrounding circumstances.—*McQUEEN v. McQUEEN* (1907), 42 N. S. R. 253; 4 E. L. R. 310.—CAN.

b. Whether sale or mortgage.]—Surrounding circumstances may be

given in evidence for the purpose of showing that what on the face of it is a conveyance is really a mtge. This rule turns on the fraud which is involved in the conduct of the person who is really a mtgee., & who sets himself up as an absolute purchaser, & the rule of admitting evidence for the purpose of defeating this fraud would not apply to an innocent purchaser without notice of the existence of the mtge., who merely bought from a person who was in possession of title-deeds & was the ostensible owner of the property.—*KAST NATH DASS v. HURRIHUR MOOKJEE* (1883), 1 L. R. 9 Calo. 898; 13 C. L. R. 11.—IND.

c. ———.]—The sole issue framed was whether the sale-deed was *bond fide* & supported by consideration:—*Held*: *pltf.* was entitled to show by collateral evidence that the sale-deed was really a usufructuary mtge., & that the mtge. had expired.—*VENKATRAM v. REDDIAH* (1890), 1 L. R. 13 Mad. 494.—IND.

d. Previous abortive contract.]—The terms of an abortive contract are not such "surrounding circumstances" as would justify the ct. in construing new contract.—*Dr WET v. HOLLOW*, [1914] App. D. 157.—S. AF.

Sect. 4.—Admission of extrinsic evidence: Sub-sect. 5, B.; sub-sect. 6, A.]

arrival at her port, upon the body, tackle, apparel, ordnance, munition, artillery, boat & other furniture of & in the good ship or vessel called the 'Ganges,' a steamer." There were pleas of unseaworthiness & of undue concealment, on which issues were joined:—*Held*: extrinsic evidence as to the character of the vessel was admissible.—*BURGES v. WICKHAM* (1863), 3 B. & S. 669; 33 L. J. Q. B. 17; 8 L. T. 47; 10 Jur. N. S. 92; 11 W. R. 992; 1 Mar. L. C. 303; 122 E. R. 251.

Annotations:—*Consd.* Clapham v. Langton (1864), 5 B. & S. 729. *Refd.* Readhead v. Mid. Ry. (1867), L. R. 2 Q. B. 412; Turnbull v. Janson (1877), 36 L. T. 635. *Mentd.* Williams v. Ayres (1877), 3 App. Cas. 133; The Vortigern, [1899] P. 140; Cantieri Meccanico Brindisino v. Janson (1912), 81 L. J. K. B. 850.

1313. Amount of consideration agreed—Contract to sell plant & protect trees.—Where A., for a valuable consideration, contracted to sell & plant 70,000 trees on certain lands of deft., & also well & sufficiently to keep in order the trees, for two years next after the planting thereof, & that such of them as should die during such period, except from injury by sheep, game, or cattle, should be replanted in the autumns of the two years by him:—*Held*: evidence of non-performance by A. of any part of his contract, by which the trees had become of less value to deft., was admissible to reduce the damages in an action on the agreement for their price, & for planting them.—*ALLEN v. CAMERON* (1833), 1 Cr. & M. 832; 3 Tyr. 907; 2 L. J. Ex. 263; 149 E. R. 635.

Annotations:—*Refd.* Dawson v. Collis (1851), 10 C. B. 523. *Mentd.* Baillie v. Kell (1838), 4 Bing. N. C. 638; Charles v. Aldin (1854), 15 C. B. 46.

1314. Shipment of goods—Readiness for dispatch.—A., the proprietor of a lead mine, sold to B., a lead merchant in London, by a written contract, "200 tons of Bog Mine lead, deliverable in the river Thames." The broker who made the contract stated at the time, in answer to a question by B., that the lead was ready for shipment. The lead was delayed a considerable time in transit, & when it arrived in London, B. refused to receive it. In an action by A. against B. for not accepting the lead:—*Held*: the parol representation of the broker, that the lead was ready for shipment, was admissible in evidence, not to vary the written contract, but as one of the data from which the reasonableness of the time was to be determined.—*ELLIS v. THOMPSON* (1838), 3 M. & W. 445; 1 Horn & H. 131; 7 L. J. Ex. 185; 150 E. R. 1219.

Annotations:—*Consd.* Hurst v. Osborne (1856), 18 C. B. 144. *Refd.* Lockett v. Nicklin (1848), 2 Exch. 93. *Mentd.* Duncan v. Topham (1849), 8 C. B. 225.

1315. Conditions of sale.—Pltf. & deft. occupied contiguous premises, which premises they had severally purchased, at the same auction, from the then owner of the whole. The lots were afterwards conveyed to pltf. & deft. by separate deeds, in which the premises were described as being in the occupation respectively of H. & R. together with all buildings, ways, etc., known or reputed to be parcel thereof:—*Held*: deft. might give in evidence conditions of sale distributed at the time of the auction, describing the premises by measurement, there being probable evidence that these conditions were seen by pltf.'s agent at the sale; inasmuch as the conditions were used, not to control or construe, but to apply, the language of the deeds.—*MURLY v. M'DERMOTT* (1838), 8 Ad. & El. 138; 3 Nev. & P. K. B. 356; 1 Will. Woll. & H. 226; 7 L. J. Q. B. 242; 112 E. R. 789; *sub nom.* *MURPHY v. M'DERMOTT*, 2 Jur. 806.

Annotation:—*Mentd.* Stedman v. Smith (1857), 8 E. & B. 1.

1316. Circumstances surrounding signature of document.—Where there is an uncertainty whether a signature applies to several documents on the same paper, or only to some of them, parol evidence of the circumstances of the transaction is admissible to explain it.—*FOSTER v. MENTOR LIFE ASSURANCE CO.* (1854), 3 E. & B. 48; 23 L. J. Q. B. 145; 22 L. T. O. S. 305; 18 Jur. 827; 2 C. L. R. 1404; 118 E. R. 1058.

1317. Nature of employment—Commercial traveller.—Pltfs., lace merchants, carrying on business by means of travellers over certain districts in England, verbally agreed with deft., who was already in their service in another capacity, to travel for them over one of the districts, which they designated the "Midland district," it being at the time understood that the terms of the engagement were to be reduced into writing. A few weeks after deft. had started on the journey the following agreement was sent to him, & he signed & returned it: "To H. & W. Mumford. In consideration of my entering upon your employ at a salary to commence with at £50 a year, I herewith agree to do so, with the understanding that, in the event of my wishing to travel, & doing so, for any other house in the same trade, on any part of the same ground, to pay you the sum of £50."—*Held*: extrinsic evidence was properly admitted to explain the nature of the employment & what was intended by the expression "the same ground."—*MUMFORD v. GETHING* (1859), 7 C. B. N. S. 305; 29 L. J. C. P. 105; 1 L. T. 64; 8 W. R. 187; 141 E. R. 834.

Annotations:—*Refd.* Rogers v. Maddocks (1892), 62 L. J. Ch. 219; Haynes v. Doman, [1899] 2 Ch. 13; Krell v. Henry, [1903] 2 K. B. 740. *Mentd.* Mills v. Dunham, [1891] 1 Q. B. 576; Maxim Nordenfolt Guns & Ammunition Co. v. Nordenfolt, [1893] 1 Ch. 630; Phillips v. Stevens, [1898] 15 T. L. R. 325; Mason v. Provident Clothing & Supply Co. (1913), 82 L. J. K. B. 1153; Estes v. Russ, [1914] 1 Ch. 468; Attwood v. Lamont, [1920] 3 K. B. 571.

1318. — Lace buyer.—On a contract in writing, within the statute, in general terms for the employment of pltf.:—*Held*: it might be shown by parol, that he was employed in a particular capacity.—*PRICE v. MOUTAT* (1802), 11 C. B. N. S. 508; 2 F. & F. 529; 142 E. R. 895.

Annotation:—*Refd.* Krell v. Henry, [1903] 2 K. B. 740.

1319. Mercantile documents generally.—Deft. gave to pltf. the following guarantee: "Gentlemen,—As Mr. D. informs me you require some person as guarantee for goods supplied to him by you in his business, I have no objection to act as such for payment of your account":—*Held*: the expression "for goods supplied" did not necessarily import a past consideration. *Semble*: if the expression was ambiguous parol evidence would be admissible to show that the parties meant, not a past, but a future supply of goods.

A mercantile instrument should be construed with reference to the surrounding circumstances (*POLLOCK, C.B.*).—*HOAD v. GRACE* (1861), 7 H. & N. 494; 31 L. J. Ex. 98; 5 L. T. 359; 8 Jur. N. S. 43; 10 W. R. 85; 158 E. R. 567.

Annotation:—*Refd.* Chalmers v. Victors (1868), 18 L. T. 481.

1320. Allegation of implied warranty—Evidence to rebut.—Where it is sought to import a warranty into a contract of sale contained in letters which are ambiguous in their terms, it is competent to the party sought to be charged to give evidence of all the surrounding facts & circumstances, for the purpose of showing that a warranty was not contemplated by the parties.—*STUCKLEY v. BAILY* (1862), 1 H. & C. 405; 31 L. J. Ex. 483; 10 W. R. 720; 158 E. R. 943.

1321. Preparation of securities by solicitor for client—Violation of instructions.—M. & D. about

to advance \$400 to A. on mtge. security, the three parties met with their solr. G., who was to act for them all & draw up an agreement & prepare the securities. The written agreement set forth that of the money to be advanced M. was to be liable for only \$100 & D. for \$300, & M. & D. accordingly drew bills on each other, which were discounted, & the proceeds advanced to A. Afterwards D. became insolvent, & G., being a creditor of D., got the bills indorsed to himself, G., & sued M. for the whole amount.

On the trial of an issue whether G. had not been retained by M. as his solr. to prepare proper securities to protect M. against liability beyond the amount of \$100:—*Held*: it was competent to prove by parol that at the time the written agreement was made & executed, M. gave directions to G. so to prepare such securities, for this was not an attempt to vary a written instrument by parol evidence.—*GEMMILL v. MACALISTER* (1863), 7 L. T. 841; 9 Jur. N. S. 285; 11 W. R. 486, H. L.

1322. Insurance policy.—Evidence of unstamped slip.—L & C. plffs., who were ship & insurance brokers in London were in the habit of effecting insurances by the instructions of S. on behalf of G. & R., merchants at Hamburg. On Sept. 23, 1869, they received instructions from S. to open a policy on hides to the amount of £5,000. On the same day C. filled up a slip on one of the printed forms kept at the office of defts., who were underwriters, for £5,000 on hides per "ships" & left it at the office. On Feb. 3, 1870, C. called on defts., & taking up the slip for £5,000, which he had filled up on Sept. 23, 1869, filled up two slips, one for £2,455 on hides per The Socrates, & the other for £2,500 on hides per The Sophie, saying that it would be more convenient to have two separate policies. In due course policies were executed in accordance with the slips. In an action upon the policy for £2,455:—*Held*: although by 30 Vict. c. 23, ss. 4 & 9, the slip of Sept. 23, 1869, not having been stamped, would not be available as a policy, it might be referred to for the purpose of showing what was the intention of the parties at the time of the execution of the policy which was founded upon that slip.—*IONIDES v. PACIFIC INSURANCE CO.* (1872), L. R. 7 Q. B. 517; 41 L. J. Q. B. 190; 26 L. T. 738; 21 W. R. 22; 1 Asp. M. L. C. 330, Ex. Ch.

Annotations.—*Reid*. Cory v. Patton (1872), L. R. 7 Q. B. 304; Fisher v. Liverpool Marine Insee. (1873), L. R. 8 Q. B. 469; Citizens Insee. of Canada v. Parsons, Queen Insee. v. Parsons (1881), 7 App. Cas. 96; Ashling v. Boon, [1891] 1 Ch. 568; Home Marine Insee. v. Smith, [1893] 1 Q. B. 829. *Mentd.* Anderson v. Pacific Fire & Marine Insee. (1872), L. R. 7 C. P. 65; Stephens v. Australasian Insee. (1872), L. R. 8 C. P. 18; Lishman v. Northern Maritime Insee. (1875), L. R. 10 C. P. 179; Davies v. National Fire & Marine Insee. of New Zealand, [1891] A. C. 485.

1323. Negotiations prior to agreement.—*McCOLLIN v. GILPIN*, No. 1196, *ante*.

1324. Carriage of goods.—Evidence of existing cartage rates.—Appets. were manufacturers of oil cake & their works at Selby, which were about half a mile distant from Selby station, were con-

nected with defts.' main line of railway by a siding at a point of great congestion.

The siding had been laid down in accordance with an agreement between the parties, which provided that appets. should receive a rebate of 5d. per ton if their consignment of oil cake from their works at Selby over defts.' railway in any year should not be less than 30,000 tons. By a long standing practice, the railway co. collected the traffic of appets.' trade competitors at Hull free of charge, or allowed such competitors a rebate varying with distance in cases where they did their own cartage to the station at Hull. The practice at Hull was present to the minds of & was discussed between the parties during the negotiations leading up to the said agreement. Upon a complaint that the railway co. were upon the above facts unduly preferring appets.' competitors at Hull:—*Held*: evidence to the effect that the existing cartage rebate at Hull was taken into consideration in fixing the terms of the agreement was admissible, but not to vary such agreement.—*OLYMPIA OIL & CAKE CO., LTD. v. NORTH-EASTERN RY.* (1913), 30 T. L. R. 236; 15 Ry. & Can. Tr. Cas. 166.

To connect two documents.]—*See* Sect. 3, sub-sect. 25, *ante*.

To identify parties.]—*See* Sub-sect. 6, A., *post*.

To identify subject matter.]—*See* Sub-sect. 6, B., *post*.

SUB-SECT. 6.—TO IDENTIFY PARTIES AND SUBJECT-MATTER.

A. Parties.

1325. General rule.]—Extrinsic circumstances not only may but must always be looked at, because an agreement can never be made intelligible unless the persons & the subject matter with which the parties are dealing can be identified (*BRAMWELL, B.*).—*BROWN v. FLETCHER* (1876), 35 L. T. 165.

1326. In sale of goods.—To identify buyer & seller.]—*SHARP'S CASE* (1626), Lat. 272; 82 E. R. 382.

Annotation.—*Mentd.* Roe v. Gatehouse (1696), 1 Ld. Raym. 145.

1327. ———.]—Defts.' agent, W., wrote in a book of pltf.—"Mr. N. (pltf.), 32 sacks culasses, at 39s., 280 to wait orders, W." Pltf. afterwards wrote to W. about the flour he "had bought," & W. wrote in reply about the flour he "had sold." It appeared that pltf. was a baker, & defts. flour dealers:—*Held*: the surrounding circumstances might be considered in order to explain who was buyer & who was seller.—*NEWELL v. RADFORD* (1867), L. R. 3 C. P. 52; 37 L. J. C. P. 1; 17 L. T. 118; 16 W. R. 79.

Annotations.—*Reid*. Sheers v. Thimbleby (1897), 76 L. T. 709; *Re* Holland, Gregg v. Holland, [1902] 2 Ch. 360.

1328. To show in what character party makes agreement.—Or in what name carrying on trade.]—

PART III. SECT. 4, SUB-SECT. 6.—A.

a. Identity of parties.]—Where there is nothing to raise a doubt as to the identity of the persons through whom a title comes, it will be presumed from the identity of the names. In this case, however, to confirm the identity, there were besides the names the description of the parties & the handwriting, & the fact that the patent had been handed down with the different conveyances; & it appeared further than both parties assented to the title of one M., who claimed through the deeds as to the names in which proof of

identity was insisted upon.—*NICHOLSON v. BURKHOLDER* (1861), 21 U. C. R. 108.—*CAN.*

f. ———.]—Pltf. claimed under a deed to him from G., the heir of the patentee, A. He gave evidence that his grantor was the heir of one A., who had been a captain in the navy, & put in the patent to A. of 980 acres, with a deed to himself from the alleged heir of the same land, of which the land in dispute formed part:—*Held*: sufficient evidence to go to the jury of identity between the patentee & the alleged ancestor.—*BROWN v. LIVING-*

STONE (1870), 29 U. C. R. 520.—*CAN*
g. ———.]—A discharge of mtge. was signed by "Eliza" Switzer, whereas the mtge. purporting to be discharged was made to "Elizabeth" Switzer:—*Held*: there was no valid objection to the discharge, for the identity of the person signing was established by affidavit to the satisfaction of the registrar, & as a matter of family usage the names are synonymous & interchangeable.—*Re CLARKE & CHAMPRELLAIN* (1889), 18 O. R. 270.—*CAN.*

h. ———.]—Parol evidence admitted to identify the parties to the contract.—

Sect. 4.—Admission of extrinsic evidence: Sub-sect. 6, A. & B.]

Deft., established H. as his general agent in London, authorising him to make contracts in his own name: that authority was, however, revoked shortly before the making of the contract in question with plffs. The contract was effected through W., a broker, in the terms previously sanctioned by deft., & was contained in two notes. In an action for non-delivery:—**Held**: parol evidence was admissible to show in what character a party had made a contract, or in what name a party was carrying on his trade.—**TRUEMAN v. LODER** (1840), 11 Ad. & El. 589; 3 Per. & Dav. 567; 9 L. J. Q. B. 165; 4 Jur. 934; 113 E. R. 539.

Annotations:—**Refd.** *Humfrey v. Dale* (1857), 7 E. & B. 266; *Calder v. Dobell* (1871), L. R. 6 C. P. 486. **Mentd.** *Beckham v. Drake* (1841), 9 M. & W. 79; *Furze v. Sharwood* (1841), 2 Q. B. 388; *Royal Exchange Insce. v. Moore* (1863), 11 W. R. 592; *Re Oriental Bank Corpn., Ex p. Guillemin* (1884), 28 Ch. D. 634; *Durant v. Roberts & Kelghley Maxsted*, [1901] 1 Q. B. 629; *Willis, Faber v. Joyce* (1911), 104 L. T. 576.

1329. ———. **Whether as principal or agent.**—The parol evidence received did not go to extend the terms of the agreement in writing: it only went to show that the letter was addressed to him as the attorney for pltf. & not as the principal & creditor (LORD ELLENBOROUGH, C.J.).—**BATEMAN v. PHILLIPS** (1812), 15 East, 272; 104 E. R. 847.

Annotations:—**Refd.** *Higgins v. Senior* (1841), 11 L. J. Ex. 199; *Plant v. Bourne* (1897), 76 L. T. 820; *Sheers v. Thimbleby* (1897), 76 L. T. 709. **Mentd.** *Jenkins v. Reynolds* (1821), 3 Brod. & Bing. 14; *Farrell v. Hickie* (1867), 30 L. T. O. S. 56; *Holmes v. Mitchell* (1859), 7 C. B. N. S. 381; *North Staffordshire Ry. v. Peek* (1860), E. B. & E. 986; *Williams v. Byrnes* (1863), 1 Moo. P. C. C. N. S. 154.

1330. ———. **A. contracted with B., who appeared on the face of the contract to be an agent for C., for whom B. had sold the goods, but B. was in fact the principal. Evidence was adduced to show A.'s knowledge that B. was the principal & not the agent.**—**Held**: such evidence was rightly received, & the jury might infer from the facts that A. knew he was dealing with B. as principal & not as agent.—**RAYNER v. GROTE** (1846), 15 M. & W. 359; 16 L. J. Ex. 79; 8 L. T. O. S. 474; 153 E. R. 888.

Annotations:—**Refd.** *Cox v. Hubbard* (1847), 4 C. R. 317; *Schmaltz v. Avery* (1851), 10 Q. B. 655; *Gillett v. Offer* (1856), 18 C. B. 905. **Mentd.** *Totley v. Shand* (1871), 25 L. T. 658.

1331. ———. **Two deeds were executed between a co., a landowner, & the agent or steward of the latter, the effect of which would have been to constitute the agent contractor for the execution of certain improvements upon the land, which were about to be effected for a certain sum of money, to be advanced by the co. to the landowner for the purpose. The works having been completed, under the agent's superintendence, for a less sum, the agent filed his bill against the landowner, claiming as contractor's profit the difference between the actual cost & the sum actually advanced to the landowner by the co.**—**Held**: it was competent

to deft. to show that the intention of the parties, when the deeds were executed, was that pltf. should be only nominally the contractor, & the evidence establishing this, that he was not entitled to the profit he claimed.—**WATERS v. SHAFTESBURY (EARL)** (1867), 2 Ch. App. 231; 15 L. T. 489; 15 W. R. 289, L. C.

1332. ———. **Plffs. requested defts., wharfingers & lightermen in L., to quote a through rate for carriage of machinery from L. to C., & handed to them a specification of the machinery in writing. Defts. in reply, sent to plffs. a written quotation. In an action to recover damages for injury caused to the machinery whilst on board a steamer in the course of transit to C.**—**Held**: parol evidence was admissible to prove that defts. received the goods as wharfingers only, & acted in the carriage of the goods as agents only, & not as carriers.—**PONTIFEX & WOOD, LTD. v. HARTLEY & Co.** (1893), 62 L. J. Q. B. 196; 9 T. L. R. 184; 4 R. 245, C. A.

1333. ———. **An action for breach of charterparty was brought by persons claiming to be the undisclosed principals of a party described in the contract as "charterer," & objection was taken to the admission of evidence that plffs. were in fact the charterers, on the ground that such evidence would contradict the written contract.**—**Held**: the evidence was admissible.—**DRUGHORN (FRED), LTD. v. REDERI AKTIEBOLAGET TRANS-ATLANTIC**, [1919] A. C. 203; 88 L. J. K. B. 233; 120 L. T. 70; 35 T. L. R. 73; 63 Sol. Jo. 99; 14 App. M. L. C. 400; 24 Com. Cas. 45, H. L.; *affg.* S. C. *sub nom.* **REDERI AKTIENBOLAGET TRANSATLANTIC v. DRUGHORN (FRED)**, [1918] 1 K. B. 394, C. A.

Annotation:—**Refd.** *Ariadne S.S. Co. v. McKelvie*, [1922] 1 K. B. 518.

1334. ———. **Agreement signed specifically as agent.**—A memorandum annexed to particulars & conditions of sale was signed by C. "as agent for the vendors." Neither the memorandum nor particulars nor conditions contained the names of the vendors, but the particulars & conditions showed that the vendors were a co. in possession of & carrying on mining operations on the property. On bill filed for specific performance setting out the memorandum, conditions, & particulars, & containing an allegation that plffs. were the co. referred to in them, & were in possession of the property:—**Held**: parol evidence could not be admitted to explain the memorandum & show who were the principals for whom C. signed as agent.—**COMMINS v. SCOTT** (1875), L. R. 20 Eq. 11; 44 L. J. Ch. 563; 32 L. T. 420; 23 W. R. 498.

Annotations:—**Consd.** *Wylson v. Dunn* (1897), 34 Ch. D. 569. **Refd.** *Shardlow v. Cotterill* (1881), 45 L. T. 572; *Filby v. Hounsell*, [1896] 2 Ch. 737.

See, also. **AGENCY**, Vol. I., pp. 287, 634, 637, Nos. 177, 2565, 2586–2588.

Relation between agents & third parties.—Admissibility of parol evidence to charge or discharge parties.—To support action by third party.]

ANGLO-CANADIAN LAND CO. v. GORDON (1909), 10 W. L. R. 317; 11 W. L. R. 658; 19 Man. L. R. 301.—**CAN.**

k. Identity of person to whom letter written.—Parol evidence is admissible to show that, though a letter is addressed to W., S. was the person referred to as W., & the letter was given to her.—**UMESH CHANDRA MOOKERJEE v. SAGEMAN** (1869), 5 B. L. R. 633.—**IND.**

l. To show in what character party makes agreement.—Whether as principal or agent.—By an agreement in writing, A., after reciting that he bid for certain

property sold in execution of a decree *enam* for B. & paid the deposit, mount into ct. for B. & that B. paid the balance, promised to convey their property to B. In a suit by B. to recover the property from A.:—**Held**: B. was not debarred from proving that A. bought the property for himself, & not *enam* for B.—**KUMARA v. SRINIVASA** (1887), 1 L. R. 11 Mad. 213.—**IND.**

m. ———.—Evidence is admissible to show that a party executed a *mitra*-bond as a surety only.—**SHAMSH-UL-JAHAN BEGAM v. AHMAD**

WALI KHAN (1903), 1 L. R. 25 All. 337.—**IND.**

n. ———.—The question, whether a party is a principal or merely a surety in the grant of an annuity, is to be determined on the terms of the instrument: extrinsic evidence is not admissible for that purpose.—**HOLLIER v. EVRE** (1842), 2 Dr. & War. 590; 9 Cl. & Fin. L.—**FR.**

o. ———.—Parol evidence is admissible to prove that a party to a written contract entered into it as agent for an undisclosed principal.—**COOK v. ALDRED**, [1909] T. S. 150.—**S. AF.**

—See AGENCY, Vol. I., pp. 637, 638, Nos. 2591-2597.

—As defence to action by third party against agent personally.]—See AGENCY, Vol. I., pp. 638, 639, Nos. 2598-2605.

—To support action by principal against third party.]—See AGENCY, Vol. I., pp. 639, 640, Nos. 2606-2610.

—As defence to action by principal against third party.]—See AGENCY, Vol. I., pp. 640, 641, No. 2611.

—To support action by agent against third party.]—See AGENCY, Vol. I., p. 641, No. 2612.

1335. Guarantee to individual.—To show benefit intended for all partners.]—An action may be maintained by the several partners of a firm upon a guarantee given to one of them if there be evidence that it was given for the benefit of all.—GARRETT v. HANDLEY (1825), 4 B. & C. 664; 7 Dow. & Ry. K. B. 144; 107 E. R. 1208.

Annotations:—Consd. Alexander v. Barker (1831), 2 Tyr. 140. Rejd. Higgins v. Senior (1841), 11 L. J. Ex. 199.

1336. Lease.—To identify lessor.]—A mtgee., who was not in possession, but collected the rent as agent of the mtgors., executed an agreement under seal for a tenancy of a farm from year to year to deft. The agreement was expressed to be made between the mtgee. "as agent, hereinafter called the landlord," & deft. "hereinafter called the tenant." "The landlord" thereby let & "the tenant" took the premises. By one of the covenants the tenant agreed to consume on the premises all hay & fodder & to spread on the land manure & compost produced on the farm & not to sell off any hay or fodder, & to leave all manure & compost at the end of the tenancy. The mtgee. afterwards sold the farm, & his purchaser sought to enforce the above covenant by deft.:—Held: the question who was the lessor was one of construction, in deciding which the ct. could look at the surrounding circumstances.—CHAPMAN v. SMITH, [1907] 2 Ch. 97; 76 L. J. Ch. 394; 96 L. T. 662; 51 Sol. Jo. 428.

Annotation:—Rejd. Ariadne S.S. Co. v. McKelvie, [1922] 1 K. B. 518.

To explain position of parties.]—See Sub-sect. 5, A., ante.

B. Subject-Matter.

1337. General rule.]—SHORE v. WILSON, No. 688, ante.

PART III. SECT. 4, SUB-SECT. 6.—B.

1337 i. General rule.]—Parol evidence can be adduced to show property intended.—MULDOWAN v. GERMAN CANADIAN LAND CO. (1909), 10 W. L. R. 561; 19 Man. L. R. 667.—CAN.

1337 ii. —.]—Oral evidence is admissible to apply a document to the land to which it is intended to refer.—VALAMPUDDUCHERI PADMANABHAN v. CHOWAKAREN PUDIAPURAYIL KUNHIKOLENDAN (1870), 5 Mad. 320.—IND.

1337 iii. —.]—Evidence may be given to show what land was hypotheated by a bond.—RAM LAL v. HARRISON (1980), 1 L. R. 2 All. 832.—IND.

1337 iv. —.]—Parol evidence is admissible to identify the subject-matter of a written lease.—GROENEWALD v. DUVENHAGE, [1915] O. F. S. 25.—S. AF.

1341 i. Property conveyed.]—Where, in trespass for cutting timber, the question was, in which of two townships there was an allowance for road, & the grants from the Crown not being very explicit, plff. endeavoured to support his construction of the grant by parol evidence, which was rebutted by deft. by parol testimony also:—Held: parol evidence

was admissible.—MILLER v. PALMER (1834), 3 O. S. 425.—CAN.

1341 ii. —.]—When the description in a deed which was supposed to contain half of a lot, in giving metes & bounds stated as a measurement 49 chains "being half the length of the lot," as the length conveyed:—Held: it was necessary for the grantee to prove that the whole lot contained more than 80 chains from front to rear, to entitle him to any greater quantity, for the production of the deed alone would entitle him to 40 chains only.—VAN EVERY v. DRAKE (1860), 9 C. P. 478.—CAN.

1341 iii. —.]—JUSON v. REYNOLDS (1873), 34 U. C. R. 174.—CAN.

1341 iv. —.]—Land was described in a deed as consisting of certain lots, excepting thereout certain portions:—Held: evidence was properly admitted to show what these portions were.—LLOYD v. HENDERSON (1875), 25 C. P. 253.—CAN.

1341 v. —.]—SMITH v. SMITH (1875), 1 R. & C. 29.—CAN.

1341 vi. —.]—JOHNSON v. CROSSON (1886), Cass. Dig. 2nd ed. 848.—CAN.

1341 vii. —.]—KENNY v. CALDWELL

1338. —.]—Parol evidence is generally admissible to apply the words used in a deed, & to identify the property comprised in it. You cannot, indeed, show that the words were intended to include a particular piece of land, but you may prove facts from which you may collect the meaning of the words used, so as to include a portion of land, where the words are capable of either construction (LORD CHELMSFORD).

In deeds, as well as wills, the state of the subject at the time of execution may always be inquired into; & as, with respect to ancient deeds, the state of the subject at their date can seldom, if ever, be proved by direct evidence, modern usage & enjoyment for a number of years is evidence to raise a presumption that the same course was adopted from an earlier period, & so to prove contemporaneous usage & enjoyment at the date of the deed (LORD WENSLEYDALE).

When the evidence of all material facts is exhausted, & there is still ambiguity, no parol evidence of the grantor's intention, as distinguished from extrinsic facts, can be admissible, except in the single case of there being two subjects, or two objects, to which the terms of the instrument are equally applicable (LORD WENSLEYDALE).—WATERPARK (LORD) v. FENNELL (1859), 7 H. L. Cas. 650; 33 L. T. O. S. 374; 23 J. P. 643; 5 Jur. N. S. 1135; 7 W. R. 634; 11 E. R. 259, H. L. Annotations:—Appl. Devonshire v. Pattinson (1887), 20 Q. B. D. 263. Rejd. Hastings Corp'n. v. Ival (1874), L. R. 19 Eq. 558; Pryor v. Petre, [1894] 2 Ch. 11; Van Diemen's Land Co. v. Table Cape Marine Board, [1906] A. C. 92; Watcham v. East Africa Protectorate, [1919] A. C. 533.

1339. —.]—Extrinsic evidence is admissible to explain what is the subject-matter of a contract where the contract relates to some specific thing.—CHADWICK v. BURNLEY CORPN. (1864), 4 New Rep. 401; 12 W. R. 1077.

1340. —.]—When the obvious intention under a deed of grant is to give a title to what has been taken & retained before the actual grant, acts of user before the grant are cogent evidence of the identity of what is granted, for they lead up to & explain what was intended to be conveyed.—VAN DIEMEN'S LAND CO. v. TABLE CAPE MARINE BOARD, [1906] A. C. 92; 75 L. J. P. C. 28; 93 L. T. 709; 54 W. R. 498; 22 T. L. R. 114, P. C. Annotation:—Consd. Watcham v. East Africa Protectorate, [1919] A. C. 533.

1341. Property conveyed.]—DOE d. FREELAND v. BURT, No. 875, ante.

(1894), 21 A. R. 110; aff'd., 24 S. C. R. 699.—CAN.

1341 viii. —.]—SCOTTEN v. BARTHEL (1894), 21 A. R. 569; revid., 24 S. C. R. 367.—CAN.

1341 ix. —.]—While the report & plans of a Crown Land Surveyor leading to a grant cannot be used to contradict the terms of the grant, but they can be used for the purpose of ascertaining where the surveyor started & where he established his marks.—MILLER v. BEZANSON (1910), 9 E. L. R. 16.—CAN.

1341 x. —.]—Parol evidence was admissible to show that "lots 3 and 4" was the name of the whole parcel occupied by the vendor & his predecessors in title & was the property described in the agreement.—HE HREN, ZEL & ROBINOVITCH (1918), 42 O. L. R. 394; 14 O. W. N. 37.—CAN.

1341 xi. —.]—Where a sale-deed describes the land sold by wrong survey numbers, extrinsic evidence is admissible to show that the lands intended to be sold & actually sold & delivered were lands bearing different survey numbers.—KURUPPA GOUNDAN v. PERIATHAMBI GOUNDAN (1907), 1 L. R. 30 Mad. 397.—IND.

1341 xii. —.]—A farm was let for a

Sect. 4.—Admission of extrinsic evidence: Sub-sect. 6, B.; sub-sect. 7.]

1342. —.]—Parol evidence is admissible to explain the subject-matter of an agreement, although not to vary the terms.—*OGILVIE v. FOLJAMBE* (1817), 3 Mer. 53; 36 E. R. 21.

Annotations:—Apld. Naylor v. Goodall (1877), 47 L. J. Ch. 53. *Consd. Shardlow v. Cotterell* (1881), 20 Ch. D. 90. *Apld. Plant v. Bourne*, [1897] 2 Ch. 281. *Reid. McMurray v. Sploor* (1888), L. R. 5 Eq. 527; *Bank of New Zealand v. Simpson*, [1900] A. C. 182; *G. W. Ry. & Mid. Ry. v. Bristol Corp'n.* (1918), 87 L. J. Ch. 414; *Auerbach v. Nelson*, [1919] 2 Ch. 383. *Mentd. Evans v. Jackson* (1836), Donnelly, 147; *A.-G. v. Dixon* (1842), 1 Y. & C. Ch. Cas. 614; *Clive v. Beaumont* (1848), 1 De G. & Sm. 397; *Cowley v. Watts* (1853), 22 L. J. Ch. 591; *Cox v. Middleton* (1854), 2 Eq. Rep. 631; *Caton v. Caton* (1867), L. R. 2 H. L. 127; *Ellis v. Rogers* (1885), 20 Ch. D. 661; *Sheers v. Thimbleby* (1897), 76 L. T. 709; *McGrory v. Alderdale Estate Co.*, [1918] A. C. 603.

1343. —.]—A. by agreement promised to surrender into the hands of the lord, etc., "all those brickworks, copyhold of inheritance, then in the possession of A., with full liberty, etc." to the use of B. & C. No surrender was made, but B. & C. entered upon the premises. B. afterwards surrendered his interest to C., & an action of trespass having been brought against C. & D., they pleaded leave & licence from A. to B. & C., C. justifying in his own right, & D. as the servant of B. & C., & by their command, to which A. replied *de injuria*, etc. The question being whether the *locus in quo* was comprised in the agreement, B. was called by defts. to prove, by parol declarations of pltf., that the *locus in quo* was so comprised:—*Held*: the terms of the agreement being ambiguous might be explained by parol testimony.—*PADDOCK v. FRADLEY* (1830), 1 Cr. & J. 90.

1344. —.]—*OWEN v. THOMAS*, No. 983, ante.

1345. —.]—In an order to prove a settlement by estate in the parish of B., resps. put in a deed of feoffment, which conveyed an estate, set out on the deed by abutments, but which was described as being in the parish of S.:—*Held*: resps. might bring forward parol evidence, to show that the lands described in the deed, & of which livery was given, were situate in the parish of B. & not of S. as therein described.—*R. v. WICKHAM (INHABITANTS)* (1835), 2 Ad. & El. 517; 4 Nev. & M. K. B. 408; 2 Nev. & M. M. C. 575; 4 L. J. M. C. 45; 111 E. R. 200.

Annotation:—Reid. R. v. Exminster (1837), 6 Ad. & El. 598.

1346. —.]—S. agreed to purchase of pltf. "the mill property, including six cottages in E. village":—*Held*: parol evidence was admissible to identify "the mill property," part of which was neither in the village nor in the parish of E.—*McMURRAY v. SPICER* (1868), L. R. 5 Eq. 527; 37 L. J. Ch. 505; 18 L. T. 116; 16 W. R. 332.

Annotations:—Mentd. Webb v. Hughes (1870), L. R. 10 Eq. 281; *McGrory v. Alderdale Estate Co.*, [1918] A. C. 503.

term of years "All as some time occupied by" B., the preceding tenant. Some years after the date of the lease a question arose as to whether a piece of rough pasture which had been possessed by the tenant since his entry was included in the subjects let. It was proved that this pasture had not been occupied by B., but the tenant deposed that before offering for the farm he had applied to the landlord's factor to show him the boundaries, & that the factor had pointed out the pasture as included in the farm:—*Held*: B.'s possession was the measure of the tenant's right.—*GREGSON v. ALBOP* (1897), 24 R. (Ct. of Sess.) 1081; 24 Sc. L. R. 811; 5 S. L. T. 105.—*SCOT*.

p. — Not what is generally reported in neighbourhood.]—Whether

lands are granted or not cannot be proved by evidence as to what is generally known & reported in the place where the lands are situate.—*DAVIDSON v. KING* (1876), 3 Pug. 396.—*CAN*.

q. *Consideration.*—A witness who had once been agent for the defenders, having drawn a deed founded on in the case, & which stated that it was granted for certain causes thereunto moving:—*Held*: competent to ask what the causes were.—*IVISON v. EDINBURGH SILK YARN CO.* (1846), 9 Dunl. (Ct. of Sess.) 1039.—*SCOT*.

r. *Extent of covenant.*—The language of a covenant being indefinite, evidence is properly admitted to explain it.—*HOUSTON v. McLAREN* (1887), 14 A. R. 103.—*CAN*.

1347. —.]—In 1861, P., a common predecessor in title of both pltf. & deft., being possessed of 27 rods of land, conveyed to deft.'s predecessor in title "all that piece of garden ground, containing by estimation 20 rods, bounded on the south by other land, or garden ground belonging to the said P." In 1866, P. conveyed the residue of the property to pltf.'s predecessor in title, describing it as "15 rods more or less," the result being that if the measurement of the deed of 1861 was accurate, deft. took under it 12 rods instead of 20, while if the measurement of the deed of 1866 was accurate, pltf. took under it 7 rods instead of 15. Pltf. brought ejectment for the 8 rods in dispute:—*Held*: the parol evidence of P. was admissible to show that he had conveyed 12 & not 20 rods by the deed of 1861.—*JERVEY v. STYRING* (1874), 29 L. T. 847.

1348. —.]—By an instrument under seal dated Nov. 2, a customer gave to his bankers a charge on the premises mentioned in the schedule as a security for all money then due or thereafter to become due from him to them, subject to a prior mtge. of Oct. 3, to a building society, & he covenanted to execute a legal mtge. when required. The schedule described the property as "three leasehold houses in C. held by the mtgor. under a lease of Sept. 25." The lease of Sept. 25, in fact, comprised only one house. There was evidence that on Nov. 2, the bankers agreed to make further advances to the customer, upon his giving them satisfactory security; that he then offered to give them a charge upon three leasehold houses, which he pointed out to the manager; that the manager agreed to accept those three houses as security; & that the deed of charge was then drawn up at the bank, the description in the schedule being inserted from the customer's instructions. One only of the three houses thus pointed out was comprised in the lease of Sept. 25, & the two others were comprised in a lease of Dec. 31, which, as well as the lease of Sept. 25, was subject to a prior mtge. to the building society:—*Held*: this evidence was admissible, & the bankers were entitled to a charge on the two houses comprised in the lease of Dec. 31.—*Re BOULTER, Ex p. NATIONAL PROVINCIAL BANK OF ENGLAND* (1876), 4 Ch. D. 241; 46 L. J. Bey. 11; 35 L. T. 673; 25 W. R. 100.

Annotation:—Mentd. Craddock v. Hunt, [1923] 2 Ch. 136.

1349. —.]—One of three trustees acting as if he were absolute owner entered into a contract to sell the entirety of certain freehold property (in one-fifth part of which he had a beneficial interest) describing the property as "The Jolly Sailor, offices, etc.," to pltf. The other trustees, afterwards, refused to concur in the sale. Pltf. having brought his action for specific performance of the contract:—*Held*: the subject-matter of the contract was sufficiently defined, as the vagueness

s. —.]—On transferring to pltf.s. his shares in a co. dealing in automobiles & their accessories, deft. covenanted that he would not engage in competition with the business carried on by the co. in the certain provinces:—*Held*: extrinsic evidence might be given to show what was the business carried on by the co. at the time.—*KELLY v. McLAUGHLIN* (1911), 21 Man. L. R. 789.—*CAN*.

t. *Sale of trees.*—In an action between the parties to an agreement in writing for the purchase of oaks growing on certain lands, "together with all other trees growing through the oak plantations, & mixed with the oak," the question in dispute being what trees beside oaks were included in the

(if any) about the meaning of the words "Jolly Sailor, offices, etc.," might be removed by on inquiring at chambers.—*NAYLOR v. GOODALL* (1877), 47 L. J. Ch. 53; 37 L. T. 422; 26 W. R. 162.

1350. —.]—*SHARDLOW v. COTTERELL*, No. 984, *ante*.

1351. —.]—*CLARKE v. COLEMAN*, [1895] W. N. 114, C. A.

1352. —.]—*PLANT v. BOURNE*, No. 985, *ante*.

1353. —.]—*Document unambiguous*.—*GOLDFOOT v. WELCH*, No. 1171, *ante*.

1354. —.]—The only memorandum of an assignment of copyright was a receipt for a sum paid for "Five original card designs inclusive of all copyrights. Subjects: four golfing subjects: one Teddy Bear painting":—*Held*: parol evidence was admissible to identify the designs intended.—*SAVORY (E. W.) LTD. v. WORLD OF GOLF LTD.*, [1914] 2 Ch. 566; 83 L. J. Ch. 824; 111 L. T. 269; 58 Sol. Jo. 707, C. A.

1355. —.]—On Nov. 21, 1918, pltf. paid deft. £10 & received the following receipt: "Received of Mr. A. £10 on account of house being sold for £500 from Mr. N. Possession to be taken in six weeks after date." Pltf. alleged & proved that on Nov. 21, 1918, before signing this receipt deft. verbally agreed to sell him his house & residence, N. Lodge, for £500 with possession in six weeks, & that the £10 was paid as a deposit on account of the purchase-money. Pltf. claimed specific performance:—*Held*: the receipt was a sufficient memorandum of the verbal contract, the date, parties & price being apparent on the face of it, & the actual "house being sold" by deft. to pltf. on that date at that price being readily ascertainable by parol evidence.—*AUERBACH v. NELSON*, [1919] 2 Ch. 383; 88 L. J. Ch. 403; 122 L. T. 90; 35 T. L. R. 655; 63 Sol. Jo. 683.

1356. *Promissory note*.—To what debt note applicable.]—A promise in writing to pay a debt, to be transferred from promisor's account to that of a third party, his agent:—*Held*: valid, as a guarantee, & to admit parol evidence to identify the debt.

There appeared to have been two debts, & the dispute is, as to which of them the promise applies. That can be proved by parol, for though by Stat. Frauds the contract must be in writing, the ambiguity is latent & raised by parol evidence, & therefore may be removed by parol evidence (*BRAMWELL, B.*).—*BRUNTON v. DULLENS* (1859), 1 F. & F. 450, N. P.

1357. *Sale of Goods*.—In Aug., pltf. told deft.'s agent that they had wool for sale, partly of their own clip, & partly of wool which they had contracted to buy of neighbouring farmers, & that altogether it amounted to 2,300 stones, 100 more or less. Pltf. also, in a letter in Aug., mentioned one of those clips, & that they had succeeded in

getting a promise of another superior clip about 550 stones. On Sept. 1, deft. wrote to pltf. offering for "your wool" 16s. per stone, etc. To this pltf. replied, agreeing to "your offer for the wool of 16s. per stone." Pltf. tendered to deft., in pursuance of the contract, 2,700 stones of wool:—*Held*: the evidence of the conversation & other letters was admissible to explain what was meant by "your wool."—*MACDONALD v. LONG-BOTTOM* (1860), 1 E. & E. 987; 29 L. J. Q. B. 256; 2 L. T. 606; 6 Jur. N. S. 724; 8 W. R. 614; 120 E. R. 1181, Ex. Ch.

Annotations:—*Apld.* *Mumford v. Gething* (1859), 7 C. B. N. S. 305. *Consd.* *Bank of New Zealand v. Simpson*, [1900] A. C. 182. *Refd.* *Cullen v. O'Meara* (1867), 15 W. R. 1174; *Newell v. Radford* (1887), L. R. 3 C. P. 52; *Crane v. Powell* (1868), 17 W. R. 161; *Hefield v. Meadows* (1869), L. R. 4 C. P. 595; *Buxton v. Rust* (1872), L. R. 7 Exch. 279; *Roder v. London Small Arms Co.* (1876), 46 L. J. Q. B. 213; *Cunningham v. Dunn* (1878), 48 L. J. Q. B. 62; *McCullin v. Gilpin* (1881), 6 Q. B. D. 516; *Plant v. Bourne* (1897), 76 L. T. 820; *Krell v. Henry*, [1903] 2 K. B. 740; *G. W. Ry. & Mid. Ry. v. Bristol Corp.* (1918), 87 L. J. Ch. 414.

1358. *Contract for work & labour*.—Place & quantum of work.]—When a written memorandum of the terms on which work is to be done does not show where it is to be done, nor by measurement or otherwise identify the work or define the quantity of work to which it applies, parol evidence is admissible to explain it in this respect, & show to what it refers.—*PHAROAH v. LUSH* (1862), 2 F. & F. 721, N. P.

SUB-SECT. 7.—TO EXPLAIN PARTICULAR WORDS AND PHRASES.

Meaning of particular words & phrases.—*See Titles passim*; WORDS & PHRASES.

Admissibility of usages.—*See CUSTOM & USAGES*, pp. 42-47, Nos. 470-522, *ante*.

1359. *General rule*.—Where an expression used in a written instrument has a technical meaning, parol evidence is admissible to show that it has been used in that sense, & not in its ordinary meaning in common parlance, although that may be perfectly clear & unambiguous in itself.—*CLAYTON v. GREGGSON* (1835), 5 Ad. & El. 302; 1 Har. & W. 159; 4 Nev. & M. K. B. 602; 4 L. J. K. B. 161; 111 E. R. 1180.

Annotations:—*Consd.* *Shore v. Wilson* (1842), 9 Cl. & Fin. 355. *Mentd.* *Sweeting v. Pearce* (1859), 7 C. B. N. S. 449.

1360. —.]—*THE GLASGOW PACKET*, No. 1154, *ante*.

1361. —.]—*A. G. v. CLAPHAM*, No. 1215, *ante*.

1362. —.]—*BEACON LIFE ASSURANCE CO. v. GIBB*, No. 1383, *post*.

1363. —.]—*HOLT & CO. v. COLLYER*, No. 792, *ante*.

1364. —.]—Words with a fixed meaning in a written contract cannot be explained by oral

agreement:—*Held*: evidence of conversations between the parties in reference to the sale, prior to the agreement, was properly received in order to identify the subject matter of the contract.—*CHAMBERS v. KELLY* (1873), 1 R. 7 C. L. 231.—*IR.*

a. *Acknowledgment*.—Parol evidence was admissible to show what debt was referred to in an acknowledgment, & to what it related.—*UMESH CHANDRA MOOKERJEE v. SAGEMAN* (1869), 5 B. L. R. 633.—*IND.*

b. *Licence*.—R., holding a licence to sell intoxicating liquor at premises known as "Bottle Store":—*Held*: oral evidence was admissible to show what premises were meant by the words

"Bottle Store."—*ROULSTON v. R.*, [1911] T. P. D. 65.—*S. AF.*

c. *Sale of goods*.—Pltf. agreed to sell to defts. a waterwheel & place the same in position for \$150, but defts. refused payment upon the ground that the wheel had not been properly placed, & did not in fact perform the work stipulated for:—*Held*: the term placed in position was so indefinite that defts. were at liberty to show what was meant thereby, the writing, by such parol evidence, not being added to or varied, but only rendered intelligible.—*HARRIS v. MOORE* (1884), 10 A. R. 10.—*CAN.*

d. —.]—*WOOLF v. ALLEN* (1900), 21 C. L. T. 99; 4 Terr. L. R. 431.—*CAN.*

e. —.]—Extrinsic evidence may be received to identify the thing referred to in a written agreement. Where there is a written agreement to deliver a quantity of grain, parol evidence is admissible under certain limitations to show what kind of grain the contracting parties had in their contemplation at the time the contract was made.—*VALLA BIN HATAJI v. SIDOJI BIN KONDABI* (1868), 5 Bom. A. C. 87.—*IND.*

f. —.]—Where a contract contained the words "all the assets, roughly 1,800 sheep," etc.:—*Held*: parol evidence was admissible to prove what in fact constituted all the assets & what was the number of sheep.—*WANNENBERG v. TOOTH*, [1912] C. P. D. 750.—*S. AF.*

Sect. 4.—Admission of extrinsic evidence: Sub-sects. 7 & 8, A.]

evidence to mean something different from what they express. Where the words used are susceptible of more than one meaning extrinsic evidence is admissible to show what were the facts which the negotiating parties had in their minds.—**BANK OF NEW ZEALAND v. SIMPSON**, [1900] A. C. 182; 69 L. J. P. C. 22; 82 L. T. 102; 48 W. R. 591; 16 T. L. R. 211, P. C.

Annotations:—*Follis*, G. W. Ry. & Mid. Ry. v. Bristol Corp'n. (1918), 87 L. J. Ch. 414. *Consd.* Akt. Geyser v. Dansk Svovlsyre & Superphosphat Fabrik Akt., Springbank v. Same (1919), 24 Com. Cas. 178. *Reid*, Charrington v. Wooder, [1914] A. C. 71; Banbury v. Bank of Montreal, [1918] A. C. 626; Aron (Incorporated) v. Comptoir Westmont, (1921) 3 K. B. 435.

1365. Alleged special construction.—Court must be satisfied of necessity for.]—HOLT & Co. v. COLLYER, No. 792, *ante*.

1366. — Must be averred on record.]—General evidence as to the meaning of words of contract ought not to be admitted without a distinct averment on record as to the particular words to which the proof is to be directed & the precise technical or trade meaning which is intended to be attributable to them (**LORD WATSON, L.J.**).—**SUTTON & Co. v. CIGERI & Co.** (1890), 15 App. Cas. 144; 62 L. T. 742, H. L.

Annotations:—*Reid*, Price v. Union Lighterage Co., [1904] 1 K. B. 412; Lovell & Christinas v. Wall (1910), 103 L. T. 588; Pryman S.S. Co. v. Hull & Barnsley Ry. (1914), 83 L. J. K. B. 1321; Travers v. Cooper, [1915] 1 K. B. 73.

1367. Technical words.]—SHORE v. WILSON, No. 688, *ante*.

1368. —.]—HOLT & Co. v. COLLYER, No. 792, *ante*.

1369. Foreign words.]—SHORE v. WILSON, No. 688, *ante*.

1370. —.]—GRANT v. MADDOX, No. 1372, *post*.

1371. Nature of evidence admissible.—Past transactions.]—Evidence of former transactions between the same parties can be received for the purpose of explaining the meaning of the terms used in their written contract.—**BOURNE v. GATLEFF** (1844), 11 Cl. & Fin. 45; 7 Man. & G. 850; 8 Scott, N. R. 604; 8 E. R. 1019, H. L.

Annotations:—*Consd.* Burges v. Wickham (1863), 3 B. & S. 669. *Reid*, Simpson v. Margitson (1847), 11 Q. B. 23; Argos (Cargo Ex.), Gaudet v. Brown, The Hewsons, Geipel v. Cornforth (1878), L. R. 5 P. C. 134. *Mentd.* Ross v. Hill (1849), 2 C. B. 877; Mathewson v. Ray (1847), 16 M. & W. 329; Richards v. L. B. & S. C. Ry. (1849), 7 C. B. 839; Grey v. Friar (1850), 15 Q. B. 901; The Norway (1864), Brown, & Lush, 377; Butterworth v. Brownlow (1865), 19 C. B. N. S. 409; Bradshaw v. Irish North Western Ry. (1873), 21 W. R. 581; Mitchell v. L. & Y. Ry. (1875), L. R. 10 Q. B. 256; Chapman v. G. W. Ry. Co. (1880), 5 Q. B. D. 278; Bruner v. Moore, [1904] 1 Ch. 305.

1372. — Trade terms.]—There has not been in this case any infringement of the rule that parol evidence cannot be received to alter a written contract; for here the evidence was admitted only for the purpose of explaining the meaning of the words used in the contract. It is clear that this may be done with respect to foreign words or scientific expressions, & I think the same is true of a case where the words of the contract have reference to a particular profession (**ROLFE, B.**).—

GRANT v. MADDOX (1846), 15 M. & W. 787; 16 L. J. Ex. 227; 7 L. T. O. S. 187; 153 E. R. 1048.

Annotations:—*Consd.* Myers v. Sari (1860), 3 E. & E. 306. *Reid*, Simpson v. Margitson (1847), 11 Q. B. 23; Sotillochos v. Kemp (1848), 18 L. J. Ex. 36; Abbott v. Bates (1875), 45 L. J. Q. B. 117. *Mentd.* Harmer v. Cornelius (1858), 4 Jur. N. S. 1110; Bruner v. Moore, [1904] 1 Ch. 305; Clayton-Greens v. De Courville (1920), 36 T. L. R. 790.

1373. Whether evidence admissible — "Privilege"]—Hire of master of ship.]—Where the master of a ship was hired for a voyage to the East Indies by a written agreement, which stipulated that he should receive £120 "in lieu of privilege," & a question arose whether he was entitled to the freight of goods carried in the cabin, which depended chiefly upon the disputed meaning of the word "privilege":—*Held*: what the parties said upon the subject before & at the time, when the agreement was entered into, was admissible in evidence.—**BIRCH v. DEPEYSTER** (1816), 4 Camp. 385; 1 Stark. 210, N. P.

Annotations:—*Mentd.* Luckie v. Bushby (1853), 13 C. B. 864; Crampton v. Walker (1860), 3 E. & E. 321.

1374. — Interpretation of calendar—"Michaelmas."]—A lease of lands by deed, since the new style, to hold from the feast of St. Michael, must be taken to mean from the New Michaelmas, & cannot be shown by extrinsic evidence to refer to a holding from Old Michaelmas.—**DOE d. SPICER v. LEA** (1809), 11 East, 312; 103 E. R. 1024.

Annotations:—*Consd.* Doe d. Peters v. Hopkinson (1823), 2 L. J. O. S. K. B. 11. *Distd.* Smith v. Flower (1826), 11 Moore, C. P. 264. *Follis*, Smith v. Walton (1832), 8 Bing. 235. *Reid*, Cadby v. Martinez (1840), 11 Ad. & E. 720; Sidebotham v. Holland, [1895] 1 Q. B. 378. *Mentd.* Doe d. Hall v. Benson (1821), 4 B. & Ald. 588; Doe d. Willis v. Perrin (1840), 9 C. & P. 467; Croft v. Bray, [1919] 1 Ch. 277.

1375. — "Lady Day."]—Upon a written agreement to demise from the following "Lady-day," a notice to quit "on Apr. 6," is good, upon parol evidence that by "Lady-day," the parties meant "old Lady-day." Such evidence is admissible where the written agreement is not under seal.—**DOE d. PETERS v. HOPKINSON** (1823), 3 Dow. & Ry. K. B. 507; 2 L. J. O. S. K. B. 11.

Annotations:—*Reid*, Smith v. Walton (1832), 1 Moo. & S. 380; Simpson v. Margitson (1847) 11 Q. B. 23.

1376. — Martinmas.]—Deft. avowed that the rent was payable at Martinmas to wit Nov. 23:—*Held*: this must be taken to mean New Martinmas & pltf. having shown that the rent was in fact payable at Old Martinmas the ct. refused to set aside a verdict given for him.—**SMITH v. WALTON** (1832), 8 Bing. 235; 1 Moo. & S. 380; 1 L. J. C. P. 85; 131 E. R. 391.

1377. — "In consideration of . . . duly paid by husband & wife"]—Conveyance to husband & wife as joint tenants.]—A conveyance to husband & wife & their heirs as joint tenants "in consideration of £200 now in hand duly paid by husband & wife," may be explained by extrinsic evidence, showing that the money belonged to the wife only.—**DOE d. BAINBRIDGE v. STATHAM** (1825), 7 Dow. & Ry. K. B. 141.

1378. — "Close"]—Trespass on land.]—In trespass against deft., for breaking & entering his close:—*Held*: though the meaning of the word "close" is ambiguous, & may mean the quality or description of land, as well as the land itself, yet as pltf. used the word in the latter sense, to

PART III. SECT. 4, SUB-SECT. 7.

1367 i. Technical words.]—If skilled persons honestly apply a particular construction to a proposal for a contract, & enter into the contract believing such construction to be the true one, their evidence should outweigh the evidence of others who,

though possibly of equal skill, have merely considered the proposal as disinterested critics.—**O'BRIEN v. STEAD** (1894), 13 N. Z. L. R. 81.—N.Z.

g. Whether evidence admissible — "Taxes on the premises"]—*Lenes.*]—Where a written lease of a house provided that the lessors should "pay

all rates & taxes on the premises," & also the interest on the mtgs. on the property.—*Held*: no oral evidence was admissible of what took place at the time of the execution of the lease to explain the meaning of the term "taxes on the premises."—**GERMAN LUTHERAN CHURCH, TRUSTEES v. PERCIVAL** (1887), 5 S. C. 194.—S. AF.

the knowledge of deft., deft. was bound to apply the same signification, & was not at liberty to apply to the word a different meaning.—*HEATH v. MILWARD* (1835), 2 Bing. N. O. 98; 1 Hodg. 198; 2 Scott, 160; 4 L. J. C. P. 292; 132 E. R. 39.

Annotations.—*Mentd.* Ashmore v. Hardy (1836), 7 C. & P. 501; *Fleming v. Cooper* (1836), 5 Ad. & El. 221; *Carnaby v. Welby* (1838), 8 Ad. & El. 872; *Parnell v. Young* (1838), 7 L. J. Ex. 80; *Browne v. Dawson* (1840), 12 Ad. & El. 624; *Whittington v. Boxall* (1843), 5 Q. B. 139; *Jones v. Chapman* (1848), 2 Exch. 803; *Coverdale v. Charlton* (1878), 26 W. R. 687.

1379. — “Marked out”—Measurement of land.]—Upon a demise of “all that piece of ground marked out by a line 160 yards in length, drawn straight from it to a point where it turns at right angles from a point,” etc.:—*Held*: evidence was admissible to show that the words “marked out” referred to an actual measurement of the land by stakes & bounds made previously to the execution of the demise.—*DOE d. MENCE v. HADLEY* (1849), 14 L. T. O. S. 102.

1380. — “P. P.”—Courseing match.]—Standing by themselves, those letters are insensible; but the evidence confers a real meaning upon them, by showing what the parties intended by them, & that they were inserted with the view of expressing a given thing (*PARKE, B.*).

There can be no doubt the evidence was receivable. It is like the case of a word written in a foreign language (*ALDERSON, B.*).—*DAINTREE v. HUTCHINSON* (1842), 10 M. & W. 85; 11 L. J. Ex. 397; 6 Jur. 736; 152 E. R. 392.

Annotations.—*Refd.* Chotayloll v. Manickchand, Chotayloll v. Uggerhund (1856), 4 W. R. 317. *Mentd.* Thorpe v. Coleman (1845), 14 L. J. C. P. 260; *Duke v. Forbes* (1847), 11 Jur. 951.

1381. — “Same or usual terms”—Sale of goods.]—In letters constituting a contract the words “same terms,” or “usual terms,” admit of parol evidence.—*HAWK v. FREUND* (1858), 1 F. & F. 294, N. P.

1382. — “The same ground”—Agreement with commercial traveller.]—*MUMFORD v. GETHING*, No. 1317, *ante*.

1383. — “Premises”—Used in legal sense.]—In order to construe a term in a written instrument, when it is used in a peculiar sense, differing from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the term, but evidence is not admissible to contradict or vary what is plain.

The word “premises,” although in popular language is applied to buildings, in legal language, means the subject or thing previously expressed.—*BEACON LIFE & FIRE ASSURANCE CO. v. GIBB* (1862), 1 Moo. P. C. C. N. S. 73; 1 New Rep. 110; 7 L. T. 574; 9 Jur. N. S. 185; 11 W. R. 194; 1 Mar. L. C. 269; 15 E. R. 630, P. C.

Annotation.—*Refd.* County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

1384. — “Default”—Bill of sale.]—Pltf., in order to secure repayment of a sum of money lent to him by defts., assigned by deed in the ordinary form of a bill of sale all his household furniture, etc., subject to a proviso for redemption if the sum was paid by weekly instalments, provided that if pltf. should “make default in payment” of the sum or any part thereof when it should become due, the whole of the moneys secured should be then immediately due, & payable, & it should be lawful for defts. to take possession of the goods & sell them. Pltf. being unable to pay one of the instalments went to the offices of deft., a limited co., & saw their secretary,

who consented to wait till a later day, but before that day possession of the goods was taken, & on a subsequent day, after the tender of a sum which pltf. had been told would be sufficient to cover all claims, the goods were removed & sold. In an action to recover damages for the seizure & sale:—

Held:—parol evidence of the time having been enlarged for payment of the money was admissible, as it showed that there had been no “default” within the meaning of the deed.—*ALBERT v. GROSVENOR INVESTMENT CO.* (1867), L. R. 3 Q. B. 123; 8 B. & S. 664; 37 L. J. Q. B. 24.

Annotation.—*Refd.* Williams v. Stern (1879), 5 Q. B. D. 409.

1385. — Freehold equities.]—S. signed a written contract with R. to purchase a brickfield for £17,000, to be paid as follows: £16,000 in cash & £1,000 in freehold equities to pay on the £1,000. 12 per cent. per annum.

Before signing S. had made out & given to R. a list of freehold houses, in which he was entitled to the equity of redemption, but this document was not referred to in the contract:—*Held*: such list was admissible by way of parol evidence to explain the meaning of freehold equities in the contract.—*ROOTS v. SNELLING* (1883), 48 L. T. 216.

1386. — “Market price”—Covenant for sale of liquor in brewer’s lease.]—A London brewing co. demised a public-house to a publican, who covenanted to deal exclusively with the lessors for beer, provided they should be willing to supply the same to him at the fair market price. It appeared that the great bulk of the London brewers’ trade was done with tied houses; that the London brewers supplied beer at standard prices; that in the case of tied houses discount was allowed at certain recognised rates; but that in the case of free tenants the amount of discount was the subject of special bargain, & that free tenants often obtained a higher rate of discount:—*Held*: the term “market” was to be construed with reference to the surrounding circumstances, & upon the true construction of the proviso the lessee was to be charged the fair market price as applying to tenants of tied houses & was not entitled to discount beyond the recognised rates.

If the language of a written contract has a definite & unambiguous meaning, parol evidence is not admissible to show that the parties meant something different from what they have said. But if the description of the subject-matter is susceptible of more than one interpretation, evidence is admissible to show what were the facts to which the contract relates (*LORD HALDANE, C.*).—*CHARRINGTON & CO., LTD. v. WOODER*, [1914] A. C. 71; 83 L. J. K. B. 220; 110 L. T. 548; 30 T. L. R. 176; 58 Sol. Jo. 152, H. L.

Annotation.—*Refd.* G. W. Ry. & Mid. Ry. v. Bristol Corpn. (1918), 87 L. J. Ch. 414.

1387. Interpretation of extrinsic evidence—When by court or jury.]—*HILLS v. LONDON GAS-LIGHT CO.*, No. 598, *ante*.

SUB-SECT. 8.—EVIDENCE OF ACTS AND CONDUCT UNDER INSTRUMENT.

A. In General.

Admissibility of evidence of custom & usage.]—*See* CUSTOM & USAGES, p. 39, Nos. 433 *et seq.*; p. 51, Nos. 557 *et seq.*, *ante*.

1388. Whether evidence admissible—Of acts of parties.]—A legal instrument is not to be construed

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by the acts of the parties.—*BAYNHAM v. GUY'S HOSPITAL* (1796), 3 Ves. 295; 30 E. R. 1019.

Annotations:—*Reid*, *Moore v. Foley* (1801), 6 Ves. 232; *Smith v. Jersey* (1821), 3 Bil. 290; *Lewis v. Stephenson* (1898), 87 L. J. Q. B. 296; *Watcham v. East Africa Protectorate*, [1919] A. C. 533; *Gray v. Spyer*, [1922] 2 Ch. 22. *Mentid*, *Maxwell v. Ward* (1824), M'Cle. 458; *Browne v. Tighe* (1834), 8 Bil. N. S. 272; *Sadler v. Biggs* (1853), 4 H. L. Cas. 435.

1889. ———.]—*EATON v. LYON*, No. 613, ante.

1890. ———.]—A deed must be construed as from the moment of execution; not by subsequent events.—*BALEFOUR v. WELLAND* (1809), 16 Ves. 151; 33 E. R. 941.

Annotation:—*Mentid*, *Forbes v. Peacock* (1846), 1 Ph. 717.

1891. ———.]—The intention of the parties must be collected from the language of the instrument & may be elucidated by the conduct they have pursued (*PARK, J.*)—*CHAPMAN v. BLUCK* (1838), 4 Bing. N. C. 187; 1 Arn. 27; 5 Scott, 515; 7 L. J. C. P. 100; 2 Jur. 206; 132 E. R. 760.

Annotations:—*Consd.*, *Watcham v. East Africa Protectorate* [1919] A. C. 533. *Reid*, *Jones v. Reynolds* (1841), 1 Q. B. 506; *Doe d. Wood v. Clarke* (1845), 5 L. T. O. S. 91.

1892. ———.]—*COE v. CLARKE* (1845), 5 L. T. O. S. 73.

placed upon an expression.—*BUSBY v. CLARKE* (1914), 14 S. R. N. S. W. 189.—*AUS.*

1888 iii. ———.]—*LETARGET v. DUTYLL* (1850), 1 Gr. 227; 3 Gr. 369.—*CAN.*

1888 iv. ———.]—*GREENSHIELDS v. BARNHART* (1853), 3 Gr. 1; C. R. 2, A. C. 91.—*CAN.*

1888 v. ———.]—The words in the deed, with the surrounding facts, together with what followed immediately after its execution, were sufficient to show with reasonable certainty what land passed by the deed; & evidence of such facts was properly received at the trial.—*NOLAN v. FOX* (1865), 15 C. P. 505.—*CAN.*

1888 vi. ———.]—*JUSON v. REYNOLDS* (1873), 34 U. C. R. 174.—*CAN.*

1888 vii. ———.]—A deed should be interpreted in the light of the conduct of the parties in taking & remaining a long time in possession without objection.—*QUEBEC CITY v. NORTH SHORE RY. CO.* (1897), 27 S. C. R. 102; *affd.*, 31 Can. Gaz. 11, P. C.—*CAN.*

1888 viii. ———.]—The omission of the word "assigns" does not necessarily make a contract unassignable; & the nature of the contract, coupled with the absence of the word "assigns," & evidence as to the subsequent conduct of the parties & all the circumstances, may show an intention that the contract is assignable.—*PATERSON v. CANADIAN PACIFIC TIMBER CO.* (1910) 14 W. L. R. 598.—*CAN.*

1888 ix. ———.]—The deed contained the following: "then running in an eastwardly direction along the highway until it comes to a crossway in the public highway & running in a southerly direction until it comes to the waters of Broad cove." There were two crossways in the highway, & S. contended that the first one reached on the course was indicated, & R. that it was the second lying a little farther south.—*Held*: as S. had apparently for many years treated the second crossway as the boundary; & what evidence there was favoured that view, the construction should be that the crossway mentioned in the description was the second of the two.—*REDDY v. STROPE* (1911), 44 S. C. R. 246.—*CAN.*

1888 x. ———.]—*Re BRENNEL & ROBINOVITCH* (1918), 42 O. L. R. 394;

1893. ———.]—*Qu.*: If, in the construction of an agreement, the contemporaneous conduct of the parties may be regarded.—*BROWN v. HICKNOTT* (1847), 8 L. T. O. S. 345.

1894. ———.]—I do not deny that facts existing at the time of making the agreement may be admissible to assist the ct. in determining the meaning of the language; nor do I deny that an act done or letter written after the agreement may be evidence of a fact existing at the time, material to the right interpretation of the agreement. But no point of law can, I apprehend, be better settled than this: that, in construing the agreement, no acts of the parties subsequent to the making of it are, as such, admissible for the purpose of determining its meaning. The acts of the parties subsequent to the agreement may be material to show that a writing does not express that which the parties intended to express in it; & proof of that may be a reason why this ct. should refuse to act upon the written agreement. But that is a very different thing from deducting from the acts of the party the meaning of the agreement itself (*WIGRAM, V.-C.*)—*MONRO v. TAYLOR* (1848), 8 Hare, 51; 68 E. R. 269; on appeal (1852), 3 Mac. & G. 713, L. C.

Annotation:—*Mentid*, *Abbott v. Calton* (1853), 22 L. J. Ch. 936.

1895. ———.]—The terms "Protestant

14 O. W. N. 37.—*CAN.*

1888 xi. ———.]—Evidence of the acts & conduct of the parties to a written contract is not admissible if tendered solely in support of an oral stipulation varying its terms.—*DAIMOD-DEE PAIK v. KAIM TARIDAR* (1879), 1 L. R. 5 Calc. 300; 4 C. L. R. 419.—*IND.*

1888 xii. ———.]—Deft., in answer to a suit by plff. for possession of certain land, alleged that the kobala, which purported to be an out-&-out sale in favour of plff. & on which the plff. based his title to the property, was intended by the parties to operate only as a mtge., & to prove such allegations tendered evidence of the circumstances under which the kobala was executed, & of the conduct of the parties to show that the document had all along been treated as a mtge. & intended to operate as such.—*Held*: such evidence was admissible.—*REM CHUNDER SOOR v. KALLY CHURN DASS* (1883), 1 L. R. 9 Calc. 528; 12 C. L. R. 287.—*IND.*

1888 xiii. ———.]—Oral evidence of the acts & conduct of parties, such as oral evidence that possession remained with the vendor notwithstanding the execution of a deed of out-&-out sale, is admissible to prove that the deed was intended to operate only as a mtge.—*PREONATH SHAHA v. MADHU SUDAN BHUTIA* (1898), 1 L. R. 25 Calc. 603; 2 C. W. N. 562.—*IND.*

1888 xiv. ———.]—Evidence of conduct, as for instance return of a lease, is admissible in evidence to prove that such return was due to an intention to make the lease unoperative.—*SHYAMAO CHARAN MANDAL v. HERAS MOLLAH* (1898), 1 L. R. 26 Calc. 160.—*IND.*

1888 xv. ———.]—Oral evidence is not admissible for the purpose of contradicting a statement made in a registered kabuliya as to the amount of rent; but evidence is admissible to show that, as between the landlord & the tenant, the kabuliya was never intended to be acted upon or enforced, or that there was a waiver of some of its terms.—*BENI MADHUB GORANI v. LALMOTI DASSI* (1898), 6 C. W. N. 242.—*IND.*

1888 xvi. ———.]—Oral evidence of the acts & conduct of parties, such as evidence of the repayment of the

money, the return of the deed & the exercise of the acts of possession by the vendor, is admissible to show that a certain conveyance was really a mtge. by way of conditional sale.—*KHANKAR ABDUR RAHMAN v. ALI HAFEZ* (1900), 1 L. R. 28 Calc. 256; 5 C. W. N. 351.—*IND.*

1888 xvii. ———.]—Plff. contended that, although a deed was, in its terms, an absolute conveyance, he was entitled to adduce evidence of the subsequent conduct of himself & deft., to show that the transaction was, in fact, not a sale but a mtge.—*Held*: the evidence was not admissible.—*ACHUTARAMARAJU v. SUBBARAJU* (1901), 1 L. R. 25 Mad. 7.—*IND.*

1888 xviii. ———.]—Oral evidence of the acts & conduct of parties, such as evidence of promise by the vendee to restore the property on repayment in two or three years, is admissible to show that a certain conveyance was really a mtge. by way of conditional sale.—*MAHOMED ALI HOSSEIN v. NAZAR ALI* (1901), 1 L. R. 28 Calc. 289; 5 C. W. N. 323.—*IND.*

1888 xix. ———.]—A deed is not to be construed by the subsequent acts of the parties.—*BURROWS v. HAYES* (1834), Haynes & Jo. 597.—*IR.*

1888 xx. ———.]—Evidence is admissible, to explain the signification in which ambiguous words or expressions were generally understood at the time of the execution of a deed.—*A. G. v. DRUMMOND* (1842), 1 Dr. & War. 353.—*IR.*

1888 xxi. ———.]—Although covenants are not to be construed by the acts of parties, yet their conduct in relation to them may evidence the existence of a new agreement.—*Ex p. PILKINGTON* (1859), 11 Ir. Jur. 102.—*IR.*

1888 xxii. ———.]—Where parties have for a long time acted on a construction of their obligation, this must be regarded as true meaning & receive effect accordingly.—*JOFF'S TRUSTEES v. EDMOND* (1888), 15 R. (Ct. of Sess.) 271; 25 Sc. L. R. 211.—*SCOT.*

1888 xxiii. ———.]—No ambiguity.—A covenant which is unambiguous in its terms cannot be construed by the interpretation that has been put on it by the parties.—*ADAMS v. HARVEY* (1904), 9 Nfld. L. R. 6.—*NFLD.*

Sect. 4.—Admission of extrinsic evidence: Sub-sect. 8, A. & B.; sub-sects. 9, 10 & 11, A.]

long time so understanding it (LORD GRANWORTH, C.).—**SADLER v. BIGGS** (1859), 4 H. L. Cas. 435; 10 E. R. 531, H. L.

1403. ————.]—**NORTH EASTERN RY. v. HASTINGS** (LORD), No. 798, *ante*.

1404. ————.]—**Ambiguity latent or patent.**—**WATCHAM v. EAST AFRICA PROTECTORATE**, No. 923, *ante*.

B. Ancient Documents.

See, generally, CUSTOM & USAGES.

Construction of Royal Grants.—*See* CONSTITUTIONAL LAW, Vol. XI., p. 573, Nos. 782 *et seq.*

1405. General rule.—In ascertaining the meaning & effect of a charter, contemporaneous documents, proceedings in causes relating to it, & parol testimony, may be resorted to, in order to explain & give to the charter a construction, but not to contradict it.—**LUCKTON FREE SCHOOL (GOVERNORS) v. SCARLETT** (1828), 2 Y. & J. 330; 148 E. R. 945, Ex. Ch. in Eq.; *on appeal, sub nom. SCARLETT v. LUCKTON SCHOOL* (1836), 10 Bli. N. S. 592, H. L.

1406. Evidence admissible.—Of contemporary user.—In the construction of ancient grants & deeds, there is no better way of construing them than by usage, & *contemporanea expositio* is the best way to go by (LORD HARDWICKE, C.).—**A.-G. v. PARKER** (1747), 3 Atk. 576; 1 Ves. Sen. 43; 26 E. R. 1132, L. C.

Annotations.—**Consd. Withnell v. Gartham** (1795), 6 Term Rep. 388; **Waterpark v. Fennell** (1859), 7 H. L. Cas. 650. **Refd. A.-G. v. Newcombe** (1807), 14 Ves. 1. **Mentd. Davis v. Jenkins** (1814), 3 Ves. & B. 151; **Milligan v. Mitchell** (1835), 4 L. J. Ch. 281; **Carter v. Cropley** (1857), 26 L. J. Ch. 246; **Etherington v. Wilson** (1875), 1 Ch. D. 160; **Shaw v. Thompson** (1870), 3 Ch. D. 233; **Re St. Stephen, Coleman Street, Re St. Mary the Virgin, Aldermanbury** (1888), 39 Ch. D. 492.

1407. ————.]—However general the words of the ancient deeds may be, they are to be construed, as Lord Coke says, by evidence of the manner in which the thing has been always possessed & used (LORD ELENBOROUGH, C.J.).—**WELD v. HORNBY** (1806), 7 East, 195; 3 Smith, K. B. 244; 103 E. R. 75.

Annotations.—**Consd. Beanfort v. Swansea Corp.** (1849), 3 Exch. 413; **Waterpark v. Fennell** (1859), 7 H. L. Cas. 650. **Refd. Leonfield v. Lonsdale** (1870), L. R. 5 C. P. 657. **Mentd. Joel v. Harvey** (1857), 5 W. R. 488; **Rolle v. Whyte** (1868), L. R. 3 Q. B. 286; **Barker v. Faulker** (1898), 79 L. T. 24.

1408. ————.]—**DRUMMOND v. A.-G. FOR IRELAND**, No. 1395, *ante*.

1409. ————.]—**If doubtful in its terms.**—If an instrument be doubtful in its terms, it is to be interpreted by contemporaneous usage.—**A.-G.**

PART III. SECT. 4, SUB-SECT. 8.—B.

1406 i. Evidence admissible.—Of contemporary user.—**PESTONJI JIVANJI v. SHAPURJI EDULJI CHINYOI** (1908), 1 L. R. 35 Cal. 478; L. R. 35 Ind. App. 79; 12 C. W. N. 465.—**IND.**

1406 ii. ————.]—**Contemporaneous usage may be resorted to to assist in construction of an ancient deed.**—**A.-G. v. DRUMMOND** (1842), 1 Dr. & War. 353; 1 Con. & Law. 310; *affd.* 2 H. L. Cas. 837.—**IR.**

1406 iii. ————.]—**To infer from subsequent events that a particular limitation was contained in a lost deed, the events must be inconsistent with any other hypothesis.**—**SMITH v. SMITH** (1876), 1 L. R. Ir. 206.—**IR.**

1406 iv. ————.]—**In a question, inter hæredes, as to the right to certain subjects which had been possessed under a conveyance by the common ancestor, the applicability & sufficiency**

of which was disputed, the ct. took into consideration the state of possession, & also the intention of the grantor of the conveyance, as gathered from other family deeds executed by him.—**BURKE & CARMICHAEL v. MACKAY** (1865), 3 Macph. (Cl. of Sess.) 799; 37 Sc. Jur. 374.—**SCOT.**

1409 i. ————.]—**If doubtful in its terms.**—**EDWARDS v. EDWARDS** (1918), 24 C. L. R. 312.—**AUS.**

1409 ii. ————.]—**Where a document is an ancient one & its meaning doubtful, the rule applies that the acts of its author may be given in evidence in aid of its construction.**—**VINAYAK VASUDEV v. RITCHIE, STEWART & Co.** (1867), 4 Bom. O. C. 139.—**IND.**

1409 iii. ————.]—**In the construction of ancient grants & deeds, evidence is admissible as to the manner of which the thing granted has always been possessed & used, for so the**

v. ROCHESTER CORPN. (1854), 5 De G. M. & G. 797; 23 L. T. O. S. 104; 48 E. R. 1079, L. J.J.

Annotations.—**Refd. A.-G. v. Sidney Sussex College** (1869), 4 Ch. App. 722. **Mentd. Re Campden Charities** (1881), 18 Ch. D. 310.

1410. ————.]—**It is quite true that neither contrary practice nor disuse can repeal the positive enactment of a statute, but contemporaneous & continuous usage is of the greatest efficacy in law, for determining the true construction of obscurely worded documents (per OVR.).**—**HEBBERT v. PURCHAS** (1871), L. R. 3 P. C. 605; 7 Moo. P. C. O. N. S. 468; 40 L. J. Eccl. 33; 35 J. P. 452; 19 W. R. 898; 17 E. R. 177, 208, P. C.; *subsequent proceedings* (1872), L. R. 4 P. C. 301, P. C.

Annotations.—**Consd. Bourne v. Keane**, [1919] A. C. 815. **Mentd. Boyd v. Philpotts** (1874), L. R. 4 A. & E. 297; **Martin v. Mackonochie** (1874), L. R. 4 A. & E. 279; **Ridsdale v. Clifton** (1877), 2 P. D. 276; **Combe v. Edwards** (1878), 3 P. D. 103; **Serjeant v. Dale** (1879), 43 J. P. 220; **Mackonochie v. Penzance** (1881), 6 App. Cas. 424; **Martin v. Mackonochie** (1882), 7 P. D. 94; **Heywood v. Manchester Bp.** (1884), 12 Q. B. D. 404; **Venkata Narasimha Appa Row v. Court of Wards, Venkata Ramalakshmi Garu v. Gopala Appa Row, Ex p. Gopala Appa Row** (1886), 11 App. Cas. 660; **Read v. Lincoln Bp.**, [1892] A. C. 644; **Re Robinson, Wright v. Tugwell**, [1897] 1 Ch. 85; L. C. C. v. Dundas, [1904] P. 1; **Lord Advocate v. Walker Trustees**, [1912] A. C. 95; **Gore-Booth v. Manchester Bp.** (1920), 89 L. J. K. B. 1123; **Rhondas's Claim**, [1922] 2 A. C. 339.

1411. ————.]—**By a decree made in 1693 in a suit between the owners of Ashdown Forest & persons claiming rights of common, after allotting to the owners for enclosure & improvement portions of the forest within which the commoners were to be excluded & debarred from any common of pasture, herbage, or pasturage, the residue was allotted to remain open & unenclosed, so that the commoners should have & take "sole common pasturage & herbage" thereof, the owners, their trustees, & assigns, being for ever excluded "from having or claiming" any common of pasture or herbage upon or in the said lands so left for common.**—**Held:** evidence of subsequent usage was not admissible to affect the construction of the decree, which was plain & unambiguous.—**DE LA WARR (EARL) v. MILES** (1881), 17 Ch. D. 535; 50 L. J. Ch. 754; 44 L. T. 487; 29 W. R. 809, C. A.

Annotations.—**Mentd. Lemaitre v. Davis** (1881), 19 Ch. D. 281; **Hollins v. Verney** (1884), 13 Q. B. D. 304; **Brookbank v. Thompson**, [1903] 2 Ch. 344; **Lyell v. Hothfield**, [1914] 3 K. B. 911.

1412. ————.]—**In an action against a corp. to have certain charitable trusts of a deed of feoffment made by the corp. in the year 1599 carried into effect, & the lands & property subject thereto ascertained & distinguished:**—**Held:** the deed was not sufficiently ambiguous to entitle the corp. to bring in contemporaneous or subsequent

parties thereto must be supposed to have intended. The ct. may call in aid acts under the deed as a clue to the intention. This principle does not apply unless there is an ambiguity.—**KULADA PRASAD DEGHORIA v. KALI DAS NAIK** (1914), 1 L. R. 43 Cal. 536.—**IND.**

1409 iv. ————.]—**Where parcels are described in old documents by words of a general nature, of doubtful import, evidence of usage is proper to be received in order to show what they comprehend. The construction of a deed is always for the ct., but in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the ct. in the situation of the grantor.**—**BLOOMFIELD v. JOHNSTON** (1868), 1 R. 8 C. L. 68.—**IR.**

h. Whether evidence admissible.—Modern user.—Deed ambiguous.—**Qu.**

usage to explain its meaning.—*A.-G. v. DARTMOUTH CORPN.* (1853), 48 L. T. 983.

1413. ———.—]—There can be no doubt that contemporaneous usage may be resorted to for the purpose of explaining any uncertainty or ambiguity in an ancient grant; but then there must be uncertainty or ambiguity (*VAUGHAN WILLIAMS, L.J.*).—*HASTINGS (LORD) v. NORTH EASTERN RY.*, [1899] 1 Ch. 656; 68 L. J. Ch. 815; 80 L. T. 217; 15 T. L. R. 247; 43 Sol. Jo. 932. O. A.; on appeal, *sub nom.* *NORTH EASTERN RY. v. HASTINGS (LORD)*, [1900] A. C. 260, H. L.

Annotations.—*Consd. Watcham v. East Africa Protectorate*, [1919] A. C. 533. *Reid. Van Diemen's Land Co. v. Table Cape Marine Board*, [1906] A. C. 92. *Mentd. Brown v. Peto*, [1900] 2 Q. B. 653; *A.-G. v. Tamworth R. D. Co.* (1901), 85 L. T. 190; *Eckersley v. Wigan Coal & Iron Co.* (1910), 102 L. T. 264; *Hong Kong & China Gas Co. v. Glen* (1914), 110 L. T. 859.

1414. ———.—Of modern user.]—Where a right of election is given by an old deed to any number of persons, usage is admissible evidence as to its construction & meaning. In many cases a party undertakes to prove a custom from the time of legal memory, the reign of Richard II., but that proof is generally established by evidence of acts done at a much later period (*LORD KENYON, C.J.*).—*WITHELL v. GARTHAM (LORD)*, 6 Term Rep. 388; 1 Esp. 321; 101 E. R. 610.

Annotations.—*Mentd. Grindley v. Barker* (1798), 1 Bos. & P. 229; *Blacket v. Billard* (1829), 9 B. & C. 851; *Wilkinson v. Malin* (1832), 2 Cr. & C. 636; *R. v. Mashiter* (1837), 6 Ad. & El. 153; *Fell v. Charity Lands Official Trustee* (1898), 2 Ch. 44.

1415. ———.—]—*A.-G. v. BOSTON CORPN.* (1847), 1 De G. & Sm. 519; 63 E. R. 1175; *previous proceedings* (1845), 2 Holt, Eq. 107.

1416. ———.—]—All ancient documents, where a question arises as to what passed by a particular grant, can be explained by modern usage (*PARKE, B.*).—*BEAUFORT (DUKE) v. SWANSEA CORPN.* (1849), 3 Exch. 413; 12 L. T. O. S. 453; 154 E. R. 905.

Annotations.—*Consd. Waterpark v. Fennell* (1859), 7 H. L. Cas. 650; *Hastings Corpn. v. Ivall* (1875), L. R. 10 Eq. 558; *Saltash Corpn. v. Goodman* (1881), 7 Q. B. D. 106; *Devonshire v. Pattinson* (1887), 20 Q. B. D. 263. *Reid. Re Alston's Estate* (1856), 25 L. T. O. S. 337; *Sutton Harbour Improvement Co. v. Plymouth Town Grdns.* (1890), 63 L. T. 773; *The Abonoma, The Hillerod, The Florida, The Albania, The Adjutant*, [1919] P. 41. *Mentd. A.-G. v. Hamner* (1858), 27 L. J. Ch. 837; *Penryn Corpn. v. Holm* (1877), 37 L. T. 133; *Lord Advocate v. Young, N. B. Ry. v. Young* (1887), 12 App. Cas. 544.

1417. ———.—]—*WATERPARK (LORD) v. FENNELL*, No. 1338, *ante*.

1418. ———.—Where words general.]—When a grant of remote antiquity contains general words the best exposition of such a grant is long usage under it (*DALLAS, C.J.*).—*CHAD v. TILSED* (1821), 2 Brod. & Bing. 403; 5 Moore, C. P. 185; 129 E. R. 1022.

Annotations.—*Consd. Healy v. Thorn* (1870), 18 W. R. 1004. *Reid. Watcham v. East Africa Protectorate*, [1919] A. C. 533.

1419. ———.—If nothing to contrary.]—*NEILL v. DEVONSHIRE (DUKE)*, No. 1046, *ante*.

1420. ———.—If deed ambiguous.]—Wherever an old deed is ambiguous in its terms, modern user affords material aid in the elucidation of its meaning (*WILLES, J.*).—*SIMPSON v. DENDY* (1860), 8 C. B. N. S. 433; 6 Jur. N. S. 1197; 141 E. R. 1233; *affd. sub nom. DENDY v. SIMPSON* (1861), 7 Jur. N. S. 1058, Ex. Ch.

Annotations.—*Mentd. Berridge v. Ward* (1861), 10 C. B. N. S.

whether the acts of the parties in removing soil, which removal was not proved to have taken place earlier than 1863, could be called in aid of the interpretation of ambiguous words in the lease of 1754. There was no "con-

temporanea expositio."—*Re PURMANANDAS JEKWARDAS* (1889), 1 L. R. 7 Bom. 199.—*IND.*

k. ———.—Of modern declarations by grantees.]—A deed, purporting to be an absolute sale, will not be held a mtge.,

400; *Tidswell v. Whitworth* (1867), L. R. 2 C. P. 326; *C. L. Ry. v. City of London Land Tax Comrs.*, [1911] Ch. 487.

1421. ———.—]—*HEBBERT v. PURCHAS*, No. 1410, *ante*.

1422. ———.—]—*A.-G. v. DARTMOUTH CORPN.*, No. 1412, *ante*.

1423. ———.—Whether ambiguity latent or patent.]—*WATCHAM v. EAST AFRICA PROTECTORATE*, No. 923, *ante*.

SUB-SECT. 9.—EVIDENCE OF CUSTOM AND USAGE.
See CUSTOM & USAGES, pp. 3 *et seq.*, *ante*.

SUB-SECT. 10.—DOCUMENT IN FOREIGN LANGUAGE.

See CONFLICT OF LAWS, Vol. XI., p. 394, Nos. 673 *et seq.*

1424. Evidence admissible.—Of translators & experts.]—Pltf., a Brazilian subject, executed in Brazil in the Portuguese language a power of attorney to a broker resident in London to buy & sell shares. The broker accordingly sold certain shares of pltf. in deft. co., & they were registered in the names of the purchasers. Pltf. claimed a rectification of the register, on the ground that the sale was not authorised by the power of attorney. On the trial of a preliminary issue to determine whether the construction of the power of attorney was to be governed by Brazilian or by English law:—*Held*: the intention of pltf. was to be ascertained by evidence of competent translators & experts, including if necessary Brazilian lawyers, & if, according to such evidence, the intention appeared to be that the authority should be acted on in England, the extent of the authority, so far as transactions in England were concerned, must be determined by English law.—*CHATENAY v. BRAZILIAN SUBMARINE TELEGRAPH CO.*, [1891] 1 Q. B. 79; 60 L. J. Q. B. 295, 63 L. T. 739; *sub nom. Re BRAZILIAN SUBMARINE TELEGRAPH CO., LTD.*, 39 W. R. 65; 7 T. L. R. 1, C. A.

Annotations.—*Reid. Wehner v. Dene S.S. Co.* (1905), 10 Com. Cas. 139. *Mentd. Western Counties Ry. v. Anderson* (1892), 8 T. L. R. 595; *Ralli v. Compania Naviera Sota y Aznar*, [1920] 2 K. B. 287.

SUB-SECT. 11.—IN MATTERS PARTICULARLY RELATING TO CONTRACT.

A. To show whether Document or Documents constitute Contract.

1425. Evidence admissible.]—*ROGERS v. HADLEY*, No. 1193, *ante*.

1426. ———.—]—*KEMPSON v. BOYLE* (1865), 3 H. & C. 763; 34 L. J. Ex. 191; 11 Jur. N. S. 832; 14 W. R. 15; 159 E. R. 782.

1427. ———.—]—*BROWN v. HATCH* (1729), 1 Barn. K. B. 321; 94 E. R. 218.

1428. ———.—Auctioneer's minute of agreement.]—A written paper, delivered by the auctioneer to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, & the rent payable, but not signed by the auctioneer or any of the parties, was held not to be such a minute

on the grantor's evidence, supported by the testimony of third parties, touching alleged declarations to that effect made by the grantee long after its execution.—*Re NAGHTEN* (1840), 12 Ir. Jur. 196.—*IR.*

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of the agreement as was required to be stamped, pursuant to Probate & Legacy Duties Act, 1808 (c. 149), nor such a writing as would exclude parol evidence.—*RAMSBOTTOM v. TUNBRIDGE* (1814), 2 M. & S. 434; 105 E. R. 442.

*Annotations:—*Consd. *Hawkins v. Warre* (1825), 3 B. & C. 690. *Dist. Duffell v. Spottiswoode* (1825), 3 C. & P. 436. *Reid. Strother v. Barr* (1828), 5 Bing. 136; *Doe d. Marlow v. Wiggins* (1843), 4 Q. B. 367; *Whitford v. Tutin* (1834), 4 Moo. & S. 166.

1429. — *Letters*.—Where letters are stated as the agreement, no testimony *aliunde* is admissible; otherwise, where stated as evidence of the agreement only.—*BIRCE v. BLETCHLEY* (1821), 6 Madd. 17; 56 E. R. 995.

1430. — *Deft. having ordered goods by letter which did not mention any time for payment, plffs. sent the goods & an invoice:—Held: evidence to show that the order was given on the terms of six months' credit was admissible, the letter not being a valid contract within Stat. Frauds.*

The evidence here does not contradict the writing but it shows that the real contract was (*ALDERSON, B.*).—*LOCKETT v. NICKLIN* (1848), 2 Exch. 93; 19 L. J. Ex. 403; 154 E. R. 419.

1431. — *A. having entered into a contract for the supply of iron rails for Vera Cruz, applied to B. & Co., ship-owners & brokers, to procure vessels to carry it thither; whereupon B. & Co. on Nov. 19, wrote to A.: "We hereby engage to find tonnage for about 5,000 tons of rails to load at M. for Vera Cruz, subject to the following conditions, viz. 1,000 tons to be delivered at Vera Cruz in three months from this time, & 1,000 tons per month afterwards," etc. After a long correspondence & several interviews as to the class of vessels to be chartered, & the flag, B. & Co. on Dec. 11, wrote A. as follows,—"Our engagement to procure tonnage for Vera Cruz is the letter addressed to your Mr. B. on Nov. 19 & in accordance therewith, we are arranging to take up vessels for the first shipment of 1,000 tons. We cannot restrict ourselves to vessels of any particular flag or class, but will of course give a preference to neutral ships of high class." On Dec. 15, B. & Co. wrote to A. saying that they would prefer abandoning the contract altogether. & afterwards on the same day A. wrote: "We accept your offer of Nov. 19, last, coupled with the initialled offer of Nov. 18. Messrs. B. hold us to our contract, & therefore we must hold you to yours, & cannot consent to your abandoning it as intimated:—" *Held: these letters did not constitute a complete contract, but that recourse must be had to parol evidence; & consequently, it was properly left to the jury to say whether or not a binding contract as alleged in the declaration was to be inferred from the whole.*—*BOLCKOW v. SKYMOUR* (1864), 17 C. B. N. S. 107; 144 E. R. 43.*

1432. — *When letters contain certain terms which may form the basis of a contract, it is necessary to ascertain from the letters whether the terms are finally arrived at, & if they are not, verbal evidence is admissible to show that a different contract has been entered into.*—*APPLEBY v. JOHNSON* (1874), L. R. 9 C. P. 158; *sub nom. JOHNSON v. APPLEBY*, 43 L. J. C. P. 146; 30 L. T. 261; 22 W. R. 515.

1433. — *A written document from which a particular contract would, in ordinary cases, be implied, may be shown by parol to have been made under circumstances which exclude such implication.*—*BARTLETT v. PARNELL* (1836), 4

Ad. & El. 792; 2 Har. & W. 16; 6 Nev. & M. K. B. 299; 5 L. J. K. B. 169; 111 E. R. 981.

*Annotations:—*Reid. *Hopkins v. Tanqueray* (1854), 15 C. B. 130; *Dale v. Humphrey* (1858), E. B. & E. 1004. *Mentd. Manley v. Berkett*, [1912] 2 K. B. 329.

1434. — *Memorandum of sale.*—The general principle is quite true, that if there has been a parol agreement, which is afterwards reduced into writing, that writing alone must be looked to to ascertain the terms of the contract; but the principle does not apply here; there was no evidence of any agreement by plff. that the whole contract should be reduced into writing by deft. the contract is first concluded by parol, & afterwards the paper is drawn up, which appears to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, not as containing the terms of the contract itself (*LORD ABINGER, C.B.*).—*ALLEN v. PINK* (1838), 4 M. & W. 140; 1 Horn & H. 207; 7 L. J. Ex. 206; 2 Jur. 895; 150 E. R. 1376.

*Annotation:—*Reid. *Brumby v. Johnston* (1862), 5 L. T. 715.

1435. — *PYM v. CAMPBELL*, No. 1190, ante.

1436. — *Invoice & receipt—Pretended sale.*—Pltf. being in difficulties & fearing that some of his creditors would issue execution against his goods, agreed with deft., who was also a creditor, that there should be a pretended sale of them to him. For this purpose an invoice was made out & a receipt given to deft. for a sum therein stated to be the purchase-money, & possession of the goods was delivered to deft. Afterwards deft. sold the goods as his own, whereupon pltf. brought trover:—*Held: pltf. was not precluded from showing that no payment was in fact made & that the transaction was not a real, but a pretended sale.*—*BOWES v. FOSTER* (1858), 2 H. & N. 779; 27 L. J. Ex. 262; 30 L. T. O. S. 306; 4 Jur. N. S. 95; 6 W. R. 257; 157 E. R. 322.

*Annotations:—*Consd. *Lee v. L. & Y. Ry.* (1871), 6 Ch. App. 527. *Apld. Taylor v. Bowers* (1876), 1 Q. B. D. 291. *Mentd. Ashpitel v. Bryan* (1863), 3 B. & S. 474.

1437. — *Memorandum & promissory note.*—A trader being indebted to various persons procured from A. an advance of £200 for which he verbally agreed to give a bill of sale of all his property if called upon to do so. On receiving the money he gave to A. a promissory note for £200, a memorandum of agreement to assign some property expectant on the death of his wife's father together with a policy of insurance, & also another memorandum of agreement to pay £10 yearly as bonus. At a later period, on being requested, he executed a bill of sale of all his property to A.:—*Held: evidence of the original verbal agreement was admissible, inasmuch as the subsequent written agreement did not contain & was not intended to contain the whole agreement between the parties.*—*HARRIS v. RICKETT* (1859), 4 H. & N. 1; 28 L. J. Ex. 197; 32 L. T. O. S. 389; 157 E. R. 734.

*Annotations:—*Reid. *Chapman v. Callis* (1861), 7 Jur. N. S. 995. *Mentd. Re Disputed Adjudication* (1860), 3 L. T. 632; *Lindley v. Lacey* (1864), 17 C. B. N. S. 578; *Re Nurse, Ex p. Foxley* (1888), 17 L. T. 623; *Re Holland, Gregg v. Holland*, [1902] 2 Ch. 360.

1438. — *WAKE v. HARROP*, No. 1192, ante.

1439. — *No doubt when the parties agreed to put the entire contract in writing, that writing alone is the contract. But to apply that well it must appear that they had so intended to put the entire contract into writing; & if it appears that they only did so as to part of it there is no reason why oral evidence may not be resorted to to show what the rest of the contract was* (*MARTIN, B.*).—*ALLAN v. SUNDIUS* (1862), 1 H. & C. 123; 31

L. J. Ex. 307; 6 L. T. 359; 10 W. R. 648; 1 Mar. L. C. 222; 158 E.R. 827.

1440. —[Parol evidence is admissible at all events, to show whether the minds of the parties ever were *ad idem*, & whether, in fact, they ever contracted at all.—MEYER v. BARNETT (1863), 3 F. & F. 696, N. P.

1441. —[Agreement for loan.]—A co. had borrowed from a bank a sum of money, to be repaid with interest, & deposited a lease as security. Afterwards a document was drawn up by the co., stating that the lease had been deposited as security for the loan, without mentioning the interest. The bank refused to give up the deed until the whole of the interest as well as the loan had been repaid. In an action of detinue for the lease:—*Held*: the written document was not conclusive against the bank as to the terms of the loan, & parol evidence was rightly admitted to show that the lease had been intended as security for the interest as well as the principal.—PENTREQUINNY FUEL CO. v. YOUNG (1866), 12 Jur. N. S. 56.

1442. —[McCOLLIN v. GILPIN, No. 1196. *ante*.

1443. —[Agreement for sale.]—Upon a negotiation between pltf. & deft. for the sale of the fixtures, furniture, & goodwill of a business, the agreement for which was afterwards reduced into writing, a distinct & separate promise was made by deft., in consideration of pltf.'s signing the agreement, that he, deft., would settle an action then pending against pltf. at the suit of one C.:—*Held*: evidence of this prior oral agreement was admissible, notwithstanding the written agreement contained an authorisation to deft. to settle C.'s action out of the purchase-money.

Evidence may be given of a prior or a contemporaneous oral agreement which constitutes a condition upon which the performance of the written agreement is to depend (BYLES, J.).—LINDLEY v. LACEY (1864), 17 C. B. N. S. 578; 5 New Rep. 51; 34 L. J. C. P. 17; 11 L. T. 273; 10 Jur. N. S. 1103; 13 W. R. 80; 144 E. R. 232.

Annotations:—*Refd.* Young v. Auston (1869), 38 L. J. C. P. 233. *Mentd.* Newman v. Gatti (1907), 24 T. L. R. 18.

1444. —[To show condition of document when signed.]—A memorandum containing proposed terms for the sale of a ship having been drawn up by the vendors' broker, but not signed, was sent to the purchaser. He made certain interlineations in red ink altering the terms, & having signed the document, returned it to the vendors' broker. The alterations were subsequently not acquiesced in by the vendors, & were struck out, & further interlineations were made by the vendors. The vendor's broker then signed the document & submitted it to the purchaser, who assented to the terms of it as it then stood:—*Held*: notwithstanding the provisions of Stat. Frauds, parol evidence was admissible to show that the purchaser had so assented, inasmuch as there never had been a contract between the parties until such assent on his part; & the effect of the parol evidence was, therefore, not to vary a written contract, but merely to show what was the condition of the document when it became a contract between the parties.—STEWART v. EDDOWES, HUDSON v. STEWART (1874), L. R. 9 C. P. 311; 43 L. J. C. P. 204; 30 L. T. 333; *sub nom.* HUDSON v. STUART, STUART v. EDDOWES, 22 W. R. 534.

Annotations:—*Apid.* Koenigsblatt v. Sweet, [1923] 2 Ch. 314. *Refd.* Dartford Union Grains v. Trickett (1888), 59 L. T. 754.

1445. —[To show writing does not contain whole contract.]—A contract, which was not required by law to be in writing, had been entered

into between pltf. & deft., & its terms had been reduced into writing; but the writing, by itself, did not form the complete contract:—*Held*: parol testimony was admissible to supplement written evidence of the contract.—LOIBL v. STRAMPFER (1867), 16 L. T. 720.

1446. —[There is a class of case where deft. has been allowed to say: "This document which you produce against me, showing my signature to it, does not express the real & true agreement which was entered into between us." Cases there are in which a plea of this kind has been allowed, even at law. But it is to be observed that all these were cases of a deft. defending himself. No single instance has been produced in which a pltf. bringing forward a document on which he founds his right, has been allowed to say that the instrument which he himself produces to the ct. does not express the real agreement into which he has entered (WOOD, V.-C.).—DRIFF v. PARKER (LORD) (1868), L. R. 5 Eq. 131; 37 L. J. Ch. 241; 18 L. T. 46; 10 W. R. 557.

1447. —[To show document not a contract.]—Where a document appears on the face of it to contain the terms of a written agreement, parol evidence is admissible to show that it was not intended to be an agreement, but was written for some other purpose, & the question whether this is so or not is for the jury.

It is clear that a person who has signed a document may adduce evidence as to the time at which it was intended to operate (LINDLEY, J.).—OLEVER v. KIRKMAN (1875), 33 L. T. 672; 24 W. R. 159.

1448. —[An intimation in the written acceptance of a tender that a contract will be afterwards prepared, does not prevent the parties from becoming bound to perform the terms in the tender & acceptance respectively mentioned, if the intention of the parties was thereby to enter into an agreement, & if the preparation of the contract was contemplated merely for the purpose of expressing the agreement already arrived at in formal language.—LEWIS v. BRASS (1877), 3 Q. B. D. 667; 37 L. T. 738; 26 W. R. 152, C. A.

Annotations:—*Refd.* Hawkesworth v. Chaffey (1886), 55 L. J. Ch. 335. *Mentd.* Wood v. Silcock (1884), 32 W. R. 845.

1449. —[PATTLE v. HORNIBROOK, No. 1197, *ante*.

1450. —[When parties have arrived at a definite written contract, the presumption is that the writing was intended to contain all the terms of the contract; but it is a presumption only, & either party may allege an antecedent express stipulation intended to continue in force with the written contract, & may contend that the written contract was not intended to include all the terms (LORD RUSSELL OF KILLOWEN, C.J.).—GILLESPIE v. CHENEY, EGGAR & Co., [1896] 2 Q. B. 59; 65 L. J. Q. B. 552; 12 T. L. R. 274; 40 Sol. Jo. 354; 1 Com. Cas. 373.

Annotations:—*Mentd.* Sumner, Permain v. Webb (1921), 91 L. J. K. B. 228; Manchester Liners v. Rea, [1922] 2 A. C. 74.

Whether constituting a contract in futuro.]—
See Sub-sect. 11, C., *post*.

Whether constituting only collateral agreement.]—
See Sub-sect. 11, G., *post*.

B. To Connect Documents forming a Contract.

Contracts within Statute of Frauds.]—See CONTRACT, Vol. XII.

1451. Whether evidence admissible—To identify document referred to.]—When it is proposed to

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prove the existence of a contract by several documents it must appear on the face of the instrument signed by the party sought to be charged that reference is made to another document & this omission cannot be supplied by verbal evidence. If, however, it appears from the instrument itself that another document is referred to that document may be identified by verbal evidence (*THESSIGER, L.J.*).—*LONG v. MILLAR* (1879), 4 Q. P. D. 450; 48 L. J. Q. B. 596; 41 L. T. 306; 43 J. P. 797; 27 W. R. 720, C. A.

Annotations:—*Reid. Cave v. Hastings* (1881), 7 Q. B. D. 125; *Shardlow v. Cotterell* (1881), 20 Ch. D. 90; *Studds v. Watson* (1884), 28 Ch. D. 305; *Stidde v. Bond-Cabbell* (1885), 2 T. L. R. 44; *Oliver v. Hunting* (1890), 44 Ch. D. 205; *Taylor v. Smith*, [1893] 2 Q. B. 65; *Pearce v. Gardner*, [1897] 1 Q. B. 688; *Sheers v. Thimbleby* (1897), 76 L. T. 709; *Dewar v. Mintoft*, [1912] 2 K. B. 373; *Last v. Hunklesby* (1914), 58 Sol. Jo. 431; *Chaproniere v. Lambert* (1917), 117 L. T. 353; *Stokes v. Whitcher* (1920), 1 Ch. 411.

1452. — Evidence of surrounding circumstances.]—*HARMAN v. RICHARDS*, No. 1126, *ante*.

1453. —*J.*—*M. bought from T. & T., metal brokers, iron of a superior quality. T. & T. thereupon delivered certain delivery notes of D., W., & Co. to M., in the following form:—"We hold 100 tons No. 1 pig iron, deliverable, f.o.b. here, to the bearer of this document, only on presentation.—D., W., & Co." M. sought to insist, as against D., W., & Co., on delivery of the quality of iron he had bought of T. & T. & endeavoured by evidence to connect the two contracts, & show they referred to the same quality of iron:—Held: evidence for that purpose was admissible.*—*MACKENZIE v. DUNLOP* (1856), 3 Macq. 22; 28 L. T. O. S. 313; 2 Jur. N. S. 957; 4 W. R. 815, H. L.

1454. — Memorandum of sale—Receipt of purchase-money.]—Vendor & purchaser signed a document containing all terms necessary to constitute a contract for the purchase of land, except a description of the land itself. The vendor subsequently signed a receipt for a sum of money paid by the purchaser as paid on account of certain land expressly described. In an action by the purchaser for specific performance:—*Held: parol evidence was admissible to connect the two documents.*—*OLIVER v. HUNTING* (1890), 44 Ch. D. 205; 59 L. J. Ch. 255; 62 L. T. 108; 38 W. R. 618.

Annotations:—*Reid. Freeman v. Freeman* (1891), 7 T. L. R. 431; *Stokes v. Whitcher*, [1920] 1 Ch. 411.

— To connect letters to constitute acknowledgment in writing—Statute of Limitations.]—See LIMITATION OF ACTIONS.

C. To show that Contract was Executory—Escrow.

1455. Evidence admissible.]—*PYM v. CAMPBELL*, No. 1190, *ante*.

1456. —*J.*—*Parol evidence is admissible to show that a written contract which has no date was not intended to operate from its delivery but from a future uncertain period.*

It is true that this instrument contains a certain portion of the terms of the holding, & so far parol evidence is not admissible to vary or control it, yet it does not show the time from which the tenancy was to commence. A written instrument does not necessarily operate from delivery: it is competent to a party to show that it was delivered as an escrow, & that, though it appears upon the face of it to be presently operative, it was in reality not intended to operate until the happening of a given event (*JEVVIS, C.J.*).—*DAVIS v. JONES*

(1856), 17 C. B. 625; 25 L. J. C. P. 91; 4 W. R. 248; 189 E. R. 1222.

Annotations:—*Reid. Pym v. Campbell* (1856), 6 M. & B. 870; *Wallis v. Littell* (1861), 11 C. B. N. S. 369; *Lindley v. Lacey* (1864), 17 C. B. N. S. 578; *Clever v. Kirkman* (1875), 33 L. T. 672.

1457. —*J.*—*Although, in general, the question whether a contract has been executed only as an escrow is for the jury, because it generally depends on facts proved by oral evidence, yet where the evidence is in writing, as where the contract, signed by one party even after signature by the agent of the other, is sent inclosed in, or is accompanied by, a letter explaining that it is only signed on condition of something being done—as, for example, a counterpart being executed by the other party—the construction of such evidence is for the judge:—Held: such evidence was sufficient to show that the contract was signed & sent only as an escrow, to take effect after the condition was performed.*—*FURNESS v. MEEK* (1857), 27 L. J. Ex. 34.

Annotation:—*Reid. Pattie v. Hornibrook*, [1897] 1 Ch. 25.

1458. —*J.*—*LINDLEY v. LACEY*, No. 1443, *ante*.

1459. —*J.*—*The rules excluding parol evidence have no place in any inquiry in which the ct. has not got before it some ascertained paper beyond question binding & of full effect. Nor indeed are these rules pressed in the cts. either of law or equity beyond this mark. For if the written document is alleged to have been signed under condition that it should not operate except in certain events parol evidence has been admitted at law to prove such condition & the breach of it* (*SIR J. P. WILDE*).—*GUARDHOUSE v. BLACKBURN* (1866), L. R. 1 P. & D. 109; 35 L. J. P. & M. 116; 14 L. T. 69; 12 Jur. N. S. 278; 14 W. R. 463.

Annotations:—*Reid. Refell v. Refell* (1866), L. R. 1 P. & D. 139; *Fulton v. Andrew* (1875), L. R. 7 H. L. 448; *Garnett-Bothfeld v. Garnett-Bothfeld*, [1901] P. 335. *Mentd. Harter v. Harter* (1873), L. R. 3 P. & D. 11; *In the Goods of Boehm*, [1891] P. 247; *Collins v. Elstone*, [1893] P. 1; *Gregson v. Taylor*, [1917] P. 256.

1460. —*J.*—*CLEVER v. KIRKMAN*, No. 1447, *ante*.

1461. — Sale of goods.]—Defts. & T. were partners in a colliery, & in Oct., 1835, defts. signed an agreement with pltf., purporting to be made between defts. & T. of the one part, & pltf. of the other part, by which the parties of the first part agreed to sell to the pltf. a certain supply of coals from their colliery for the term of three years, to commence from July 1, 1837, at a certain price; the instrument also contained a stipulation by the parties of the first part, for a lease to pltf. of a wharf. At the date of this agreement the parties were acting under a similar agreement, which was to expire on July 1, 1837, & was executed by T. also; but T. never signed the agreement in question, & on being asked so to do, in July, 1837, refused. There was also evidence that pltf. had treated this agreement as not binding. In an action by pltf. against defts. on the agreement:—*Held: it was a question for the jury, whether the parties intended the instrument to be binding only on the condition that T. should sign it.*—*LATCH v. WEDLAKE* (1840), 11 Ad. & El. 959; 3 Per. & Dav. 499; 9 L. J. Q. B. 201; 113 E. R. 678.

Annotations:—*Reid. Cumberlege v. Lawson* (1857), 1 C. B. N. S. 709; *Coyte v. Elphick* (1874), 22 W. R. 541; *Royal Albert Hall Corpn. v. Winchelsea* (1891), 7 T. L. R. 362.

1462. — Bill of exchange.]—In an action by indorsee against acceptor of a bill of exchange, debt. under a traverse of the indorsement, may prove that the drawer wrote his name on the bill, & delivered it to pltf., upon condition of certain

other bills being given up to the drawer, & the condition had not been complied with.—*BELL v. INGESTRE (LORD)* (1848), 12 Q. B. 317; 19 L. J. Q. B. 71; 11 L. T. O. S. 200; 116 E. R. 888.

Annotations.—*Reid*. Law v. Parnell (1859), 7 C. B. N. S. 282; Dawson v. Isle, [1906] 1 Ch. 688.

1463. — *Pltfs. sued defts. on a promissory note made by deft. co. & indorsed at the request of pltfs. by deft. D. who was president of deft. co. The note was given in part payment of goods supplied by pltfs. to deft. co. Deft. co. did not appear at the trial, but deft. D. appeared & set up an oral agreement made by him with pltfs., contemporaneous with the promissory note, that he was not to be called upon to pay if the goods supplied to deft. co. should be unequal to sample. The goods were retained by deft. co., but D. proved that they were unequal to sample:—Held: the oral agreement relied upon by D. not being an agreement suspending the coming into force of the contract contained in the promissory note, but being an agreement in defeasance of that contract, evidence in support of it was inadmissible, & therefore, D. was liable on the promissory note.—HITCHINGS & COULTHURST CO. v. NORTHERN LEATHER CO. OF AMERICA & DOUSHKESS, [1914] 3 K. B. 907; 83 L. J. K. B. 1819; 111 L. T. 1078; 80 T. L. R. 688; 20 Com. Cas. 25.*

1464. — *Hire of furnished house.*—*BROADWOOD v. LOZANO* (1858), 1 F. & F. 180, N. P.

1465. — *Lease.*—Where, by a written agreement, deft. agreed to assign to pltf. a farm with immediate possession, upon the same terms as he held of his landlord, but at the time of the making of such agreement an oral agreement was entered into between pltf. & deft. that the written agreement should be void if the landlord refused to consent to the assignment. In an action for non-assignment:—*Held*: the oral agreement was admissible, as it was in analogy with the delivery of a deed as an escrow, & neither varied nor contradicted the writing, but suspended the commencement of the obligation.—*WALLIS v. LITTELL* (1861), 11 C. B. N. S. 369; 31 L. J. C. P. 100; 5 L. T. 489; 8 Jur. N. S. 745; 10 W. R. 192; 142 E. R. 840.

Annotations.—*Reid*. Wake v. Harrop (1862), 1 H. & C. 202; Lindley v. Lacey (1864), 17 C. B. N. S. 578; Abrey v. Crux (1869), L. R. 5 C. P. 37; Johnson v. Appleby (1874), 30 L. T. 261; Hitchings & Coulthurst Co. v. Northern Leather Co. of America & Doushkeess, [1914] 3 K. B. 907.

1466. — *—*—*PATTLE v. HORNIBROOK*, No. 1197, ante.

Delivery as escrow.—See Part I., Sect. 5, sub-sect. 2, ante.

D. To prove Consideration.

Cases within the Statute of Frauds—Generally.]

—See CONTRACT, Vol. XII.

—Guarantees.]—See, now, Mercantile Law Amendment Act, 1856 (c. 97), & generally, GUARANTEE.

—Agreement for leases.]—See LANDLORD & TENANT.

1467. General rule.]—As a general rule evidence may be given to show that a deed in form voluntary was in truth for valuable consideration (COZENS-HARDY, L.J.).—*Re HOLLAND, GREGG v. HOLLAND*, [1902] 2 Ch. 360; 71 L. J. Ch. 518; 86 L. T. 542;

50 W. R. 575; 18 T. L. R. 563; 46 Sol. Jo. 493; 9 Mans. 259, C. A.

Annotations.—*Reid*. Re Gillespie, Ex p. Knapman, The Trustees v. Gillespie (1913), 20 Mans. 311; Re Davies, Ex p. Miles, [1921] 3 K. B. 628. *Mentd.* Carruthers v. Peake (1911), 55 Sol. Jo. 291.

1468. To prove real consideration.—Where no consideration expressed.]—A deed which professed to be a voluntary assignment of part of a bankrupt's property in favour of his wife & children, & which was made a short time before the bkpcy. was sustained, under the circumstances which were proved, *dehors* the deed.

The evidence proves that this agreement was for valuable consideration. The valuable consideration may be shown by matter *dehors* the deed (KNIGHT BRUCE, V.-C.).—*POTT v. TODHUNTER* (1845), 2 Coll. 76; 5 L. T. O. S. 144; 9 Jur. 589; 63 E. R. 644.

Annotation.—*Reid*. Re Holland, Gregg v. Holland, [1902] 2 Ch. 360.

1469. — *—*—The L. Ry. Co., being in want of money to complete an extension line, applied to the N. W. Ry. Co. for a loan of £40,000, & it was agreed that the N. W. Ry. Co. should lend the money & have running powers over the lines of the L. Co. An agreement under seal was entered into, not referring to the loan:—*Held*: evidence of the advance of the £40,000 having been the consideration for the agreement was admissible.—*LLANELLY RY. & DOCK CO. v. LONDON & NORTH WESTERN RY. CO.* (1873), 8 Oh. App. 942; 42 L. J. Ch. 884; 29 L. T. 357; 21 W. R. 889; L. J.J.; on appeal (1875), L. R. 7 H. L. 550, H. L.

Annotations.—*Mentd.* Levy v. Creighton (1874), 31 L. T. 1; Cochrane v. Exchange Telegraph Co. (1896), 12 T. L. R. 197; Re Lindrea, Lindrea v. Fletcher (1913), 109 L. T. 623; Tynemouth Corp'n. v. Newbiggin-by-the-Sea U. D. C. (1915), 80 J. P. 195.

1470. — *Nominal consideration stated.*—A nominal consideration being expressed in a deed does not prevent the admission of evidence *aliunde* of the real consideration provided such real consideration be not inconsistent with the deed.—*Re BRITISH & FOREIGN CORK CO., LEITCHCHILD'S CASE* (1865), L. R. 1 Eq. 231; 13 L. T. 267; 11 Jur. N. S. 941; 14 W. R. 22.

Annotations.—*Mentd.* Re Baglan Hall Colliery Co. (1870), 5 Oh. App. 349, n.; Re Britannia Permanent Benefit Bldg. Soc. (1891), 65 L. T. 196; Re Wragg, [1897] 1 Ch. 796.

1471. — *Consideration expressed generally*—"Divers good consideration."—*MILDMAY'S CASE* (1582), 1 Co. Rep. 175 a; Jenk. 247; Oro. Eliz. 34; 76 E. R. 379.

Annotations.—*Reid*. Bedell's Case (1608), 7 Co. Rep. 40 a; Harpur's Case (1614), 11 Co. Rep. 23 a; Foster v. Foster (1662), 1 Keb. 160; Goodtitle v. Petto (1734), 2 Stra. 934; Sargent v. Reed (1745), 2 Stra. 1228; Clifford v. Turrell (1845), 14 L. J. Ch. 390. *Mentd.* Paget's Case (1591), 1 And. 259; Cross v. Faustenditch (1607), Oro. Jac. 180; Howel v. Sambay (1615), 1 Brownl. 179; Colt & Glover v. Coventry & Litchfield Bp. (1616), Hob. 140; Miller v. Manwaring (1635), Oro. Car. 397; Ratcliffe's Case (1719), 1 Stra. 267; Doe d. Milburn v. Salkeld (1755), Willes, 673; Rowe v. Roach, Rowe v. Hoar (1813), 1 M. & S. 304; Peover v. Hassel (1861), 1 John. & H. 341; Poole v. Whitcomb (1862), 12 C. B. N. S. 770; British Ry. & Traffic & Electric Co. v. C. R. C. Co. & L. C. C., [1922] 2 K. B. 260.

1472. — *—*—Where a deed purported to be made "in consideration of esteem for T. & for divers other good considerations" evidence is admissible that it was made in consideration of an intended marriage with T. & it is admissible evidence of this fact, that the settlor,

PART III. SECT. 4, SUB-SECT. 11.—D.

1468. To prove real consideration.]—The statement of the consideration in a deed of conveyance does not estop the parties from proving the real agreement

& transaction.—*FIRMIN v. PUBLIC TRUSTEE, PRICE'S CLAIM* (1889), 7 N. Z. L. R. 277.—N.Z.

1470. — *Nominal consideration stated.*—Where a conveyance is made

in consideration of an exchange of lands & \$1, parol evidence is admissible to show that the transaction was not really an exchange & to show what it actually was.—*CAMPBELL v. DOUGLAS* (1916), 27 O. W. R. 129; 54 S. C. R. 28.—CAN.

1. *Whether to prove other consideration*—When a real consideration is expressed.)—An impeached deed cannot

may be averred.—**BEDELL'S CASE** (1607), 7 Co. Rep. 40 a; 77 E. R. 470.

Annotations:—**Consd.** *Harpur's Case* (1614), 11 Co. Rep. 23 a; *Doe d. Milburn v. Salkeld* (1755), Willes, 673. **Refd.** *Samon v. Jones* (1690), 2 Vent. 318; *A. G. v. Coventry Corp.* (1700), 2 Vern. 397; *Goodtitle v. Petto* (1732), 2 Stra. 934; *Clifford v. Turrell* (1845), 14 L. J. Ch. 390. **Mentd.** *Idle v. Cooke* (1705), 2 Ld. Raym. 1144.

1483. ———. **CLARKSON v. HANWAY** (1723), 2 P. Wms. 203; 24 E. R. 700.

Annotations:—**Mentd.** *Cray v. Mansfield* (1750), 1 Ves. Sen. 379; *Hawes v. Wyatt* (1790), 2 Cox, Eq. Cas. 263; *Blachford v. Christian* (1829), 1 Knapp, 73.

1484. ———. **CLIFFORD v. TURRELL** (1845), 14 L. J. Ch. 390; 5 L. T. O. S. 281; 9 Jur. 633, L. O.

Annotations:—**Consd.** *Keenan v. Handley* (1864), 10 L. T. 683. **Foll.** *Re Barnstaple Second Annuitant Soc.* (1884), 50 L. T. 424. **Consd.** *Frith v. Frith*, [1906] A. C. 254. **Refd.** *Kelson v. Kelson* (1853), 1 W. R. 143; *Re British & Foreign Cork Co., Lefchild's Case* (1865), L. R. 1 Eq. 231. **Mentd.** *Jervis v. Berridge* (1873), 8 Ch. App. 351.

1485. ———. **TOWNEND v. TOKER** (1866), 1 Ch. App. 446; 35 L. J. Ch. 608; 14 L. T. 531; 12 Jur. N. S. 477; 14 W. R. 806, L. J.

Annotations:—**Mentd.** *Rosher v. Williams* (1875), L. R. 20 Eq. 210; *Crossman v. R.* (1886), 18 Q. B. D. 256.

1486. ———. **What amounts to contradiction.**—Where any consideration is mentioned, as of love & affection only, if it is not said also & for other consideration you cannot enter into proof of any other: the reason is because it would be contrary to the deed (**LORD HARDWICKE, L.C.**).—**PEACOCK v. MONK** (1748), 1 Ves. Sen. 127; 27 E. R. 934.

Annotations:—**Consd.** *Clifford v. Turrell* (1845), 14 L. J. Ch. 390. **Refd.** *Gale v. Williamson* (1841), 8 M. & W. 405. **Mentd.** *Hulme v. Tonant* (1779), Dick, 560; *Kelson v. Kelson* (1853), 1 W. R. 143; *Aitchison v. Le Mann* (1854), 23 L. T. O. S. 302; *Re British & Foreign Cork Co., Lefchild's Case* (1865), L. R. 1 Eq. 231.

1487. ———. **FRITH v. FRITH**, [1906] A. C. 254; 75 L. J. P. C. 50; 94 L. T. 383; 54 W. R. 618; 22 T. L. R. 388, P. C. **Annotation:**—**Mentd.** *Prosperity v. Lloyds Bank* (1923), 39 T. L. R. 372.

1488. ———. **R. v. SCAMMONDEN (INHABITANTS)** (1789), 3 Term Rep. 474; 2 Bott. 6th ed. 551; 100 E. R. 685.

Annotations:—**Foll.** *R. v. Llangunnor* (1831), 2 B. & Ad. 616; *Clifford v. Turrell* (1841), 1 Y. & C. Ch. Cas. 138; *R. v. Stoke-upon-Trent* (1843), 5 Q. B. 303. **Refd.** *Rich v. Jackson* (1794), 4 Bro. C. C. 514; *R. v. Cottingham* (1827), 7 B. & C. 603; *Re Govett & Leigh, Ex p. Morley* (1832), 2 Deac. & Ch. 50; *Vonhollen v. Knowles* (1844), 2 L. T. O. S. 370; *Harris v. Rickett* (1859), 4 H. & N. 1.

1489. ———. **FRAIL v. ELLIS** (1852), 16 Beav. 350; 22 L. J. Ch. 467; 20 L. T. O. S. 197; 51 E. R. 814.

be supported by evidence of considerations different from those alleged in it.—**WATT v. GROVE** (1805), 2 Sch. & Lef. 501, 502, 503.—**IR.**

m. ———. **Equity will not permit a party to travel out of the formal deed to give proof of an agreement, for a consideration less valuable than the consideration stated, & when a deed recites a valuable consideration, no**

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other can be proved.—**DROUGHT v. EUSTACE** (1828), 1 Mol. 384.—**IR.**

n. ———. **Semble:** The ct. may look to other considerations besides those stated in the deed.—**MYERS v. LEINSTER (DUKE)** (1844), 7 I. Eq. R. 146.—**IR.**

o. ———. **Parol evidence is admissible to show that in an agreement to pay an annuity there was a**

1490. ———. **By an agreement in writing G. agreed that Y. should receive all the money that was then due, & which should become due to G. upon the winding-up of the Society, Y. paying to G. out of such money the sum of £100. The consideration was stated to be "In consideration of a sum of money this day paid, etc.":—Held:** evidence was admissible to show that in addition to the consideration expressed there was another consideration, namely, that Y. should vote for the winding-up of the society.—**Re BARNSTAPLE SECOND ANNUITANT SOCIETY** (1884), 50 L. T. 424.

1491. **To disprove allegation of past consideration.**—In an action on the following guarantee: "In consideration of your having this day advanced to our client, D., £750, secured by his warrant, of attorney, payable on Aug. 22, next, we hereby jointly & severally undertake to pay the same on default, etc. Dated June 20, 1840": the declaration stated, that, in consideration that pltf. would on June 22, 1840, lend to one D. £750, on the security of a warrant of attorney, payable on Aug. 22, then next, & would forbear & give time to D. until Aug. 22, deft. promised, etc.:—**Held:** the instrument was sufficiently ambiguous to admit of evidence to show that the advance was not a past one, but was made simultaneously with the execution of the guarantee & that no amendment of the declaration was necessary.—**GOLDSHEDE v. SWAN** (1847), 1 Exch. 154; 16 L. J. Ex. 284; 9 L. T. O. S. 248; 154 E. R. 65.

Annotations:—**Refd.** *Simpson v. Margitson* (1847), 11 Q. B. 23; *Steele v. Hoe* (1849), 14 Q. B. 431; *Colbourn v. Dawson* (1851), 10 C. B. 765; *Broom v. Batchelor* (1856), 1 H. & N. 265; *Bruff v. Conyboare* (1862), 9 Jur. N. S. 78; *Bruner v. Moore*, [1904] 1 Ch. 306. **Mentd.** *Edwards v. Jevons* (1849), 8 C. B. 438; *Bainbridge v. Wade* (1850), 16 Q. B. 89; *Horlor v. Carpenter* (1857), 27 L. J. C. P. 1; *Wood v. Priestner* (1866), 4 H. & C. 681.

1492. ———. **A declaration on a guarantee stated that, in consideration that pltf., at the request of deft., would sell & deliver certain goods, to wit, etc., to B. & W. on certain credits, then agreed upon by & between pltf., & B. & W., deft. then promised pltf. to guarantee to them the price of the goods to the amount of £200," etc.:—Held:** this was a good guarantee, the correspondence showing that it applied to future as well as to past credits.—**COLBOURN v. DAWSON** (1851), 10 C. B. 765; 20 L. J. C. P. 154; 17 L. T. O. S. 125; 15 Jur. 680; 138 E. R. 302.

1493. ———. **HOAD v. GRACE**, No. 1319, ante.

1494. **To prove consideration in contracts in restraint of trade.**—Parol evidence of the consideration is admissible in regard to contracts in restraint of trade just as it is in regard to all other simple contracts.—**COOPER v. SOUTHGATE** (1894), 63 L. J. Q. B. 670; 10 R. 552.

1495. **To prove by whom consideration paid.**—An unstamped assignment of a parish apprentice stated that E., the new master, in consideration of £3 10s. paid him by H., the old master, agreed to accept the apprentice, etc.:—**Held:** parol evidence was admissible to show that the money paid on the assignment of the apprentice was parish money.—**R. v. LLANGUNNOR (INHABITANTS)** (1831), 2

consideration for the granting of the annuity different from that expressed in the agreement.—**JAFAR ALI NIZAM ALI v. AHMED ALI IMAM HAIDAR BAKSH** (1868), 5 Bom. A. C. 37.—**IND.**

p. ———. **Party to a contract may show that there was no consideration, or that the consideration was different from that described in the contract.**—**HUKUMCHAND v. HIRALAL** (1876), 1 L. R. 3 Bom. 159.—**IND.**

Sect. 4.—Admission of extrinsic evidence: Sub-sect. 11, D. & E. (a).]

B. & Ad. 616; 9 L. J. O. S. M. C. 90; 109 E. R. 1272.

Annotation:—*Mentd. R. v. Billingham* (1836), 5 Ad. & Ell. 676.

E. Evidence of Matters Prior to Contract.

(a) Parol.

1496. Evidence inadmissible—Conversations.]—*CHRISTMAS v. CHRISTMAS* (1725), *Cas. temp. King*, 20; 25 E. R. 199, L. C.

1497. ———.]—Parol evidence not admissible to prove from conversations before & at the time of signing an agreement for a lease, that the intent of the parties was different from the memorandum, though the same was written by the lessee, & the words "clear of all taxes," which was the purport of the conversation, were omitted in the memorandum.—*RICH v. JACKSON* (1794), 4 Bro. C. C. 514; 29 E. R. 1017.

Annotations:—*Consd. Ogilvie v. Follam* (1817), 3 Mer. 53. *Reid. Townshend v. Stangroom* (1801), 6 Ves. 328.

1498. ———.]—If there are parol negotiations, which are afterwards reduced into writing, the writing must be looked to, as showing the final arrangement.—*SINCLAIR v. STEVENSON* (1824), 1 C. & P. 582, N. P.; *subsequent proceedings* (1825), 2 Bing. 514.

Annotations:—*Mentd. Re Walsh, Ex p. King* (1840), 4 Jur. 510; *Load v. Green* (1846), 15 M. & W. 216; *Elmes v. Ogle* (1851), 15 Jur. 180; *Burgess v. Bennett* (1872), 20 W. R. 720.

1499. ———.]—No weight is to be given to parol testimony which is contrary to the obvious construction of written documents.

I should not think it safe to give any credit to a witness who should be called for the purpose of stating something that had passed in conversation inconsistent with the result of such documents (*LORD COTTENHAM, C.*).—*ATTWOOD v. SMALL* (1838), 6 Cl. & Fin. 232; 2 Jur. 226, 246; 7 E. R. 684, H. L.; *previous proceedings, sub nom. SMALL v. ATTWOOD* (1832), *You.* 407.

Annotations:—*Mentd. Walburn v. Ingilby* (1833), *Coop. temp. Brough.* 270; *Lavell v. Hicks* (1836), 2 Y. & C. Ex. 46; *Brown v. Sawyer* (1841), 3 Beav. 598; *Benson v. Heathorn* (1842), 1 Y. & C. Ch. Cas. 326; *Kirkman v. Andrews* (1842), 4 Beav. 554; *Gibson v. D'Este* (1843), 2 Y. & C. Ch. Cas. 542; *Bather v. Kearley* (1844), 13 L. J. Ch. 321; *Humphries v. Horne* (1844), 3 Hare, 276; *Nelthorpe v. Holgate* (1844), 8 Jur. 551; *Archbold v. Charity Bequests for Ireland Comrs.* (1849), 2 H. L. Cas. 440; *Marshall v. Sladden* (1849), 7 Hare, 428; *Reynell v. Sprye* (1849), 8 Hare, 222; *Bodenham v. Hoskyns* (1852), 2 De G. M. & G. 903; *Cockell v. Taylor* (1852), 15 Beav. 103; *Morrill v. Wootton* (1852), 16 Beav. 197; *A.-G. v. Chesterfield* (1854), 18 Beav. 596; *Jorden v. Money* (1854), 5 H. L. Cas. 185; *Smith v. Kay* (1859), 7 H. L. Cas. 751; *Beavan v. Mornington* (1860), 8 H. L. Cas. 535; *Ernest v. Croyadill* (1860), 2 De G. F. & J. 175; *Higgins v. Samels* (1862), 2 John. & H. 460; *Central Ry. Co. of Venezuela v. Kisch* (1867), L. R. 2 H. L. 99; *Aberaman Ironworks v. Wickens* (1868), L. R. 5 Eq. 485; *Other v. Smurthwaite* (1868), L. R. 5 Eq. 437; *Shedden & Shedden v. A.-G. & Patrick* (1869), 23 L. T.

PART III. SECT. 4, SUB-SECT. 11.—E. (a).

14961. Evidence inadmissible—Conversations.]—An engineer of deeds, whose duty it was to obtain transfers of land & determine the situation of station houses, procured from the ptfs., for nominal considerations, grants of land for a station house & ground, representing that the station would be put, as desired by ptfs., at a certain point advantageous to both. The deed of ptf. S. contained this proviso:—"Provided that the co. do erect & maintain on the lands a station for the accommodation of passengers & freight." The station was erected on the land in the deed containing this proviso, but not at the point represented.—*Held:*

deeds had done all they were bound to do by observing the proviso in the deed, which called for the erection of the station house on the lands without specifying any particular point.—*SCHLIEHAUF v. CANADA SOUTHERN RY. CO.* (1881), 28 Gr. 236.—*CAN.*

14962. ———.]—In interpreting a written contract of an ambiguous character, anything which passed between the parties prior thereto & leading up to it, as well as anything concurrent therewith & the acts of the parties immediately afterwards may be looked at.—*SCHILL v. McCALLUM & VANMATTER*, [1818] 2 W. W. R. 735; 57 S. C. R. 15.—*CAN.*

14963. ———.]—Evidence to

631; *Torrance v. Bolton* (1879), 41 L. J. Ch. 648; *Weiss v. Wardle* (1874), L. R. 19 Eq. 171; *Panama & South Pacific Telegraph Co. v. Indiarubber, Gutta Percha & Telegraph Co.* (1875), 32 L. T. 238; *Arkwright v. Nevbold* (1880), 2 W. R. 828; *Banco de Portugal v. Waddell* (1880), 5 Apr. Cas. 161; *Redgrave v. Hurd* (1881), 20 Ch. D. 1; *Roots v. Snelling* (1883), 48 L. T. 216; *Burstell v. Beyfus* (1884), 28 Ch. D. 35.

1500. ———.]—When, after a parol contract, before the parties separate, one asks that he may have a note of it, & the other writes out a note or memorandum of it, which purports to contain the contract, & does contain all the essential elements of it, the latter must be taken to contain the terms of the contract, & the previous parol contract cannot be referred to.—*BROMLEY v. JOHNSON* (1862), 10 W. R. 303.

1501. ———.]—To allow a previous conversation to affect the damages is really to allow parol evidence to be given to alter the effect of the contract. The contract must be judged of & determined by the writing if there be one, & by nothing else, & the heads of damage are to be determined from the contract itself, & not from preceding conversations about which there may be a dispute (*POLLOCK, C.B.*).—*BRADY v. OASTLER* (1864), 3 H. & C. 112; 33 L. J. Ex. 300; 11 L. T. 681; 11 Jur. N. S. 22; 159 E. R. 469.

Annotations:—*Reid. Ogle v. Vane* (1868), L. R. 3 Q. B. 272. *Mentd. Chinnock v. Ely* (1864), 5 New Rep. 185.

1502. ———.]—The general rule of law is, that where a contract has been reduced into writing, the written document alone is the contract, & therefore, where P. agreed in writing to engage E. to play a certain part in a drama "during the run of the piece":—*Held:* parol evidence was not admissible to show that in conversations that took place before the contract was reduced into writing, it was guaranteed by deft. that the run of the piece should last for at least eight weeks, there being no such proviso in the written agreement.—*EMERY v. PARRY* (1867), 17 L. T. 152.

1503. ———.]—You cannot for the purpose of construing an agreement or explaining it, give in evidence what the parties intended when the result of the negotiations is that the agreement has been reduced into writing. You cannot give in evidence what has passed during the negotiations for the purpose of putting a construction on the agreement (*MELLISH, L.J.*).—*LONDON CORPN. v. SANDON, LONDON CORPN. v. METROPOLITAN RY. CO., METROPOLITAN RY. CO. v. LONDON CORPN.* (1872), 26 L. T. 86, L. J.J.

1504. ———.]—*EVANS v. ROE*, No. 1163, *ante*.

1505. ———.]—*McCLEAN v. KENNARD*, No. 1164, *ante*.

1506. ———.]—In a suit against one of five joint & several sureties to recover the amount guaranteed, it appeared that ptf. had without defts. knowledge & consent, released another o. the sureties "from all debts due by him to the bank

show what took place between the parties prior to the making of the contract was held inadmissible.—*GRIEVE McCLOREY LTD. v. DOMS LUMBER CO., LTD.*, [1922] 2 W. W. R. 1282.—*CAN.*

q. ———. Representations.]—Where the covenants in a deed are silent as to the removal of buildings or obstructions on property conveyed thereby, the fact that in an advertisement for the sale of the property it was stated they would be removed, & that representations to that effect were made by the vendors at the sale, does not entitle the purchaser to a decree for their removal; for any relief he may be entitled to in this respect he must rely on his deed.—*O'SULLIVAN v. CLUXTON* (1879), 28 Gr. 612.—*CAN.*

date":—*Held*: the legal effect of the deed could not be modified by evidence of verbal agreements prior to the release for the purpose of making an agreement to reserve rights against the releasees.—*MERCANTILE BANK OF SYDNEY v. GIBBS*, [1893] A. C. 317; 57 J. P. 741; 9 T. L. R. 1 R. 371, P. O.

1507. ———.]—*MALCOLM v. ARMSTRONG & CO.* (1896), 12 T. L. R. 167, C. A.
1508. ———.]—*Re DUNCAN & PRYCE*, [1913] V. N. 117, D. C.

1509. ——— Parol agreement.]—Pltf., in answer to an application on his part, had shares allotted to him in a co. provisionally registered for making a railway, the prospectus of which stated, that the capital of the co. was to be £700,000; that there were to be 35,000 shares of £20 each; & that all the shares had been allotted. He paid a deposit on his shares, & executed the subscription contract, which deed, after setting forth the intended railway, stated that the co. was to have a capital not exceeding £700,000, & it authorised the directors to apply the deposits for the purpose of the undertaking, & to indemnify themselves. All the shares were not, in fact, allotted, nor was there any likelihood that they ever would be allotted. The co., after incurring great preliminary expenses, were unable to comply with the Standing Ords. of the House of Commons, & leave to bring in a bill to carry out the scheme was refused. Pltf. brought *assumpsit* for money had & received against a director, to recover back his deposit. On the trial, the judge told the jury that the scheme having failed, pltf. was entitled to recover back his whole deposit, as he had subscribed to & executed the subscription contract in an association in which the capital was to be £700,000, & the number of shares 35,000, all of which it was said had been allotted; & it had turned out that the whole number of shares had never been subscribed for, & therefore that the allottee were not authorised to go to Parliament at pltf.'s expense. He added that pltf.'s execution of the deed had no material effect on his right to recover, as the deed was applicable only to a scheme in which 35,000 shares had been allotted:—*Held*: the deed which merely stated that the capital was to exceed £700,000, must be read by itself, & with reference to the previous parol contract between the parties; & by executing it pltf. had authorised the directors to apply his deposit for the purposes of the undertaking set forth in the deed.—*WATTS v. SALTER* (1850), 10 C. B. 477; 20 J. C. P. 43; 138 E. R. 190, Ex. Ch.

Annotation:—*Mentd.* Aldham & Bardsley v. Brown (1857), 3 Jur. N. S. 158.

1510. ———.]—An agreement to grant a lease had been executed by the lessor & lessee, in which it was stipulated that the lease should be granted "so far as the lessor can grant the same." The allegations in the bill filed by the lessee were to

the effect that the agreement was that the lessor should grant a lease in more ample terms than those which by the written agreement he had engaged to do:—*Held*: the lease could not set up the parol agreement against the written one.—*LONDONERRY (MARCHIONESS) v. BAKER* (1860), 3 L. T. 546; *subsequent proceedings* (1861), 3 De G. F. & J. 701, L. JJ.

1511. ———.]—Evidence to show not that an agreement in writing was a mere blind & never intended to have any operation at all, but that it was only to have a partial operation:—*Held*: inadmissible, as in effect altering by parol the terms of the written agreement.—*FENWICK v. BRINKWORTH* (1860), 2 F. & F. 86, N. P.

1512. ———.]—Pltf., on June 26, verbally agreed to purchase of deft. a smack load of herrings then on its way from A. to L., at 32s. 6d. per mace, to be delivered on the following day, & paid deft. £20 as earnest to bind the bargain. Deft. afterwards expressing a wish to have an agreement written out, pltf. said, "I'll write a bit of a note to specify I've bought the fish," & thereupon he wrote & gave deft. the following memorandum: "L., June 26, 1861. This is to certify that I, R. B., bought of B. J., all the fish in the smack Eliza Jane, now on her way from A., the fish to be in good condition, at the price of 32s. 6d. per mace." The smack not arriving & the fish not being delivered on June 27, pltf. subsequently declined to take them, & brought an action for breach of the parol contract to deliver on June 27. Deft. denied any contract to deliver on that day, & relied on the written memorandum:—*Held*: the memorandum was to be taken as evidence of the contract.—*BRUMBY v. JOHNSTON* (1862), 5 L. T. 715.

1513. ———.]—Where a written contract has been executed, containing all the terms agreed upon between the parties, a previous parol promise relating to the same subject-matter is invalid. Deft. let a house & furniture to pltf. by a written agreement; evidence of a previous parol promise by deft. to put in more furniture was tendered at the trial & rejected:—*Held*: the rejection was right.—*ANGELL v. DUKE* (1875), L. R. 10 Q. B. 174; 44 L. J. Q. B. 78; 32 L. T. 320; 39 J. P. 677; 23 W. R. 548.

Annotations:—*Consd.* Carter v. Salmon (1880), 43 L. T. 490; Bursall v. Bianchi (1891), 65 L. T. 678; De Lassalle v. Guildford, [1901] 2 K. B. 215; Braithwaite v. Foreign Hardwood Co. (1905), 92 L. T. 837. *Refd.* Lee v. Colyer (1875), Bitt. Prac. Cas. 80; Boston v. Boston, [1904] 1 K. B. 124. *Mentd.* Re Banks, Weldon v. Banks (1912), 56 Sol. Jo. 362.

1514. ———.]—Where land is sold by auction with a warranty that it answers a certain description, & a conveyance is afterwards executed which contains no covenant corresponding to the warranty, no action can be brought upon the warranty.

1509 i. ——— Parol agreement.]—Pltf. right to restrain deft. from cutting timber on lands demised to him, contrary to the covenants in a lease:—evidence of a parol agreement to the lease was inadmissible.—*ROY v. McMILLAN* (1884), 8 O. R. 1—CAN.

1510. ———.]—Parol evidence is inadmissible to show a warranty made to the entering into of a contract which is inconsistent with the written warranty, as it would be allowing the admission of parol evidence to control, vary, add to, or subtract from, the written contract.—*NORTHEY MANUFACTURING CO. v. SAUNDERS* (1906), C. L. T. 171; 31 O. R. 476.—CAN.

1509 iii. ———.]—*Held*: whatever might have been the previous parol agreement, the lease put an end to its legal operation.—*BELL v. NANGLE* (1841), 3 Jebb. & S. 629.—IR.

1509 iv. ———.]—A written contract cannot be treated as not binding on the parties, & judgment given according to an alleged prior verbal agreement, on the ground that a mistake has been made in drawing up the written contract, & that it does not express the real agreement between the parties.—*CARR v. CHAFFKE* (1897), 15 N. Z. L. R. 416.—N.Z.

1509 v. ———.]—Where parties had executed a deed of sale of fixed property & the document was silent as

to the payment of costs of transfer, evidence of a prior parol agreement by the purchaser to pay such costs was not admitted.—*AYMARD v. WEBSTER* (1909), T. P. D. 123.—S. AF.

r. Evidence admissible.—When amounting to a condition precedent.]—Where there is a written contract complete on the face of it, parol evidence cannot be admitted to contradict or vary its terms, but parol evidence may be given of a prior or contemporaneous oral agreement not inconsistent with the terms of what has been reduced to writing, or of a separate oral agreement constituting a condition precedent to the coming into operation of the contract.—*CLARK v. MULLER* (1914), 35 N. L. R. 18.—S. AF.

Sect. 4.—Admission of extrinsic evidence: Sub-sect. 11, E. (b) & F.]

that nothing therein contained should give A. a right to any easement which did not belong to the premises agreed to be demised as they then existed, nor to any right of light & air derived from over the houses opposite, which belonged to the lessors. The lease subsequently granted was of the land, together with the house erected thereon, & all lights, easements, & appurtenances thereto belonging in accordance with the scheduled form:—*Held*: the grant by the lease of lights & easements was controlled by the antecedent agreement, which was to be read as part of the lease.—*SALAMAN v. GLOVER* (1875), L. R. 20 Eq. 444; 44 L. J. Ch. 551; 82 L. T. 792; 23 W. R. 722.

1528. — *Settlement—Previous articles of.*—Articles previous to settlement cannot in general be read to construe the settlement, unless the bill is brought to rectify the settlement, or the settlement refers to them.—*PRITCHARD v. QUINCHANT, JENKINS v. QUINCHANT* (1752), Amb. 147; 27 E. R. 95, L. C.

Annotations:—Reid. Rogers v. Earl (1757), Dick. 295; *Thomas v. Davis* (1757), Dick. 301. *Mentd. Milligan v. Mitchell* (1835), 4 L. J. Ch. 281.

1529. — *Letters.*—A conveyance, referring to letters of a preceding treaty, but not specifying what letters, is too uncertain to incorporate the letters, & make them part of the final contract. Such letters cannot be used in evidence, to explain the contract, by showing what was intended to be part of the sale & purchase, although not expressed in the conveyance.—*HUGHES & HAMILTON v. GORDON* (1819), 1 Bli. 287; 4 E. R. 109.

1530. — — *—*—If the terms of a contract are proposed & accepted by letters, but are afterwards varied by the contract as drawn up, the construction of the contract cannot be affected by the letters.—*FARQUHARSON v. BARSTOW* (1829), 4 Bli. N. S. 560; 5 E. R. 199.

1531. — — *—*—*DIMES v. FOULKES* (1838), 2 Jur. 180.

1532. — — *—*—*HALHEAD v. YOUNG*, No. 1219, *ante*.

1533. — — *—*—*INGLIS v. BUTTERY*, No. 706, *ante*.

1534. — — *& telegrams.*—Letters & telegrams between the parties prior to the execution of the charterparty are not admissible in evidence to explain the contract on the ground of ambiguity.—*THE NIFA*, [1892] P. 411; 62 L. J. P. 12; 69 L. T. 56; 7 Asp. M. L. C. 324; 1 R. 540, D. C.

Annotations:—Mentd. Akt. Helios v. Ekman (1897), 76 L. T. 537; *Brenda S.S. Co. v. Green* (1900), 69 L. J. Q. B. 153; *Palgrave, Brown v. SS. Turid*, [1923] 1 A. C. 397.

1535. — *Minutes of proceedings.*—An action in land has been brought to try whether the reversion justices, deo houses was in the Prison Comrs. or the minutes of the proposed to adduce as evidence the minutes of the proceedings of the justices in order to show that the land had been bought for the

purpose of rendering the prison more commodious or safe:—*Held*: the conveyance having been executed, the minutes of the proceedings of the justices were inadmissible as evidence showing the purpose for which the land & the houses had been bought.—*PRISON COMRS. v. MIDDLESEX CLERK OF THE PEACE* (1882), 9 Q. B. D. 506; 51 L. J. Q. B. 433; 46 L. T. 861; 46 J. P. 740, C. A.

1536. — *Draft assignment—Of book debt.*—Where the unregistered assignment of a book debt contained covenants onerous to some of the assignors & a subsequent registered assignment omitted the same:—*Held*: the second assignment being in substitution for the first, the covenants were no longer enforceable.

The drafts cannot properly be received in evidence to alter its language, still less to explain or assist in the interpretation of the deed as finally executed (*per CUR.*).—*NATIONAL BANK OF AUSTRALASIA v. FALKINGHAM & SONS*, [1902] A. C. 585; 71 L. J. P. C. 105; 87 L. T. 90; 18 T. L. R. 737, P. C.

1537. — *Prospectus of company.*—Where a policy of life assurance is expressed to be issued subject to the deed of settlement of the co. & its bye-laws, & by the constitution of the co. power is given in a prescribed manner to alter the bye-laws from time to time, & no reference is made in the policy to prospectuses issued by the co., the policy constitutes the whole contract, & the ct. cannot, for the purpose of construing the contract, refer to the prospectuses.—*BRITISH EQUITABLE ASSURANCE CO., LTD. v. BAILY*, [1906] A. C. 35; 75 L. J. Ch. 73; 94 L. T. 1; 22 T. L. R. 152; 13 Mans. 13, H. L.; *revg. S. C. sub nom. BAILY v. BRITISH EQUITABLE ASSURANCE CO.*, [1904] 1 Ch. 374, C. A.

Annotations:—Mentd. British Murac Syndicate v. Alpertion Rubber Co., [1915] 2 Ch. 186; *McEllistram v. Ballymacolligott Co-op. Agricultural & Dairy Soc.*, [1919] A. C. 548.

1538. — *Initialed deleted words in the contract.*—*INGLIS v. BUTTERY*, No. 706, *ante*.

1539. To show that several matters part of one transaction—Letters not inconsistent with bond—*Admissible.*—A. borrowed from B. £200, & gave as security a bond for £400, conditioned for the payment to B. of an annuity & all additional premiums of insurance that might be necessary. A. also gave a warrant of attorney to secure the £200, & B. insured A.'s life for £200. Some letters previous to the bond were tendered as evidence that all these matters formed part of the transaction for securing the £200 & interest:—*Held*: these letters might be looked at, not being inconsistent with the bond.—*GOTTLIEB v. CRANCH* (1853), 17 Jur. 686; *on appeal, sub nom. GOTTLIEB v. CRANCH*, 4 De G. M. & G. 440, L. J.J.

Annotations:—Mentd. Drysdale v. Piggett (1856), 8 De G. M. & G. 546; *Fraser v. Brade* (1858), 2 De G. & J. 582; *Courtenay v. Wright* (1860), 2 Giff. 337; *Knox v. Turner* (1870), L. R. 9 Eq. 155; *Preston v. Neele* (1879), 12 Ch. D. 760.

To show contract executory.]—*See Sub-sect. 11, C., ante.*

1529 I. — *Letters.*—*STEWART* (1842), 1 Bore. J. Sc. App. 796.—*SCOT.*

e. Evidence admitted—Instrument not final & so Where formal—Where a preliminary agreement followed by the execution of a formal instrument & on the construction of a formal instrument it is not clear that it is the final & sole agreement that it is the parties, the ct. must take into consideration the preliminary contract on all surrounding circumstances in order to determine whether the latter instrument was intended to supersede the

prior contract or cover part of the ground only.—*LITCHBURST v. MOORE* (1907), 75 L. J. N. S. W. 202; 24 N. S. W. N. 37.—*AUS.*

i. — — *—*—The debt, an assignee for creditors, agreed with ptfr. to exchange five houses, then in course of erection, for certain lands of ptfr. By the contract, of Mar. 24, the houses were to be completed by May 30, similar to certain houses on O. street. Mutual conveyances were to be exchanged between the parties by May 24, but as a matter of fact they were executed & exchanged about

May 9. Ptfr. subsequently, in the present action, claimed damages for non-completion of & defects in the finishing of the houses. The deed from the debt, contained no covenants covering the matters complained of:—*Held*: ptfr. was entitled to recover on the original contract. A contract to perform work or to do things for the other contracting party on a sale of lands, at a period after the time fixed by the same contract for the execution & final delivery of the formal conveyance, does not become merged in the conveyance.—*SMITH v. TENNANT* (1890), 30 O. R. 180.—*CAN.*

F. Evidence of Matters Subsequent to Contract.

1540. Evidence inadmissible.]—BALFOUR v. WELLAND, No. 1890, ante.

1541. ——Where a party entered his horse for a sweepstakes, towards which he paid £30, but did not sign the written agreement prescribing the terms upon which the race was to be run, & which had been signed by the other subscribers, in an action brought by him against the stakeholder:—*Held*: he could not, in order to recover the sweepstakes, go into verbal evidence of a subsequent variance in the written agreement, nor entitle himself to the amount of his subscription by mere proof of the payment, until the written agreement had been given in evidence.—**DAY v. CANNING (1827), 5 L. J. O. S. K. B. 231.**

1542. — Documentary — Letters.]—Defts., being solrs. to the assignees of a bkpt. wrote to pltf.'s solr., saying "In consideration of pltf.'s consenting to the sale we hereby, on behalf of the assignees, consent that the net proceeds shall be paid to pltf." This offer was accepted & the goods were sold, but the net proceeds were not paid over. The letter was written by the authority of the trade assignee, but not known to nor ratified by the official assignee. Other subsequent letters were in evidence:—*Held*: subsequent letters were not admissible to aid in construing the contract in the first letter.—**LEWIS v. NICHOLSON (1852), 18**

Q. B. 503; 21 L. J. Q. B. 311; 19 L. T. O. S. 122; 16 Jur. 1041; 118 E. R. 190.

Annotations:—Reid. Tanner v. Christian (1855), 4 E. & B. 591; Gollen v. Wright (1857), 8 E. & B. 647. Mentd. Bull v. Chapman (1853), 8 Exch. 444; Thol v. Leach (1855), 1 Jur. N. S. 117; Green v. Kopke (1856), 18 C. B. 649; Randall v. Trimer (1856), 18 C. B. 786; Cherry v. Colonial Bank of Australasia (1869), 6 Moo. P. C. C. N. S. 235; Royal Albert Hall Corpn. v. Winchelsea (1891), 7 T. L. R. 362; Starkey v. Bank of England, [1903] A. C. 114; Yonge v. Tonybee, [1910] 1 K. B. 215.

1543. — Lease drafted in pursuance of written agreement.]—A draft lease was prepared by the lessor, in pursuance of a written contract, which was not objected to by the lessee, who afterwards refused to complete:—*Held*: the draft lease could not be used for the purpose of controlling or explaining the contract itself.—HAYWOOD v. COPE (1858), 25 Beav. 140; 27 L. J. Ch. 468; 31 L. T. O. S. 48; 4 Jur. N. S. 227; 6 W. R. 304; 53 E. R. 589.****

1544. — Parol—Agreement between parties.]—LESLIE v. DE LA TORRE (1795), cited 12 East, at p. 584.

Annotations:—Reid. White v. Parkin (1810), 12 East, 578; Thompson v. Brown (1817), 7 Taunt. 655. Mentd. Nash v. Armstrong (1861), 10 C. B. N. S. 259.

1545. — Declaration by party.]—DOE d. NORTON v. WEBSTER, No. 1521, ante.

1546. — — — —.]—The construction of a contract cannot be affected by the declarations of

discharged from his agreement:—*Held*: this plea being to set up a parol agreement to discharge A. from his agreement under seal, was not a legal defence.—**MCPHERSON v. DICKSON (1850), 8 U. C. R. 29.—CAN.**

1. — — —.]—B. entered into a contract under seal, to build a house or pltf. according to a plan & specification, & deft. became security for the performance of the contract. The plan of the house was changed in some particulars, by verbal agreement between pltf. & B., without deft.'s consent. B. failed to perform the contract in respect to parts of the building in which there had been alteration:—*Held*: the contract being under seal, he was not discharged at law by the parol variation of it, though it would have been otherwise if the contract had not been under seal.—**PETERS v. BRYSON (1866), 6 All. 489.—CAN.**

m. — — —.]—A replication is bad, which attempts to vary a deed by a parol agreement.—**MALOTT v. CARSCADDEN (1871), 31 U. C. R. 363.—CAN.**

n. — — —.]—*Held*: a plea was bad, which set up a new contract, not founded on any consideration, to contradict the written one.—**FAIR v. FENNELLY (1874), 34 U. C. R. 611.—CAN.**

o. — — —.]—An indenture of lease contained a covenant for renewal of the lease whereby if the lessee desired to renew the lease he should give 3 months' notice in writing of his intention to do so. The lessee failed to observe this covenant & relied on an oral statement or agreement between himself and his lessor for renewal of the lease:—*Held*: there was no waiver & the oral statement or agreement amounted either to a modification or a rescission, & evidence of such oral statement or agreement was not admissible.—**D'ORUZ v. JITTENDRA NATH CHATTERJEE (1919), 1 L. R. 46 Calc. 1079.—IND.**

p. — — —.]—A material or essential term of a contract which by law is required to be in writing cannot be varied by a subsequent parol agreement. In a contract of sale of landed property the mode of payment of the purchase price is a material term of such contract.—KUPER v. BOLLEURS, [1913] T. P. D. 334.—S. AF.****

q. — — —.]—Unless variation amounts

PART III. SECT. 4, SUB-SECT. 11.—F.

1540 l. Evidence inadmissible.]—*Sem-* ble: evidence of what took place after the execution of a document is not admissible on the question of its construction.—**VISSANJ, SONS & CO. v. SHAPURJI BURJORJI (1912), 1 L. R. 36 Bom. 387.—IND.**

g. — Documentary — Subsequent grant.]—In 1857 a patent issued for "the north-westerly quarter" of a 200-acre lot, the side lines of which ran N. 45° W. & S. 45° E. (or north-west & south-east); & in 1859 another patent was issued for "the S.E. ¼" of the same lot:—*Held*: also, that the subsequent patent could not affect the construction of the first, for the question must be, what did the patent cover when it was issued. The assignments to the respective patentees by the original purchaser from the Crown of the N.W. ¼ of the lot, could not be resorted to aid in interpreting the patent.—**DAVIS v. MCPHERSON (1873), 33 U. C. R. 376.—CAN.**

h. — — —.]—*Held*: the first patent could not be controlled by the second; & the latter being to the first patentee, he thus acquired the whole land in dispute, & there was no reason why the description in his own deed, which was according to the first patent, should be qualified by the second.—**HARRISON v. FROST (1873), 34 U. C. R. 110.—CAN.**

1544 l. — Parol—Agreement between parties.]—MAYNARDI ORTITI v. OLIVER (1898), 1 L. R. 22 Mad. 261.—IND.

1544 ll. — — —.]—In a suit deft. pleaded a subsequent oral agreement by pltf. — *Held*: evidence of such an agreement was inadmissible.—**KARAMPALLI UNNI KURUP v. THEKKU VITTEL MUTHORAKUTT (1902), 1 L. R. 26 Mad. 195.—IND.**

1545 i. — — —.]—Declarations by party.]—While the Crown is the owner of land it may, by its declarations, explain or control a previous grant, & a party claiming under a grant, subsequent to such declaration, may be bound thereby.—**CARTER v. SAUNDERS (1864), All. 147.—CAN.**

1545 ll. — — —.]—PHILIPS v. MUEMAN (1876), 3 Png. 391.—CAN.

1545 ill. — — —.]—In an action to have a deed given by one deft. to

another deft. declared a mtge., evidence was offered of a declaration made by the grantor two years after the deed had been given & recorded, to the effect that the deed was in reality only a mtge. to secure the repayment of \$200:—*Held*: this declaration could not operate to affect the rights of the grantee or derogate from the conveyance to him.—**LINTON v. SUTHERLAND (1890), 40 N. S. R. 149.—CAN.**

1545 iv. — — —.]—There being an ambiguity in this case as to what was included in the words "farm lot" & as to what was appurtenant thereto:—*Held*: there was no objection to evidence of the user to enable the ct. to interpret that language used, but that the trial Judge erred in allowing evidence to be given of declarations made by the grantor as to what he meant to convey or that he had conveyed.—**OGILVIE v. GRANT (1906), 41 N. S. R. 1; 1 E. L. R. 117; 2 E. L. R. 196.—CAN.**

1545 v. — — —.]—Declarations & admissions, either oral or written, made subsequently to the making of a written contract cannot be considered in interpreting the contract.—**SCHILL v. McCALLUM & VANNATTER, [1918] 1 W. W. R. 1; 38 D. L. R. 133; 10 Sask. L. R. 440; affd. [1918] 2 W. W. R. 735; 67 S. C. R. 15.—CAN.**

1545 vi. — — —.]—Evidence will not be admitted at the trial to contradict the terms of a written document, nor are declarations of the lessor made some time after the execution of the lease & the delivery of possession of the *locus in quo* to the lessee, evidence.—**EAGAN v. WARREN (1854), 4 Nfld. L. R. 40.—NFLD.**

k. Whether evidence admissible—Parol variation of written contract.]—A. cove- nants under seal that he will repay B. on Sept. 1, 1847, any advances of cash & goods made by B. to C. for the purpose of taking out timber provided the timber should not before then be sold & disposed of. B. after Sept. 1, 1847, sues A. upon this absolute covenant for the moneys advanced to C. A. pleads that after this covenant it was agreed between B. & C., that if C. would make the arrangement described in the plea, then B. would discharge A. from his covenant; & that C. did make the arrangement, whereby A. became wholly

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the parties made subsequent to its date though when the words are ambiguous they may be explained by the previous or contemporaneous conduct of the parties.—*HOULDER BROTHERS & Co., LTD. v. PUBLIC WORKS COMR., PUBLIC WORKS COMR. v. HOULDER BROTHERS & Co., LTD.*, [1908] A. C. 276; 77 L. J. P. C. 58; 68 L. T. 684; 11 Asp. M. L. C. 1, P. C.

1547. — Conversations.—An agreement in writing cannot be qualified or altered by subsequent conversations or a presumed intended departure from the terms of the original agreement.—*BOUN v. STROUD* (1870), 21 L. T. 695.

Act or conduct of party.—See Sect. 4, sub-sect. 8, A., *ante*.

Rescission of contract by waiver or exoneration before breach.—See CONTRACT, Vol. XII., pp. 332–334, Nos. 2790–2806.

Rescission of contract by repudiation.—See CONTRACT, Vol. XII., p. 338 *et seq.*

Rescission of simple contract within Statute of Frauds.—See CONTRACT, Vol. XII., pp. 353–358, Nos. 2938–2970.

Not within Statute of Frauds.—See CONTRACT, Vol. XII., pp. 358, 359, Nos. 2977–2987.

Alteration of contract.—See CONTRACT, Vol. XII., p. 359 *et seq.*

G. Evidence of Collateral Agreements.

(a) Contradictory of Contract.

1548. Evidence inadmissible—Bond.—*BUCKLER v. MILLER* (1688), 2 Vent. 107; 86 E. R. 336. *Annotation*:—*Mentd. Lancashire v. Killingworth* (1700), 1 Ld. Raym. 686.

1549. ——*A bkpt., previous to his bkpcy., gave a bond to trustees for the payment of £5,000 & interest, as a provision for his daughter*

to independent agreement.—Where the deft. claimed the property as preferential heir, & also set up an alternative defence of an alleged oral agreement cancelling a registered deed of sale of property by her co-widow to the pltf., the lower ct. was of opinion that prov. 4 of s. 92 of the Evidence Act (1 of 1872) was a bar to any inquiry into the merits of this defence:—*Held*: the lower ct. was wrong. The object of the oral agreement was not to rescind the original transaction, but to transfer any rights acquired by the pltfs. to defts., & was an entirely new transaction.—*RAKHMABAI v. TUKARAM* (1886), 1 L. R. 11 Bom. 47.—IND.

r. ——*Subsequent to the execution & registration of a bond, a jamog was made orally between the creditor and debtor, by which the former agreed to take the rents of certain tenants of the latter in satisfaction of interest, the latter agreed to release the tenants from payment of rent to himself, & the tenants, who were parties to the arrangement, agreed to pay their rents to the creditor. No mutation of names was effected in the revenue registers. The creditor brought a suit against the debtor to recover the principal and interest agreed to be paid under the bond, alleging that he had never received any rents under the jamog.*—*Held*: the jamog was not a subsequent oral agreement rescinding or modifying a contract which was registered according to the law for the time being in force.—*AUTU SINGH v. AJUDEH SAGU* (1887), 1 L. R. 9 All. 249.—IND.

s. ——*Pltf. sought to attach a certain hak as belonging to his judgment debtor K. Deft., who*

*was the original grantor of the hak, pleaded a re-grant of the hak to himself. In support of this plea, the deft. produced from his possession the original sanad bearing the following indorsement by K., "You have passed me a receipt for the sanad. I have accordingly given you the ownership of the sanad. Therefore over the said sanad I have no right or title." The deft. offered to put in this indorsement & also tendered the evidence of K.'s brother:—*Held*: the alleged re-grant was a transaction entirely distinct from the original grant, & therefore deft. was at liberty to adduce evidence to prove this transaction.—*HERAMBDEV DHARNI-DHARDEV v. KASHINATH BHASKAR* (1890), 1 L. R. 14 Bom. 472.—IND.*

t. ——*A. lends money upon mtge. at a certain rate of interest, & afterwards, by parol, agrees to reduce the rate of interest, this agreement, though not in writing, is binding.*—*MILTON v. EDGORTH* (1773), 5 Bro. Parl. Cas. 313.—IR.

u. ——*An oral agreement was alleged to have been entered into between mtgee. & mtgor., after the time when two bonds were passed, to the effect that upon failure to pay interest when due an extension of time would be given.*—*Held*: evidence of the agreement was admissible to vary the written contract as contained in the bonds.—*AFRICAN BANKING CORPN. v. BLAUWKIP GARDEN CO., LTD.* (1908), 25 S. C. 246; 18 C. T. R. 1053.—S. AF.

b. ——*Distinction when evidence to show condition precedent performed.*—*PANDURANG KRISHNAJI v. MARKANDEYA TUKARAM* (1921), 1 L. R. 49 Cal. 334.—IND.

on her marriage. The trustees having proved the amount under the commission, a petition was presented to expunge the proof, the bkpt. alleging that when the bond was given it was understood between him & the obligees, that it was only to be available in the event of the success of a certain speculation:—*Held*: such parol evidence was not admissible to control the absolute effect of the bond.—*Re GOVETT & LEIGH, Ex p. MORLEY* (1832), 2 Deac. & Ch. 50, Ct. of R.

1550. ——*FLIGHT v. PROVIDENT ASSOCN. OF LONDON, LTD.* (1895), 12 T. L. R. 51, C. A.

1551. — Agreement for annuity.—Parol evidence that it was part of the agreement for an annuity that it should be redeemable, although not made part of the contract in writing, was refused to be admitted.—*PORTMORE (LORD) v. MORRIS* (1787), 2 Bro. C. C. 219; 29 E. R. 122.

Annotations:—*Reid. Townshend v. Stangroom* (1801), 6 Ves. 328. *Mentd. Haynes v. Hare* (1791), 1 Hy. Bl. 659.

1552. ——*Parol evidence to prove that an annuity was intended to be redeemable, no such covenant being in the deed, is inadmissible.*—*HARE v. SHEARWOOD* (1790), 3 Bro. C. C. 168; 1 Ves. 241; 29 E. R. 470.

Annotation:—*Reid. Townshend v. Stangroom* (1801), 6 Ves. 328.

1553. — Cognovit.—*ANON.*, No. 1207, *ante*.

1554. — Agreement for partnership.—Where the terms of a partnership of which a rough sketch had been made in writing by one of the partners, & shown to & approved of by another, although it was intended subsequently to extend it into a formal deed, & this had not been done:—*Held*: parol evidence was inadmissible to prove terms.—*JONES v. HUNTER* (1829), Dan. & Ll. 214.

1555. — Hire of ship.—*SIMPSON v. HENDERSON*, No. 1311, *ante*.

1556. — Hire of furnished house.—*ANGELL v. DUKE*, No. 1513, *ante*.

PART III. SECT. 4, SUB-SECT. 11.— G. (a).

c. General rule.—The principle is—Is the matter of the contemporaneous oral agreement so outside the scope of the written one that they can logically subsist together, so that the oral shall neither contradict nor modify the written.—*FISCHER v. FISCHER* (1871), 6 Mad. 393.—IND.

d. ——*Evidence of a collateral agreement is inadmissible, when inconsistent with a written release.*—*COWAJI RUTTONJI LIMBOOWALLA v. BURJOJI RUSTOMJI LIMBOOWALLA* (1888), 1 L. R. 13 Bom. 335.—IND.

e. ——*TRIMBAK GANGADHAR RANADE v. DRAGWANDAS MULCHAND* (1898), 1 L. R. 23 Bom. 348.—IND.

f. ——*A contract in writing cannot be added to by a contemporaneous oral agreement.*—*KRISHNA-MARAZU v. MARAJU* (1905), 1 L. R. 28 Mad. 495.—IND.

g. ——*An alleged contemporaneous verbal arrangement as to the rates pltf. was to pay for working a forest was held not to be proved:—*Qu*: whether, if proved, evidence of it would have been admissible.*—*MAUNG SHWE OH v. MAUNG TUN GYAW* (1905), 1 L. R. 32 Cal. 96; 9 C. W. N. 147; 1 L. R. 31 Ind. App. 188.—IND.

h. ——*Pltf. contracted in writing to cut, deliver & stack a certain quantity of wood for defts. at the B. mine & for such services defts. agreed to pay him at a certain rate per load. One of the conditions of the contract was that all firewood was to be cut on land free of royalty, & that in the event of the contractor cutting on land on which royalty could*

1557. — — —.]—GOLDFOOT v. WELCH, No. 1171, ante.

1558. — Life insurance policy.]—Pltf. effected a semi-tontine life policy for £5,000 with defts. through their agent, who represented to him in writing that the cash value at the end of fifteen years should be £7,390. At the end of the fifteen years pltf. claimed £7,390, which defts. refused to pay, upon the ground that under the policy only £6,106 5s. was due:—*Held*: assuming that the agent had authority to make the representation, it was not a collateral agreement, as it was inconsistent with the terms of the policy, & was not admissible in evidence against defts.—*HORNCastle v. Equitable Life Assurance Society of United States* (1906), 22 T. L. R. 735, C. A.

Annotation:—*Consd.* Comerford v. Britannic Assoc. (1908), 24 T. L. R. 593.

1559. — Payment of rent.]—Parol evidence is not admissible, to prove an additional rent payable by a tenant, beyond that expressed in the written agreement for a lease.—*PRESTON v. MERCEAU* (1779), 2 Wm. Bl. 1249; 96 E. R. 736.

1560. — — —.]—Where land in the possession of a tenant for years is conveyed by deed, the right of the purchaser, as assignee of the reversion, to receive the whole rent for the current quarter, cannot be controlled by a contemporaneous parol agreement to apportion the quarter's rent between the assignor & assignee.—*FLINN v. CALOW* (1840), 1 Man. & G. 589; 133 E. R. 468.

1561. — — —.]—Def't. occupied premises under a written agreement:—*Held*: parol evidence was not admissible to show an understanding between the parties that the rents should commence from a later day than that named in the agreement.—*HENSON v. COOPE* (1841), 3 Scott, N. R. 48.

1562. — — —.]—Where, in an action by lessor against lessee for a quarter's rent upon a covenant in a lease for payment of the rent quarterly in advance, def't. set up by way of defence that by a parol agreement made between pltf. & def't. antecedently to the execution of the lease, pltf. agreed to take a bill payable at three months by way of payment of each quarter's rent in advance as it became due, & that def't. had tendered such a bill to pltf. in respect of the rent sued for, which pltf. refused to take:—*Held*: evidence of such an agreement as alleged was inadmissible.—*HENDERSON v. ARTHUR*, [1907] 1 K. B. 10; 76 L. J. K. B. 22; 95 L. T. 772; 23 T. L. R. 60; 51 Sol. Jo. 65, C. A.

Annotation:—*Mentd.* *Re Defries*, *Elcholz v. Defries*, [1909] 2 Ch. 423.

1563. — Breach of covenant in lease—Parol agreement not to sue in breach of covenant.]—

Where pltf., lessor, sued def't., administratrix of lessee, for breaches of covenants in a lease under seal, binding the lessee, his exors., administrators, & assigns, a parol promise by pltf. to def't. not to sue def't., in consequence of which promise def't. was induced to become administratrix, is no answer to the action.—*HARRIS v. GOODWIN* (1841), 2 Man. & G. 405; 9 Dowl. 409; Drinkwater, 73; 2 Scott, N. R. 459; 10 L. J. C. P. 62; 133 E. R. 803.

Annotation:—*Mentd.* *Thames Haven Dock & Ry. Co. v. Brymer* (1850), 5 Exch. 696.

1564. — Sale of goods.]—F., a broker in London, having some rum for sale, made a contract with L., & gave him a sale note in these terms: "Mr. L., London, Jan. 15, 1861. I have this day bought in my own name for your account of A.K.T., 259 puncheons of Cuba rum, sold at 1s. 9d. per gallon. Landing charges 5s. per puncheon, to be paid by the buyer; landing gauge prompt Mar. 23; Money on delivery or £5 per cent." :—*Held*: evidence was not admissible to show that F. & L. at the time of the bargain had agreed by word of mouth that a deduction of two months' warehouse rent should be made from the price of the rum.—*FAWKES v. LAMB* (1862), 31 L. J. Q. B. 98; 8 Jur. N. S. 385; 10 W. R. 348.

Annotations:—*Mentd.* *Bramble v. Spiller* (1870), 18 W. R. 316; *Fairlie v. Fenton* (1870), 39 L. J. Ex. 107.

1565. — Sale of land.]—Where the vendor of a piece of land, of which he was himself in occupation, contracted to sell the land under conditions of sale by one of which it was provided that the purchaser should be entitled "to the possession or the receipt of the rents & profits" of the land from a specified date:—*Held*: evidence was not admissible to prove an alleged contemporary parol agreement by which the vendor was to retain possession of the land to a later date, paying the purchaser in the meantime, by way of rent, interest on his purchase-money.—*ANKER v. FRANKLIN* (1880), 43 L. T. 317; *sub nom.* *ANKIN v. FRANKLIN*, 44 J. P. 830.

1566. — Breach of warranty—Lease of premises.]—*KENNARD v. ASHMAN* (1894), 10 T. L. R. 447, C. A.

Annotation:—*Refd.* *De Lassalle v. Guildford*, [1901] 2 K. B. 215.

1567. — — —.]—*LONGMAN v. BLOUNT* (1896), 12 T. L. R. 520.

Annotation:—*Refd.* *De Lassalle v. Guildford*, [1901] 2 K. B. 215.

1568. — — —.]—*CRAWFORD v. WHITE CITY RINK (NEWCASTLE-ON-TYNE), LTD.* (1913), 29 T. L. R. 318; 57 Sol. Jo. 357; 77 J. P. Jo. 111.

1569. — Speed of yacht.]—*CHANDLER v. WOODS* (1896), 12 T. L. R. 325.

be claimed he did so at his own risk:—*Held*: from the written contract itself it appeared that it was intended by the parties to be a complete & final statement of the agreement between them: & whether the effect of contemporaneous oral agreement would be to import new terms into the written contract or to introduce terms which must be inferred from such written contract itself, evidence of such oral agreement was inadmissible.—*MANAVIS v. RHODESIA REDUCTION CO., LTD.* (1909), 3 Buch. A. C. (Supp), 31.—E. AF.

k. Evidence inadmissible—Bond.]—To an action on a bond, def't. cannot set up a separate contemporaneous agreement not under seal, varying the condition from that which the bond itself imports.—*CRAMER v. HODGSON* (1846), 3 U. C. R. 174.—CAN.

l. — Lease.]—*WILSON v. KEYS* (1864), 15 C. P. 32.—CAN.

m. — Contingent agreement.]—On a division of real estate, a written agreement was signed providing for the payment of \$1,100 to P., one of the parties interested, to make his share equal to the others:—*Held*: evidence was inadmissible of a contemporaneous verbal agreement that the amount agreed to be paid was \$1,800, part of the difference depending on a contingency.—*PHERRILL v. PHERRILL* (1867), 13 Gr. 476.—CAN.

n. — Sale of land.]—A collateral parol agreement to deliver possession by a fixed date cannot be enforced when it contradicts or adds to the short form covenant for delivery of possession in a deed of conveyance.—*KEYS v. EMARD* (1885), 10 O. R. 314.—CAN.

o. — — —.]—Def't. admitted the execution of a deed of sale, but alleged that contemporaneously with it he entered into an oral agreement with the

vendee that the deed was to be merely a security for the payment of a certain sum of money by def't. to the vendee, & that a large portion of the sum so secured had already been paid to the vendee:—*Held*: as the alleged agreement was wholly inconsistent with the terms of the deed of sale, evidence to prove such agreement was excluded.—*BANATA v. SUNDARAS JAGJIVANDAS* (1876), 1 L. R. 1 Bom. 333.—IND.

p. — Bill of Exchange.]—In an action on a promissory note, oral evidence is not admissible to show an agreement contemporaneous with the making of the note that the liability of the maker as it appears on the face of the note is contingent on the happening of some event.—*RUTHENIAN FARMERS ELEVATOR CO. v. GNIAZDOSKI*, [1922] 3 W. W. R. 19; 68 D. L. R. 656; 32 Man. L. R. 322.—CAN.

q. — — —.]—Parol evidence will not be admitted to prove directly that

Sect. 4.—Admission of extrinsic evidence: Sub-sect. 11, G. (a) & (b).]

1570. — Enlarging scope of warranty.]—Where a written contract exists, parol evidence may be given to prove a verbal warranty respecting a matter on which the written contract is wholly silent. Such evidence is not admissible so far as to enlarge the scope of a warranty which is contained in the written contract.—**LLOYD (EDWARD), LTD. v. STURGEON FALLS PULP CO., LTD.** (1901), 85 L. T. 162.

Annotations:—*Reffd.* Harrison v. Knowles & Foster, [1917] 2 K. B. 606. *Mentd.* *Re* Crighton v. Law Car & General Insee. Corp., [1910] 2 K. B. 788.

— Sale of animals.]—See ANIMALS, Vol. II., p. 264, Nos. 422-424.

— Bills of Exchange.]—See BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS, Vol. VI., pp. 80-85, 88, 90, 284, Nos. 613, 614, 619, 621, 626, 628, 630, 632, 637, 649, 656, 1884.

(b) Non-Contradictory of Contract.

1571. Evidence admissible.]—Where there is a deed & also a parol agreement, the latter may be sued on at law when it stands with & does not contradict the deed.—**FOOT v. SALWAY** (1683), 2 Cas. in Ch. 142; 22 E. R. 885.

1572. — To complete terms.]—A letter signed by both parties specifying the prices to be charged for some work to be done, is not in itself a complete contract, & therefore parol evidence is admissible of a contemporaneous agreement as to the period of payment.—**KNAPP v. HARDEN** (1835), 1 Gale, 47; *previous proceedings*, 6 C. & P. 745, N. P.

Annotation:—*Mentd.* Hayselden v. Staff (1836), 5 Ad. & El. 153.

1573. — Proof of consideration.]—This is no new doctrine now promulgated for the first time but laid down in the time of Lord Thurlow, where he says parol evidence cannot be admitted to vary the terms of a written contract, except such a separate independent parol agreement that would stand by itself, & such would certainly require proof of some consideration (**PATTESON, J.**).—**OLIMO v. PEARCE** (1840), 4 J. P. 237.

1574. — If collateral agreement unambiguous.]—A parol addition to an agreement must be established without doubt or ambiguity before equity will assist in carrying the additional provi-

simultaneously with the execution of a bill of sale there was an oral agreement by way of defeasance.—**BAKSU LAKSHMAN v. GOVINDA KANJI** (1880), 1 L. R. 4 Bom. 594.—**IND.**

r. — An oral agreement alleged to have been entered into between the parties to a promissory note at the time when it was made that, upon its falling due, an extension of time would be given, constitutes such a variance from the terms of the note as to be inadmissible in evidence. *Semble:* it would be otherwise if the agreement were written.—ORAMOND v. STREYN** (1900), 18 S. C. 1; 10 C. T. R. 763.—**S. AF.****

PART III. SECT. 4. SUB-SECT. 11.— G. (b).

a. Whether evidence admissible.—To show absolute sale really a mortgage.—Collateral agreement for redemption.]—Oral evidence is admissible in equity where, by way of defence, the object is to get rid of a written contract of a sale of land by showing that it is not the contract really entered into by the parties, but the evidence must be very powerful to induce the ct. to believe that the terms expressed are not the real ones. Evidence of a

contemporaneous oral agreement to suspend the operation of a written contract of sale until an agreement for a re-sale is executed is admissible as a defence even in a ct. of law.—**DADA HONAJI v. BABAJI JAGUBHET** (1865), 2 Bom. 38.—**IND.**

t. — In a suit for specific performance of an agreement to convey certain property, the contract, which was in writing, was admitted by the parties; but deft. alleged that there had been an understanding verbally come to that, if he repaid the consideration-money with interest, etc., to pltf. within two years, pltf. would reconvey the premises to him:—*Held:* the deft. could give parol evidence to supplement the written contract, & show that it was intended to be a mtge. & not an absolute bill of sale.—BHOLANATH KHETTRI v. KALIPRASAD AGURWALLA** (1871), 8 B. L. R. 89.—**IND.****

a. — In a suit to recover possession of land on the footing of a sale-deed executed by defts. to pltf.'s vendor, defts. set up a contemporaneous oral agreement for the re-conveyance of the land to them on the repayment of a sum of money then borrowed by them from the vendee, &

slon into effect.—VOUILLON v. STATES (1856), 25 L. J. Ch. 875; 27 L. T. O. S. 268; 2 Jur. N. S. 845.

Annotation:—*Reffd.* North v. Loomes, [1919] 1 Ch. 378.

1575. — Warranty.]—LLOYD (EDWARD), LTD. v. STURGEON FALLS PULP CO., LTD., No. 1570, ante.

1576. — Condition of drainage in a house.]—Upon the execution of a lease of a dwelling-house, the landlord verbally warranted that the drains were in good condition. The lease contained covenants by the lessee to do the inside, & by the lessor to do the outside repairs, but was silent as to the then condition of the drains:—*Held:* the parol warranty was collateral to the lease & admissible in evidence, & the tenant was entitled to maintain an action for the breach of it.—**DE LASSALLE v. GUILDFORD**, [1901] 2 K. B. 215; 70 L. J. K. B. 533; 84 L. T. 549; 49 W. R. 467; 17 T. L. R. 384, O. A.; *reversg.* S. C. *sub nom.* LASSALLE v. GUILDFORD, 17 T. L. R. 264.

Annotations:—*Reffd.* Lloyd v. Sturgeon Falls Pulp Co. (1901), 85 L. T. 162; Milch v. Ooburn (1910), 27 T. L. R. 170. *Mentd.* Heilbut, Symons v. Buckleton, [1913] A. C. 30.

1577. — Carrier's consignment note.]—MALPAS v. LONDON & SOUTH WESTERN RY. CO., No. 1209, ante.

1578. — Charterparty—Payment of freight.]—One of several joint owners alone having executed a charterparty, without the others being made parties to it:—*Held:* although all the owners could not sue the freighter jointly upon the charterparty, the deed never having been executed by them, yet it did not follow but that they had a joint right of action against deft., upon a promise of payment of freight to them all; such contract being perfectly collateral to the contract contained in the charterparty.—**BUSHELL v. BEAVAN** (1834), 1 Bing. N. C. 103; 4 Moo. & S. 622; 3 L. J. C. P. 279; 131 E. R. 1056.

Annotation:—*Reffd.* Caballero v. Slater (1854), 23 L. J. C. P. 67.

1579. — Insurance policy—On goods shipped.]—A representation made by an insurance broker, when the names of the underwriters are put upon a slip, is binding on the assured, unless qualified or withdrawn by some communication upon the subject between that time & the execution of the policy.—**EDWARDS v. FOOTNER** (1808), 1 Camp. 530, N. P.

1580. — On ship.]—In an action on a

alleged that they had retained possession of, & held the pottah for, the land throughout:—*Held:* defts. were entitled to prove by oral evidence that the transaction was a mtge. & not a sale.—**RAKKEN v. ALAGAPPUDAYAN** (1892), 1 L. R. 16 Mad. 80.—**IND.**

b. — Held: the meaning of the contention of pltf. was that the document was accompanied by a contemporaneous oral agreement or statement of intention, which must be inferred from the several circumstances relied on, but that in questions of this kind etc. in India must be guided by s. 92 of the Evidence Act, & cannot have recourse to those equitable principles, which enable the Ct. of Chancery to give relief.—**DATTOO v. RAMCHANDRA** (1905), 1 L. R. 30 Bom. 119.—**IND.**

c. Evidence admissible.—Of condition precedent to operation of principal agreement.]—When a pltf. attempts to enforce, as a contract of loan binding upon the deft., immediately upon its execution, an instrument which he verbally agreed at the time should not so operate, & for which the deft. received no consideration, the latter may give evidence of the verbal agreement.—**ANNAGURUBALA CHETTI**

policy of insurance on a ship, for a loss by capture, a material stipulation contemporaneously agreed to by the parties, though by a separate slip, is admissible under *non assumpsit*; *aliter*, if it were an after stipulation to vary the terms of the original policy, by substituting a different definition of capture.—*HEATH v. DURANT* (1844), 12 M. & W. 438; 1 Dow. & L. 571; 13 L. J. Ex. 95; 2 L. T. O. S. 331; 8 Jur. 131; 162 E. R. 1268.

1581. — Landlord & tenant.—To keep down rabbits & game.]—In a conversation between a person who subsequently became the tenant, & the steward of the landlord, the former said, "I have no objection to take the farm, if the game is destroyed. I don't care so much about the birds as the hares & rabbits." To which the latter said, "Why, you are a man who keeps no dog, & use no gun, & you ought not to be annoyed with rabbits & hares. You must let the keepers know, & they must kill them," upon which the tenant said, "Then upon these terms I will take the farm":—*Held*: sufficient evidence for the jury to infer a contract on the part of the landlord to kill the hares & rabbits; & the landlord was liable for damage committed by the hares & rabbits on the tenant's farm.—*BARROW v. ASHBURNHAM* (LORD) (1835), 4 L. J. K. B. 146.

1582. — — — — —.]—A tenant entered on lands on the understanding that a lease should be signed at a future time. When the lease was presented to him for signature he refused to sign unless the landlord would undertake to destroy the rabbits. This the landlord by word of mouth promised to do, & the tenant thereupon signed. The lease contained a clause by which the tenant agreed not to shoot, hunt or sport on the demised land, or destroy any game, but to use his best endeavours for the preservation of the same, & to allow his landlord or friends at any time to hunt, shoot & sport on the land. In an action by the tenant against the landlord, for breach of agreement in not destroying the rabbits:—*Held*: this agreement was collateral to, & did not alter or vary, the written contract, & therefore evidence of such agreement was admissible in & supported an action for damage accruing from the failure by

the landlord to destroy the rabbits.—*MORGAN v. GRIFFITH* (1871), L. R. 6 Exch. 70; 40 L. J. Ex. 46; 23 L. T. 783; 19 W. R. 957.

Annotations.—*Consd.* *De Lassalle v. Guildford*, [1901] 2 K. B. 215; *Lloyd v. Sturgeon Falls Pulp Co.* (1901), 85 L. T. 162; *Boston v. Boston* (1903), 73 L. J. K. B. 17. *Refd.* *Erskine v. Adeane* (1873), 8 Ch. App. 756; *Angell v. Duke* (1875), L. R. 10 Q. B. 174; *Heselstine v. Simmons*, [1893] 2 Q. B. 547; *Flight v. Provident Assocn. of London* (1895), 11 T. L. R. 391; *Bristol Trams., etc., Carriage Co. v. Fiat Motors*, [1910] 2 K. B. 831.

1583. — — — — —.]—The lease reserved the game on the farm to the lessor. Two months before the lease was executed, the lessor's steward verbally promised the lessee that the game should be killed down, & it was on the faith of that promise that the lessee entered into the lease. In spite of this promise the shooting was let to a gentleman who kept a large quantity of game. On a claim by the lessee for damage caused by the depredations of the game:—*Held*: the verbal promise constituted a good collateral agreement, & was binding upon the lessor.—*ERSKINE v. ADEANE* (1873), 8 Ch. App. 756; 29 L. T. 234; 38 J. P. 20; 21 W. R. 802; *sub nom.* *ERSKINE v. ADEANE, BENNETT'S CLAIM* (Nos. 1 & 2), 42 L. J. Ch. 835, 849, L. J. J.

Annotations.—*Consd.* *Flight v. Provident Assocn. of London* (1895), 11 T. L. R. 391; *De Lassalle v. Guildford*, [1901] 2 K. B. 215. *Refd.* *Llanelli Ry. & Dock Co. v. L. & N. W. Ry.* (1873), 8 Ch. App. 742; *Carter v. Salmon* (1880), 43 L. T. 490; *Heselstine v. Simmons*, [1893] 2 Q. B. 547; *Kennard v. Ashman* (1894), 10 T. L. R. 213; *Lloyd v. Sturgeon Falls Pulp Co.* (1901), 85 L. T. 162; *Bally v. British Equitable Assoc.*, [1904] 1 Ch. 374; *Bristol Trams., etc. Carriage Co. v. Fiat Motors*, [1910] 2 K. B. 831. *Mentd.* *Crowhurst v. Amersham, Bural Board* (1878), 4 Ex. D. 5; *Saner v. Bilton* (1878), 7 Ch. D. 815; *Cheater v. Cater*, [1918] 1 K. B. 247.

1584. — — — — — Completion of premises.]—Deft. demised to pltf. a messuage in an unfurnished state, by a written agreement. Before & at the time of pltf.'s signing the agreement, deft. verbally promised pltf. to put the messuage into a condition fit for habitation. In an action for the breach of deft.'s promise to put the messuage into a condition fit for habitation:—*Held*: deft.'s verbal promise to finish the messuage was collateral to the written lease, & evidence of the promise was admissible

v. KRISTNASWAMI NAYAKKAN (1863), 1 Mad. 457.—IND.

d. — — — — —.]—Where, at the time of the execution of a written contract, it is orally agreed between the parties that the written agreement shall not be of any force until some condition precedent has been performed, the rule that parol evidence of such oral agreement is admissible to show that the condition has not been performed, & consequently that the contract has not become binding, cannot apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations.—*JUGTANUND MISSEER v. NERGHAN SINGH* (1880), 1 L. R. 6 Cal. 433; 7 C. L. R. 347.—IND.

e. — — — — —.]—In a deed of mtge. executed on behalf of a minor by his guardian in favour of T. (who did not execute it), it was recited that the mtge. was made to secure the repayment of a certain sum which T. had undertaken to expend in liquidating certain debts due by the minor's estate, & amongst others, a debt due to K. T. having failed to pay this debt, K. obtained a decree against, & was paid by the minor's guardian. In a suit brought on behalf of the minor against T. to recover the amount paid in satisfaction of K.'s decree, T. pleaded that it had been orally agreed at the time of the mtge. that he was to

obtain an indemnity either from K. or from the minor's guardian before payment, in case the minor repudiated the debt on coming of age. The District Ct. rejected the evidence:—*Held*: the evidence was admissible.—*TIRUVENGADA v. RANGASAMI* (1883), 1 L. R. 7 Mad. 19.—IND.

f. — — — — —.]—A distinction must be drawn between the cases where the matter sought to be introduced by extraneous evidence is a condition precedent or a defeasance. It may be shown that the instrument was not meant to operate until the happening of a given condition; but it cannot be shown by parol evidence that the agreement is to be defeated on the happening of a given event.—*ALI JAWAD v. KULIYARE SINGH* (1922), 1 L. R. 44 All. 421.—IND.

g. — — — — —.]—Where there is a written contract complete on the face of it, parol evidence may be given of a contemporaneous oral agreement not inconsistent with the terms of what has been reduced to writing, or of a separate oral agreement constituting a condition precedent to the coming into operation of the contract.—*CLARK v. MULLER* (1914), 35 N. L. R. 13.—S. AF.

h. — — — — —.]—A party may rely on a verbal agreement as a condition precedent to a written agreement & may produce parol evidence of such verbal agreement when the verbal

agreement is not inconsistent with the written agreement & supplies something which is lacking in & must have been contemplated by the written agreement itself.—*WILSON v. CAPE TOWN STEVEDORING CO.*, [1916] C. P. D. 540.—S. AF.

k. — — — — — To complete terms.—When instrument not intended to be complete.]—When a verbal agreement has been made for the sale of horses or other chattels, & the purchasers afterwards sign a lien note securing payment, with the usual provisions of such a note, evidence may be given of representations or conditions of the sale or to prove a warranty, when it appears that it was not intended to include in the lien note all the terms of the agreement between the parties.—*MCKENZIE v. MCMULLEN* (1906), 3 W. L. R. 460; 16 Man. L. R. 11.—CAN.

l. — — — — —.]—In an action by H. to recover expenses incurred in an endeavour to make a sale, & reasonable remuneration:—*Held*: parol evidence was admissible to show that the written instructions did not constitute the whole of the terms of the contract, but there had been a collateral oral agreement in respect to the expenses.—*DUNSMUIR v. LOWANBERG, HARRIS & CO.* (1900), 30 C. L. T. 377; 30 S. C. R. 334.—CAN.

m. — — — — —.]—*Held*: a

SECT. 4.—Admission of extrinsic evidence: Sub-sect. 11, G. (b) & H.; sub-sects. 12 & 13. Sect. 5: Sub-sects. 1 & 2, A. (a).]

at the trial.—*MANN v. NUNN* (1874), 43 L. J. C. P. 241; 30 L. T. 526; 35 J. P. 776.

Annotations:—*Dttd. Angell v. Duke* (1875), 32 L. T. 320. *Refd. Burtal v. Bianchi* (1891), 65 L. T. 678.

1585. ——— Payment of rent.]—By the terms of a written agreement J. agreed to lease to W. "a shop & premises, which are to be built at a cost not to exceed £400, at the annual rental of £75." J. expended £750 in building the premises, & refused to grant a lease to W. at the annual rent of £75. In an action by W. against J. for specific performance of the written agreement, *def't.* set up as a defence a contemporaneous parol proviso to the agreement, to the effect that, if the outlay exceeded £400, the rent was to be raised in proportion:—*Held*: as such parol proviso did not contradict, but merely explained, the terms of the written instrument, evidence of it was admissible.—*WILLIAMS v. JONES* (1888), 36 W. R. 573.

1586. ——— Partnership—Agreement as to debts on dissolution.]—*HART v. HART* (1843), 1 L. T. O. S. 143; *previous proceedings* (1841), 1 Hare 1.

1587. ——— Agreement to settle action.]—*LINDLEY v. LACEY*, No. 1443, *ante*.

1588. ——— Agreement for sale of shop—Memoranda of preliminary agreement.]—Memoranda in reference to the sale of a shop made preliminary to the execution of a formal contract, but not included in terms in the bill of sale subsequently executed in pursuance of the preliminary agreement, are not necessarily displaced, & do not necessarily cease to have effect, or to be admissible in evidence upon the execution of the more formal contract.—*CHAPMAN v. CALLIS* (1860), 2 F. & F. 161; *subsequent proceedings* (1861), 9 C. B. N. S. 769. **Annotation:—***Refd. Stuckey v. Bailey* (1862), 10 W. R. 720.

H. In Actions for Specific Performance.

See SPECIFIC PERFORMANCE.

the agreement was silent concerning the use of the timber, track, trestle & ore-bins, it should have been left to the jury to find whether there was a distinct collateral agreement concerning these matters, & if so, what it was.—*HALPIN v. FOWLER* (No. 2) (1907), 12 B. C. R. 447; 2 M. M. Cas. 422.—*CAN.*

n. ——— Parol agreement as to mode of performance.]—Action by the Sheriff upon a mtge. made by *def't.* to one L. seized by the sheriff under an execution against L. An equitable plea, admitting the making of a mtge. for a certain amount, but claiming that an agreement that certain sums (when paid as therein mentioned), were to have been allowed on the first instalment, for which this action was brought, was held not to amount to a variance of a covenant by a parol agreement, & therefore good.—*SMITH v. BERNIE* (1860), 10 C. P. 243.—*CAN.*

o. ——— .]—Oral evidence may be given to show that the parties at the same time verbally agreed upon a number of collateral agreements or subsidiary conditions for conveniently carrying out the written agreement.—*ANDERSON v. DOUGLAS* (1908), 18 Man. L. R. 254; 8 W. L. R. 520; 9 W. L. R. 378.—*CAN.*

p. ——— .]—In defence to a suit upon a hypothecation bond payable in instalments, it was pleaded that at the time of the execution of the bond it was orally agreed that the obligee should, in lieu of instalments, have possession of part of the hypothecated property, until the amount due

on the bond should have been liquidated from the rents; that in accordance with this agreement, the *pl'tf.* obtained possession of the land, & that he thus realised the whole of the amount due.—*Held*: that the oral agreement was not one which detracted from, added to, or varied the original contract, but only provided for the means by which the instalments were to be paid, & that it was therefore admissible in evidence.—*RAM BAKSH v. DURJAN* (1887), 1 L. R. 9 All. 392.—*IND.*

q. ——— Collateral personal obligation to a lease.]—An agreement by a lessee to pay for a term of years an annual sum of money to his lessor, forming no part of the terms of his holding, & no charge on the property leased, & being a mere personal obligation collateral to the lease, which, moreover, was to take effect at a future date after the terms of years had run out, is admissible in evidence.—*SUBRAMANIAN CHATTIAR v. ARUNACHALAM CHETTIAR* (1903), 1 L. R. 26 Mad. 603; L. R. 29 Ind. App. 138; 6 C. W. N. 865.—*IND.*

r. ——— Collateral inducement.]—In an action on a written contract it is admissible to lead oral evidence in defence to prove a collateral inducement, not mentioned in the contract, by which the *def't.* was persuaded to enter into a contract.—*PETER v. THOMAS*, [1908] E. D. C. 140.—*S. AF.*

s. ——— When action between joint contracting parties.]—There is a distinction between controlling the terms of a written contract in so far as it determines the relative rights of the principal

SUB-SECT. 12.—To show MISTAKE, MISREPRESENTATION OR FRAUD.

See MISTAKE, MISREPRESENTATION & FRAUD.

SUB-SECT. 13.—Of DATE.

See Sect. 6, *post*.

SECT. 5.—CORRECTION OF ERRORS BY INTRINSIC EVIDENCE.

SUB-SECT. 1.—IN GENERAL.

Construction by court according to intention of parties.]—See, generally, Sect. 3, sub-sect. 3, *ante*.

See, generally, MISTAKE.

1589. General rule—Intent of parties to be preserved.]—*PARKHURST v. SMITH*, No. 650, *ante*.

1590. ——— .]—*SOLLY v. FORBES*, No. 723, *ante*.

1591. ——— .]—The result of all the authorities is, that when a ct. of law can clearly collect from the language within the four corners of a deed or instrument in writing, the real intention of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, & by rejecting as superfluous whatever is repugnant to the intention so discerned (*KELLY, C.B.*).

It is within the power of this ct. to see what is the meaning of the covenant. The right course is not to reform or correct the instrument but to construe it by the light of the recitals (*CHANNELL, B.*).—*GWYN v. NEATH CANAL CO.* (1868), L. R. 3 Exch. 209; 37 L. J. Ex. 122; 18 L. T. 688; 16 W. R. 1209.

Annotation:—*Mentd. Watling v. Lewis*, [1911] 1 Ch. 414.

1592. ——— Although contrary to express words used.]—The ct. will, from the general frame of a settlement, collect the intent contrary

contracting parties & correcting its terms by proof of a collateral contract, which regulates *inter se* of two individuals who stand together as joint parties to the contract.—*NORTH BRITISH INSURANCE CO. v. TUNNOCK & FRASER* (1864), 3 Macph. (Ct. of Sess.) 1; 37 Sc. Jur. 1.—*SCOT.*

PART III. SECT. 5, SUB-SECT. 1.

1589 i. General rule—Intent of parties to be preserved.]—In the construction of an imperfect instrument, a judge is never justified in either striking out or inserting a word in order to arrive at the intention, unless there be no other means by which his clear & manifest intention can be effectuated.—*FENTON v. FENTON* (1837), 1 Dr. & Wal. 66, 76.—*IR.*

1589 ii. ——— .]—When a document is so obscurely worded as to leave a doubt as to the intention of the parties, it may be open to the ct. to inquire into & speculate upon that intention.—*BARRY v. CAMBIE* (1843), 6 L. L. R. 49, 68.—*IR.*

1589 iii. ——— .]—There is no liberty either to transpose language or to reject words out of the instrument, or to import them into it, unless it becomes necessary to do so in order to carry out the manifest intention of the parties, appearing by the language they have used.—*O'DONNELL v. RYAN* (1854), 4 I. C. L. R. 44, 56, 57.—*IR.*

1589 iv. ——— .]—Although subsidiary clauses of a deed may be legitimately referred to for the purpose of solving any ambiguity which is raised by the terms of the dispositive clause, yet if the terms of the dis-

to the express words of a particular clause.—**NORTHUMBERLAND (EARL) v. EGREMONT (EARL)** (1759), 1 Eden, 435; 28 E. R. 753.

Annotation.—**Consd. Rainy v. Ellis** (1872), 26 L. T. 602.

1593. ————.]—A ct. of equity looks to the general intent of a deed, & will give it such a construction as supports that general intent, although a particular expression in the deed may be inconsistent with it.—**ARUNDELL v. ARUNDELL** (1833), 1 My. & K. 316; *Coop. temp. Brough*. 139; 2 L. J. Ch. 77; 39 E. R. 701.

Annotation.—**Refd. Mortimer v. Picton** (1864), 33 L. J. Ch. 337, n.

1594. Wrong grammar.—**SHREWSBURY'S (EARL) CASE** (1610), 9 Co. Rep. 48 b; 77 E. R. 793.

Annotations.—**Refd. Doe d. Devine v. Wilson** (1855), 10 Moo. P. O. C. 502. **Mentd. Foster v. Jackson** (1615), Hob. 52; **Sury v. Pigot** (1628), Poph. 166; **Tyffyn v. Wingfield** (1633), Cro. Car. 325; **Holme's Case** (1634), Cro. Car. 376; **Cooper v. St. John** (1648), Sty. 130; **Lyn v. Wyn** (1665), O. Bridg. 122; **R. v. Knollys** (1694), 1 Ld. Raym. 10; **R. v. Larwood** (1694), 1 Salk 167; **R. v. Kemp** (1695), Carth 350; **Hunt v. Burne** (1702), 1 Com. 124; **R. v. Ipswich Bailiffs** (1705), 2 Ld. Raym. 1232; **Peak v. Bourne** (1732), 2 Stra. 942; **R. v. Ponsonby** (1753), 1 Keny 1; **R. v. Wells Corp.** (1767), 4 Burr. 1998; **Hambly v. Trott** (1776), 1 Cowp. 371; **Rafael v. Verelst.** (1776), 2 Wm. Bl. 1055.

1595. Wrong spelling.—**SHREWSBURY'S (EARL) CASE**, No. 1594, ante.

1596. ———— **Bond.**—**VERNON v. ONSLOW** (1614), 1 Brownl. 60; 112 E. R. 665.

———.]—*See, further*, **BONDS**, Vol. VII., pp. 185, 186, Nos. 239-260.

1597. ———— **Lease.**—A lease for *octoginta et terdecim annos* shall be taken for a term of 93 years, & not for eighty & thirty.—**HOPEHILL v. SEARLE** (1634), Cro. Car. 386; 79 E. R. 937.

See, further, **LANDLORD & TENANT**.

Clerical errors.—*See* **MISTAKE**.

1598. Plural read for singular.—**Warrant of**

attorney to enter judgment.—**GLADWIN v. SOOT** (1753), Barnes, 53; 94 E. R. 802.

Annotations.—**Apld. Fletcher v. Smith** (1779), 2 Wm. Bl. 1301. **Distd. Gee v. Lane** (1812), 15 East, 592.

1599. ————.]—**FUTCHER v. SMITH** (1779), 2 Wm. Bl. 1301; 96 E. R. 762.

1600. ————.]—**GEE v. LANE** (1812), 15 East, 592; 104 E. R. 967.

Annotations.—**Consd. Fendal v. May** (1813), 2 M. & S. 76. **Refd. Raw v. Alderson** (1817), 1 Moore, C. P. 145.

1601. ———— **Lease of sporting rights.**—In an indenture of lease the lessor granted to the lessee the right of sporting over the land demised, & certain other lands "in common with the lessor, his heirs, & assigns, & any friend of his or them":—**Held**: the privilege might be granted to several friends to sport at the same time.—**GARDINER v. COLYER** (1864), 10 L. T. 715; 28 J. P. 693; 12 W. R. 979.

SUB-SECT. 2.—REJECTION, SUPPLY & TRANSPOSITION OF WORDS AND CLAUSES.

A. Rejection.

(a) For Repugnancy.

1602. General rule.—Words of known signification but so placed in the context of a deed that they make it repugnant & senseless are to be rejected equally with words of no known signification (*per Cur.*).—**CROWLEY v. SWINDLES** (1671), Vaugh. 173; 124 E. R. 1024.

1603. ———— **Intention of parties.**—**MALLORY'S CASE** (1631), 5 Co. Rep. 111 b; 77 E. R. 228; *sub nom.* **PAIN v. MALORY**, Cro. Eliz. 832.

Annotations.—**Refd. Hewet v. Painter** (1611), 1 Bulst. 174; **Bland's Case** (1632), Godb. 448. **Mentd. Finch's Case** (1606), 6 Co. Rep. 63 a; **Molinueux v. Molinueux** (1606), Cro. Jac. 144; **Fraunces's Case** (1609), 8 Co. Rep. 89 b;

positive clause are *per se* sufficient to give a right they cannot be controlled by a reference to the other clauses of the disposition.—**LEE v. ALEXANDER** (1883), 8 App. Cas. 853; 10 R. (Ct. of Sess.) 91; 20 Sc. L. R. 877.—**SCOT**.

t. ———— **Correction should involve least departure from instrument.**—The proper correction is that which involves least departure from the terms of the instrument.—**CLAYTON v. MORRISON** (1873), 2 C. A. 263.—**N.Z.**

a. **Name given to document by parties.**—**Held**: generally speaking, the name given by the parties to a document is not conclusive as to its nature; but the designation given by the parties themselves to it cannot be lost sight of, where the document is ambiguous & is susceptible of more than one construction as to its nature & scope.—**KALABHAI v. SECRETARY OF STATE FOR INDIA** (1905), 1 L. R. 29 Bom. 19.—**IND.**

b. **Words occurring twice in same instrument to receive same meaning.**—A word, which occurs twice in the same instrument, is to receive the same meaning in both places, unless a clear intention to the contrary appears.—**RIDGEWAY v. MUNKITTERICK** (1841), 1 Dr. & War. 84.—**IR.**

c. **Negative claim read as express affirmation.**—A negative claim in a deed implies, & contains within itself a corresponding affirmative, & in the construction of the instrument shall have as much weight & effect as the express affirmation, if used, would have had.—**KELLY v. K.** (1843), 4 Dr. & War. 53; 5 I. Eq. R. 435.—**IR.**

d. **After great lapse of time—Rights of purchasers under instrument preferred.**—But when the articles are very ambiguous, & there has been a great lapse of time, the ct. will be slow

to put a construction upon them, which would affect the rights of a purchaser, which it would have adopted without hesitation as between the parties themselves.—**THOMPSON v. SIMPSON** (1841), 1 Dr. & War. 459, 491.—**IR.**

1594 i. Wrong grammar.—In a deed the word "or" may be construed to mean "&," & "&" may be construed to mean "or," if such construction be necessary to give effect to the intention of the party by whom the word is used.—**WHITE v. SUPPLE** (1842), 2 Dr. & War. 471; 1 Con. & Law 523.—**IR.**

1594 ii. ————.]—The ct. can correct a grammatical error which would have the effect of nullifying the obvious intention of the granters. Where a policy contained the words "unless legal proceedings have not been taken":—**Held**: the insertion of the word "not" was clearly a grammatical error, & the ct. was entitled to correct it.—**GLEN'S TRUSTEES v. LANCASHIRE & YORKSHIRE ACCIDENT INSURANCE CO.** (1906), 8 F. (Ct. of Sess.) 915.—**SCOT.**

e. **Punctuation.**—Regard should be had to punctuation in the construction of a lease *inter partes*.—**AYLWIN v. ROBERTSON** (1904), 7 Terr. L. R. 164.—**CAN.**

f. ————.]—Where the meaning of a clause in an instrument is doubtful, the ct. may insert punctuation, as a means of showing what construction the words are capable of; & if by such aid the ct. is enabled to see that the language can bear an interpretation which will make the whole instrument rational & self-consistent, it is bound to adopt that interpretation in preference to another which would attribute to the parties an intention utterly capricious, insensible, & absurd.—

Re DENNY'S ESTATE (1874), 1 R. 8 Eq. 427.—**IR.**

PART III. SECT. 5. SUB-SECT. 2.—A. (a).

1602 i. General rule.—No words in any deed or instrument which may have a significant & operative meaning, without incurring the natural & obvious sense of any other part of the deed or instrument, can be rejected as nugatory & redundant.—**ATKINSON v. PILLSWORTH** (1787), 1 Ridg. Parl. Rep. 449.—**IR.**

1603 i. ———— **Intention of parties.**—Letters patent granted land described as extending from a certain point 32 chains, or to a certain road, & thence to run a certain distance "on said road"; the road was 69 chains distant from the starting point:—**Held**: the words of the grant necessarily imported that the second alternative in the description should be the controlling one, & the land was bounded by the road.—**R. v. WILSON** (1835), Ber. [3], 1.—**CAN.**

1603 ii. ————.]—In ejectment a deed under which *plff.* claimed was stated to be an indenture made between G., & "H. accepting hereof for & on behalf of" T. The consideration was declared to have been paid by T., & the grant of the land was to him, as was also the *habendum*. The covenants including one for further assurance, were also made with T. The deed, however, was signed by G. & H.:—**Held**: in order to give effect to the deed in every particular according to the plain intent of the parties, the words, "H. accepting hereof for & on behalf of," must be struck out as repugnant to the rest of the deed.—**ELLIOT v. DOUGLAS** (1879), 30 C. P. 398.—**CAN.**

Sect. 5.—Correction of errors by intrinsic evidence:
Sub-sect. 2, A. (a).]

Tracy v. Dutton (1831), Cro. Jac. (817); *Blacks v. Mole* (1861), 1 Lev. 40; *Sacheverell v. Walker* (1871), Freem. K. B. 16; *Williams v. Fry* (1872), 2 Keb. 847; *Long v. Buckridge* (1718), 1 Stra. 106; *Wood v. Leadbitter* (1845), 13 M. & W. 838; *Sealcock v. Harston* (1875), 1 C. P. D. 106.

1604. ———.]—When different parts of a deed are inconsistent with each other, effect ought to be given to that part which is calculated to carry out the real intention of the parties, & the other parts should be rejected.—*WALKER v. GILES* (1849), 6 O. B. 662; 18 L. J. C. P. 323; 14 L. T. O. S. 41; 13 Jur. 753; 136 E. R. 1407.

Annotations.—*Consad. Turner v. Barnes* (1862), 2 B. & S. 435. *Reid. Barnard v. Pilsworth* (1849), 6 C. B. 698, n.; *Doe d. Dixie v. Davies* (1851), 7 Exch. 89; *Pinhorn v. Souster* (1853), 8 Exch. 783; *Brown v. Metropolitan Counties, etc., Soc.* (1859), 1 E. & E. 832; *Re Royal Liver Friendly Soc.* (1870), L. R. 5 Exch. 78. *Mentd. Thorn v. Croft* (1866), L. R. 3 Eq. 193; *Re Potter, Ex p. Parke* (1874), De Colyar's County Court Cases 235; *Re Betts, Ex p. Harrison* (1881), 18 Ch. D. 127.

1605. ———.]—Inconsistent clauses.]—Where a deed contains inconsistent clauses, the ct. very reluctantly rejects one altogether, & never unless it is absolutely impossible to reconcile the inconsistencies.—*BUSH v. WATKINS* (1851), 14 Beav. 425; 51 E. R. 350.

1606. ———.]—Or inconsistent contemporaneous deeds.]—Where contemporaneous documents can be read in two ways, in one of which they appear consistent & in the other inconsistent, the construction is to be preferred which will render them consistent. If one of two contemporaneous documents is ambiguous in its terms, & the other is clear, force is to be given to the document whose terms are clear, so as to interpret the one containing ambiguous terms.—*Re PHOENIX BESSEMER STEEL CO.* (1875), 44 L. J. Ch. 683; 32 L. T. 854.

Annotations.—*Reid. Re Pyle Works* (1890), 44 Ch. D. 534. *Mentd. Fowler v. Broad's Patent Night Light Co.* (1893) 1 Ch. 724; *Newton v. Anglo Australian Investment Co. Debenture Holders*, [1895] A. C. 244; *Re Russian Spratts Patent, Johnson v. Russian Spratts Patent*, [1898] 2 Ch. 149.

1607. ———.]—Oranges wereshipped on board a steamship under a bill of lading which stated that the ship was then "lying in the port of Malaga, & bound for Liverpool, with liberty to proceed to & stay at any port or ports in any station in the Mediterranean, Levant, Black Sea, or Adriatic,

or on the coasts of Africa, Spain, Portugal, France, Great Britain, & Ireland, for the purpose of delivering coals, cargo or passengers, or for any other purpose whatsoever." The bill of lading contained a clause whereby the shipper expressly agreed to all its stipulations whether written or printed. The deviation clause was printed with the name of the port of shipment left blank & filled up in writing. The ship left Malaga for a port on the east coast of Spain & out of her course for Liverpool, then returned & made for Liverpool, where the oranges were delivered in a damaged condition owing to the delay. In an action by the shipper against the shipowner for damages for breach of contract:—*Held*: the printed clause must not be construed so as to defeat the main object & intent of the contract, which was to carry the oranges from Malaga to Liverpool.—*GLYNN v. MARGETSON & Co.*, [1893] A. C. 351; 62 L. J. Q. B. 466; 69 L. T. 1; 9 T. L. R. 437; 1 Asp. M. L. C. 366; 1 R. 193, H. L.; *affg. S. C. sub nom. MARGETSON v. GLYNN*, [1892] 1 Q. B. 337.

Annotations.—*Reid. Caffin v. Aldridge* (1895), 1 Com. Cas. 131; *Evans v. Cunard S.S. Co.* (1902), 18 T. L. R. 374; *Burstell v. Grimsdale* (1906), 11 Com. Cas. 280; *Sanday v. British & Foreign Marine Insco.*, [1915] 2 K. B. 781; *Morrison v. Shaw, Savill, & Albion Co.*, [1916] 2 K. B. 783; *Re Sutro & Holbut, Symons*, [1917] 2 K. B. 348; *A.-G. v. Smith* (1918), 87 L. J. K. B. 1045; *Naylor, Benson v. Krasinsche Industrie Gesellschaft* (1918), 87 L. J. K. B. 1066; *Ruffy-Arnell, etc. Co. v. R.*, [1922] 1 K. B. 599.

1608. ———.]—Where a municipal council granted to a railway co. authority to construct, maintain & operate railways in its streets, with the exclusive right to such portion of any street as shall be occupied by the railway, but with the plain intent that the co. should have no concern whatever with any portions of any street not in actual occupation by their rails:—*Held*: a subsequent clause in the deed of grant giving to the co. the refusal on terms of other streets in the city for railway purposes was insufficient to constitute, contrary to the plain meaning of the previous stipulations, a right of monopoly in any of the streets of the city.—*WINNIPEG STREET RY. CO. v. WINNIPEG ELECTRIC STREET RY. CO. & CITY OF WINNIPEG*, [1894] A. C. 615; 64 L. J. P. C. 10; 71 L. T. 127; 6 R. 525, P. O.

1609. First clause or words prevail.]—*BLAUNCHET v. SYMOUND* (1309), Y. B. 2 Edw. 2, 29.

1605 I. ———.]—*Inconsistent clauses.*—A description of land in a deed, after running to a point two chains from a line with the east side of the guard lock on the W. canal proceeded: "thence S. half a degree E. 25 chains, more or less, always at a distance of two chains from a line with the east side of the guard lock, to the northern limit of lot 27," thence, etc. The course should have been north instead of south, & the effect of it as written was to go away from the northern limit of the lot, & exclude the land in question:—*Held*: the course might be rejected & a line two chains from the east side of the lock be adopted as the course to be taken in order to reach the northern limit of the lot.—*WELLAND COUNTY CORPN. v. BUFFALO & LAKE HURON RY. CO.* (1870), 30 U. C. R. 147; *affg. 31 V. C. R. 539*.—CAN.

1605 II. ———.]—A contract contained a clause under which the co. could at any time & for any cause cancel the contract. The co. agreed to furnish goods to agent but "if from any cause the co., fails to furnish the agent with these goods it shall not be liable to him for damages in consequence"—*Held*: this clause was void, being repugnant to the obligation.—*MASSEY-HARRIS CO. v. ZWICKER* 1906, 2 E. L. R. 59.—CAN.

1605 III. ———.]—In 1820, A. conveyed his life estate to his son, B., who covenanted to indemnify A. against, amongst other debts, a bond of W., who, in 1822, obtained judgment against A. In 1824, B. conveyed the estate, in trust, to sell, & to pay, first, the mto. debts mentioned in the first schedule of the deed, then the judgments in the second schedule, entered up against B., & then bond debts in a third schedule, the debts to be paid in such priority as the trustee should deem proper. The second schedule purported to set out the judgments affecting the lands appearing on record against A. & B., & enumerated W.'s judgment. The trustee did not determine the priorities.—*Held*: the words, "entered up against B.," might be rejected in construing the deed.—*TAYLOR v. GORMAN* (1844), 6 I. Eq. R. 634.—IR.

1609 I. First clause or words prevail.]—The grantor conveyed certain lands to the grantee, his heirs & assigns, & by a proviso at the concluding part of the deed declared "nevertheless, that the above L. shall have no right to sell, alien, or dispose in any way whatsoever of the above-mentioned premises, but have only the use during his lifetime, after which his children will have full right to the said property above

mentioned":—*Held*: such proviso was repugnant to the grant & *habendum* in fee, & therefore void.—*LARIO v. WALKER* (1881), 28 Gr. 216.—CAN.

1609 II. ———.]—A lease with *habendum* for a year contained a subsequent clause that either party might terminate the lease at the end of the year on giving three months' written notice prior thereto:—*Held*: the clause was repugnant to the *habendum* & must be rejected, & the lease terminated at the end of the year without any notice.—*WELLER v. CARNEW* (1898), 29 O. R. 400.—CAN.

1609 III. ———.]—When a deed contains two descriptions of premises, of sufficient & of equal certainty, & a variance is shown by extrinsic evidence to exist between them, the earlier description must prevail.—*ROX v. LIDWELL* (1859), 11 I. C. L. R. 320.—IR.

S. ———.]—*Not where inconsistencies in same provision.*—The rule that, if there be a repugnancy, the first in a deed shall prevail, has no application when the supposed inconsistencies are found in one & the same provision.—*ADVOCATE-GENERAL OF BOMBAY v. HORMUTH* (1906), 1 L. R. 29 Bom. 375.—IND.

1610. —.]—**SHARPLES v. HANKINSON** (1595), Gouldsb. 187; Cro. Eliz. 420; 75 E. R. 187.

Annotation:—**Reid. Graves v. Ashenhurst** (1673), Freem. K. B. 77.

1611. —.]—**COLE v. SURY** (1627), Lat. 264; 82 E. R. 378.

Annotation:—**Mentd. Sacheverell v. Walker** (1671), Freem. K. B. 16.

1612. —.]—**COTHER v. MERRICK**, No. 1088, ante.

1613. —.]—The general rule is, that if there be a repugnancy, the first words in a deed, & the last words in a will, shall prevail (**MANSFIELD, C.J.**).—**Doe d. LEICESTER v. BIGGS** (1809), 2 Taunt. 109; 127 E. R. 1017.

Annotations:—**Consd. Sherratt v. Bentley** (1834), 2 My. & K. 149; **Re Lashmar, Moody v. Penfold**, [1891] 1 Ch. 258. **Reid. Baker v. White** (1875), L. R. 20 Eq. 166. **Mentd. Tenny d. Gibbs v. Moody** (1825), 3 Bing. 3; **White v. Parker** (1835), 1 Bing. N. C. 573; **Doe d. Gratrex v. Homfray** (1837), 6 Ad. & El. 208; **Doe d. Jones v. Pumphrey** (1837), 1 Jur. 38; **Morrall v. Sutton** (1845), 1 Ph. 533; **Re Tanqueray-Willamoe & Landau** (1882), 20 Ch. D. 465; **Re Allsop & Joy's Contract** (1889), 61 L. T. 213; **Re Brooke, Brooke v. Brooke**, [1894] 1 Ch. 43; **Re Adams & Perry's Contract**, [1899] 1 Ch. 554.

1614. —.]—The rule of law as to construing a deed is that if you find that the first words have a clear meaning, but those that follow are inconsistent with them to reject the latter (**SHADWELL, V.-O.**).—**COPE v. COPE** (1846), 15 Sim. 118; 15 L. J. Ch. 274; 60 E. R. 562.

Annotation:—**Mentd. Bourne v. Hartley** (1854), 2 Eq. Rep. 910.

1615. —.]—**Re WEBBER'S SETTLEMENT** (1850), 17 Sim. 221; 19 L. J. Ch. 445; 60 E. R. 1114.

Annotation:—**Consd. Nichols v. Haviland** (1855), 1 K. & J. 504.

1616. — Unless some reason to contrary.]—The rule of law is clear, that if there be two clauses or parts of a deed repugnant the one to the other, the first part shall be received & the latter rejected except there be some special reason to the contrary (**WILLES, J.**).—**BATESON v. GOSLING** (1871), L. R. 7 C. P. 9; 41 L. J. C. P. 53; 25 L. T. 570; 20 W. R. 98.

Annotations:—**Mentd. Cragoe v. Jones** (1873), L. R. 8 Exch. 81; **Ellis v. Wilmot** (1874), L. R. 10 Exch. 10; **Re Whitehouse, Whitehouse v. Edwards** (1887), 37 Ch. D. 683; **Duck v. Mayeu**, [1892] 2 Q. B. 511.

Bonds.]—See BONDS, Vol. VII., p. 185, Nos. 227-234.

1617. Marine insurance policy.—When risk to attach.]—A policy of marine insurance expressed to be on freight of meat, "at or from M.V. to any ports, etc.," provided "that the assurance shall commence from the loading on board at M.V." It was known to both parties that meat could not be loaded at M.V. The words "M.V." were in writing, the rest of the clause being in print:—**Held**: the clause was to be rejected as being absolutely inapplicable, & the policy attached.

This clause, as it stands, is clearly inconsistent with the previous part of the policy (**LOPES, J.**).—**HYDARNES S.S. Co. v. INDEMNITY MUTUAL MARINE ASSURANCE Co.**, [1895] 1 Q. B. 500; 64 L. J. Q. B. 353; 72 L. T. 103; 11 T. L. R. 173; 7 Asp. M. L. C. 553; 14 R. 216, C. A.

See, further, INSURANCE; SHIPPING & NAVIGATION.

1622 I. Settlement.—Gift over after *it absolute*.]—A marriage settlement vested freshold leases in trustees, to hold to the use of A. & his heirs & assigns, from the perfection of the settlement, for his natural life, without impeachment of waste, with a power of lease; remainder to the trustees, to preserve, etc.:—**Held**: the words, "A. & his heirs" should be rejected, &

that A. took a life estate.—**Re HAMMERSLY** (1861), 11 L. Ch. R. 229; *affd.* 13 L. Ch. R. 519; 13 Ir. Jur. 328.—IR.

1623 I. Repugnant proviso void.]—A covenant in a fee-farm grant of 1858 that the grantee, his heirs & assigns, might assign, sublet, or otherwise part with the possession of the demised

1618. Lease.—Date of commencement.]—**ANON.** (1566), 3 Dyer, 261 b; 73 E. R. 580.

Annotation:—**Reid. Aldous v. Cornwell** (1868), L. R. 3 Q. B. 573.

1619. —.]—**SEAMAN'S CASE** (1610), Godb. 166; 78 E. R. 101.

1620. — Covenants "hereinafter" contained.—No covenants following.]—**DOE d. SPENCER v. GODWIN**, No. 658, ante.

See, further, LANDLORD & TENANT.

1621. Settlement.—In estate tail.]—**BARKER v. FREEMAN** (1772), Loftt, 31; 98 E. R. 516.

1622. — Gift over following gift absolute.]—A settlor settled £1,000 upon trust for his illegitimate daughter. The settlement contained a proviso that if at her death the daughter should not be under coverture, which event happened, the money should be held in trust for her, her exors., administrators & assigns. Then followed a clause that if any interest in the fund would, but for that proviso, be held in trust for the Crown, or belong to the trustees of the settlement, then this money was to be held upon trusts in favour of the settlor & his widow:—**Held**: the gift over after the absolute gift was void for repugnancy, & the Crown took.—**Re WILCOCKS' SETTLEMENT** (1875), 1 Ch. D. 229; 45 L. J. Ch. 163; 33 L. T. 719; 24 W. R. 290.

See, further, SETTLEMENTS.

1623. Repugnant proviso void.—Limitation of estate.]—**MOORE & SAVIL'S CASE** (1585), 2 Leon. 132; 74 E. R. 419.

1624. — Statute.]—**ALTON WOODS' CASE** (1600), 1 Co. Rep. 40 b; 2 And. 154; 76 E. R. 90.

Annotations:—**Consd. Alcock v. Cooke** (1829), 2 State Tr. N. S. 327. **Apld. Yarmouth Corp. v. Simmons** (1878), 10 Ch. D. 518. **Reid. Chandos' Case** (1607), 8 Co. Rep. 55 a; **Magdalen College Case** (1616), 11 Co. Rep. 66 b; **Bainbridge v. Gardiner** (1665), O. Bridg. 402; **Riddell v. White** (1794), 1 Anst. 281. **Mentd. Englefield's Case** (1591), 7 Co. Rep. 11 b.; **Case of a Fine** (1605), 7 Co. Rep. 32 a; **Prince's Case** (1606), 8 Co. Rep. 1 a; **St. Saviour's Southwark Case** (1613), 10 Co. Rep. 66 b; **Needler v. Winchester Bp.** (1614), Hob. 220; **R. v. Waller & Hanger** (1615), 3 Bulst. 1; **Sheffield v. Ratcliffe** (1615), Hob. 334; **Elvis v. York Archbp., Taylor & Bishop** (1619), Hob. 315; **Gee v. Freedland** (1626), Cro. Car. 47; **Brookham's Case** (1628), Litt. 128; **Grosse v. Gayer** (1629), Cro. Car. 172; **Collingwood v. Price** (1661), O. Bridg. 410; **Holland v. Fisher** (1662), O. Bridg. 181; **Foot v. Berkley** (1670), 2 Keb. 654; **Thompson v. Leach** (1690), 2 Vent. 198; **Re Hornbee's Petn.** (1691), Freem. K. B. 331; **Symonds v. Cudmore** (1692), Carth. 257; **R. v. London Bp. & Lancaster** (1693), 1 Show. 441; **Winter v. Loveday** (1696), 5 Mod. Rep. 378; **R. v. Chester Bp.** (1697), 1 Ld. Raym. 292; **A.-G. v. Allgood** (1743), Park. 1; **R. v. Cotton** (1751), Park. 112; **Gledstanes v. Sandwich** (1842), 4 Man. & G. 995; **O'Connell v. R.** (1844), 11 Cl. & Fin. 155; **Nickels v. Ross** (1849), 8 C. B. 678; **Eastern Archipelago Co. v. R.** (1853), 2 E. & B. 856; **A.-G. v. British Museum Trustees** (1903), 73 L. J. Ch. 743; **Liverpool & North Wales S.S. Co. v. Mersey Trading Co.**, [1908] 2 Ch. 460.

1625. — Personal liability.]—Pltf. covenanted with A., B., C., D., etc., churchwardens & overseers of the parish of St. B., to do certain works & repairs, & A., B., C., D., etc., in consideration thereof, for themselves & their successors, covenanted with pltf., that they, their successors & assigns, would pay pltf., his exors., etc., £1,169 at certain times particularly specified. The deed contained a proviso, that nothing therein contained should extend or be construed to extend to any personal covenant, or affect A., B., C., D.,

premises, provided he did not divide them into more than four divisions or lots, unless with the consent in writing of the grantor, his heirs & assigns is absolutely void & inoperative, as being repugnant to the free power of alienation necessarily implied by the fee-farm grant.—**Re LUNHAM'S ESTATE** (1871), 1 R. 5 Eq. 170.—IR.

Sect. 5.—Correction of errors by intrinsic evidence:**Sub-sect. 2, A. (a) & (b) & B.]**

etc., or any of them, in their private capacity:—**Held:** the proviso was void, as repugnant to the covenant, & the churchwardens & overseers were personally liable on it.—**FURNIVALL v. COOMBS** (1843), 5 Man. & G. 736; 6 Scott, N. R. 522; 12 L. J. C. P. 265; 1 L. T. O. S. 80; 7 J. P. 322; 7 Jur. 399; 134 E. R. 756.

Annotations:—**Distd. Veley v. Pertwee** (1870), L. R. 5 Q. B. 573. **Consd. Williams v. Hathaway** (1877), 6 Ch. D. 544; **Watling v. Lewis**, [1911] 1 Ch. 414. **Reid. Hallett v. Dowdall** (1852), 18 Q. B. 2; **Scott v. Avery** (1856), 5 H. L. Cas. 811; **De Vries v. Corner** (1865), 13 L. T. 636; **Kelner v. Baxter** (1866), L. R. 2 C. P. 174; **Forbes v. Git**, [1922] 1 A. C. 256.

1626. ———.]—A proviso which is in terms wholly repugnant to a covenant creating a personal liability is void, but a proviso only limiting the personal liability without destroying it is valid.—**WILLIAMS v. HATHAWAY** (1877), 6 Ch. D. 544.

Annotations:—**Consd. Watling v. Lewis**, [1911] 1 Ch. 414. **Reid. Forbes v. Git**, [1922] 1 A. C. 256.

1627. ———.]—A covenant by the trustees of a deceased mtgor. "as such trustees but not so as to create any personal liability" to pay the mtge. debt & indemnify the estate of a deceased co-mtgor., involves the personal liability of the covenantors. The words "but not so as to create any personal liability" are, in effect, a proviso destroying, & not qualifying, the covenant entered into by the covenantors "as trustees." That covenant is an absolute one & imports personal liability, the subsequent words are repugnant to it & must be rejected, & the personal liability therefore remains.—**WATLING v. LEWIS**, [1911] 1 Ch. 414; 80 L. J. Ch. 242; 104 L. T. 132.

Annotations:—**Reid. Re Robinson's Settlement**, **Jant v. Hobbs** (1911), 28 T. L. R. 121; **Re Tewkesbury Gas Co.**, **Tysoe v. Tewkesbury Gas Co.**, [1911] 2 Ch. 279.

1628. ———.]—A co. issued debentures which they covenanted to pay off on or after Jan. 1, 1898, the debentures to be paid off to be selected by ballot, & six months' notice being given to the holders thereof. The co. contended that the debentures were repayable after Jan. 1, 1898, only after a ballot had been held, & six months' notice had been given to the holders of the drawn debentures:—**Held:** inasmuch as the covenant created a liability to pay on or after the date specified upon demand, the clause seeking to limit its operation to such debentures as should be drawn by ballot was void for repugnancy.—**RE TEWKESBURY GAS CO., TYSOE v. TEWKESBURY GAS CO.**, [1911] 2 Ch. 279; 80 L. J. Ch. 590; 105 L. T. 300; 27 T. L. R. 511; 55 Sol. Jo. 616; 18 Mans. 301; *affd.*, [1912] 1 Ch. 1, C. A.

Annotation:—**Reid. Wylie v. Carlyon**, [1922] 1 Ch. 51.

1629. ———.]—If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant & the earlier clause prevails. But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together & effect is to be given to the intention of the parties as disclosed by the deed as a whole (**LORD WRENBURY**).—

FORBES v. GIT, [1922] 1 A. C. 256; 91 L. J. P. C. 97; 126 L. J. 616, P. C.

1630. ———.]—Not rejected if covenant only moulded.—**ANON.** (1428), Jenk. 96; 145 E. R. 68.

1631. ———.]—**WILLIAMS v. HATHAWAY**, No. 1626, *ante*.

1632. ———.]—**FORBES v. GIT**, No. 1629, *ante*.

Proviso limiting liability on bill of exchange.—**See BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS**, Vol. VI., p. 43, No. 315.

1633. Contemporaneous documents—One ambiguous one clear—Ambiguous one rejected.—**RE PHENIX BESSEMER STEEL CO.**, No. 1606, *ante*.

— **Execution of.**—**See Part I., Sect. 5, Sub-sect. 8, ante.**

1634. Two clauses relating to same matter—One absolute one restrictive—Restrictive prevails.—

—Where, in a deed of settlement, there are two clauses relating to the same matter, the first absolute & the other restrictive, that which is restrictive prevails.—**RE LONDON & COUNTY ASSURANCE CO., WOOD'S CLAIM, BROWN'S CLAIM** (1861), 30 L. J. Ch. 373; 9 W. R. 366.

Several instruments—Whether construed as one deed.—**See Part II., Sect. 3, sub-sect. 25, ante.**

(b) *As Surplusage or for Insensibility.*

1635. Obligation to pay money—Designation of object of payment.—**ANON.** (1574), Ben. & D. 116, pl. 7; 123 E. R. 319.

1636. Lease—Additional words—To an absolute reservation.—**HAYER v. CLIFTON**, No. 1118, *ante*.

1637. ———.]—To previously defined terms.—**ANON.** (1583), Sav. 71; 123 E. R. 1019.

1638. Conveyance to corporation aggregate—"Successors & assigns."—In 1777 an Act of Parliament was passed for making a canal. It incorporated a co. by name of the Co. of Proprietors of the Basingstoke Canal Navigation, authorised them to construct the canal, & make bye-laws, demand tolls, & acquire land. All persons were to have the right to use the canal on payment of tolls. The co. were to make & maintain bridges. Throughout the Act in conferring rights or imposing obligations on the co. the words "their successors & assigns" were added.

I think the words "their successors & assigns" are meaningless & must be disregarded (**COZENS-HARDY, M.R.**).

The words "successors & assigns" have not any more meaning in the case of a statutory co. formed to carry out a public undertaking than they have as words of limitation in a conveyance to a corporation aggregate. They are mere surplusage & meaningless (**SWINFEN EADY, L.J.**).—**RE WOKING URBAN COUNCIL (BASINGSTOKE CANAL) ACT**, 1911, [1914] 1 Ch. 300; 83 L. J. Ch. 201; 110 L. T. 49; 78 J. P. 81; 30 T. L. R. 135; 12 L. G. R. 214, C. A.

Annotations:—**Mentd. A.-G. v. N. E. Ry.**, [1915] 1 Ch. 905; **R. v. Bedfordshire County Council**, *7 p. Sear*, [1920] 2 K. B. 465.

1639. Insensible words—May be omitted.—If in a covenant the name of a person not a party

PART III. SECT. 5, SUB-SECT. 2.—A. (b).

h. Additional words—To previously defined terms.—**Held:** the words "be the same more or less," following the description of the quantity of land, improperly inserted in a sheriff's deed, might be rejected as surplusage.—**NELLES v. WHITE** (1851), 29 Gr. 338; *affd.* on another point, 11 S. C. R. 587.—**CAN.**

k. ———.]—A contract contained the words, "being the premises

known as number 22 A. street." The correct number was 24. There was no number 22, & deft. owned no other property in A. street.—**Held:** there being a description which identified the parcel without the aid of the street number, the words quoted might be rejected as surplusage.—**FOSTER v. ANDERSON** (1908), 16 O. L. R. 565; 11 O. W. R. 1037.—**CAN.**

1639 i. Insensible words—May be omitted.—A Crown grant setting out,

& purporting to describe parcels, but the description obviously & by demonstration is incorrect, as not enclosing a space, such description is inoperative, & should be wholly rejected.—**STEPHEN v. BELFAST SHIRE COUNCILLORS & RATEPAYERS** (1870), 1 V. R. (Law) 59.—**AUS.**

1639 ii. ———.]—DOHN v. TICE (1861), 11 C. P. 289.—**CAN.**

1639 iii. ———.]—The premises intended to be conveyed by a tax deed

to it be inserted, & words introduced which are insensible, a declaration thereon omitting the name of that person, & the insensible words, is good.—*GOODMAN v. KNIGHT* (1814), Cro. Jac. 358; 1 Roll. Rep. 84; 79 E. R. 307.

B. Supply.

1640. General rule.—*SLEIGH v. METHAM* (1697), 1 Lut. 782; 125 E. R. 410.
Annotation :—*Mentd. Doe d. Milburn v. Salkeld* (1755), Willes, 673.

1641. Name supplied.—Of grantor.—*TRETHEWY v. ELLESDON* (1690), 2 Vent. 141; 86 E. R. 356.
Annotations :—*Consd. Mill v. Hill* (1852), 3 H. L. Cas. 828. *Reid. Say v. Seal's Case* (1711), 10 Mod. Rep. 40.

1642. ————*SAY & SEAL'S (LORD) CASE* (1711), 10 Mod. Rep. 40; *on appeal, sub nom. SAY & SEALE (LORD) v. LLOYD* (1712), 4 Bro. Parl. Cas. 73.
Annotations :—*Consd. Mill v. Hill* (1852), 3 H. L. Cas. 828. *Reid. Dart v. Clayton* (1864), 4 New Rep. 221. *Mentd. Greenhough v. Gaskell* (1833), Coop. temp. Brough. 96.

1643. ————*MILL v. HILL*, No. 702, ante.

1644. ————*Of grantee—Where omitted in premises—Mentioned only in habendum.*—*BUTLER v. DODTON* (1579), Cary, 86; 21 E. R. 46.

1645. ————*BUSTARD v. COULTER* (1602), Cro. Eliz. 902, 917; Yelv. 8; Moore, K. B. 665; 78 E. R. 1124, 1138.

1646. Words or clauses—Heirs supplied.—*ANON.* (1517), Cary, 16; 21 E. R. 9.

1647. ————*VERNON v. GATACRE* (1566), 3 Dyer, 253 a; 73 E. R. 561.
Annotations :—*Mentd. Chudleigh's Case, Dillon v. Froine* (1595), 1 Co. Rep. 113 b; *Gawen v. Ramtes* (1601), Cro. Eliz. 804; *Seymour's Case* (1612), 10 Co. Rep. 95 a; *Lamb v. Thompson* (1618), Hut. 40; *Took v. Glascock* (1669), 1 S. 260.

1648. ————*BAILDON v. CHURCH* (1606), Totl. 132; 21 E. R. 145.

1649. ————*By surrender & a settlement*

dated in 1831 copyhold hereditaments were limited in trust for M. for life, & after her death for her husband, & after the death of the survivor in trust for the children of the marriage equally as tenants in common, & in default of issue then to such uses as M. should declare by her will, with remainder to the right heirs of M. There were three children of the marriage :—*Held* : there being upon the face of the instrument sufficient indication of intention on the part of the settlor that absolute interests should be given, the three children, notwithstanding the absence of any limitation to their "heirs," were entitled as tenants in common in equal shares for equitable estates in customary fee simple.—*Re TRINGHAM'S TRUSTS, TRINGHAM v. GREENHILL*, [1904] 2 Ch. 487; 73 L. J. Ch. 693; 91 L. T. 370; 20 T. L. R. 657.

Annotations :—*Distd. Re Irwin, Irwin v. Parkes*, [1904] 2 Ch. 752. *Fold. Re Oliver's Settlement, Evered v. Leigh*, [1905] 1 Ch. 181. *Distd. Re Thursby's Settlement, Grant v. Littledale*, [1910] 2 Ch. 181. *N.F. Re Bostock's Settlement, Norrish v. Bostock*, [1921] 2 Ch. 469. *Reid. Re Monckton's Settlement, Monckton v. Monckton*, [1913] 2 Ch. 638.

1650. ————*Re OLIVER'S SETTLEMENT, EVERED v. LEIGH*, [1905] 1 Ch. 191; 74 L. J. Ch. 62; 53 W. R. 215; 21 T. L. R. 61.

Annotations :—*Reid. Re Thursby's Settlement, Grant v. Littledale*, [1910] 2 Ch. 181; *Re Bostock's Settlement, Norrish v. Bostock*, [1921] 2 Ch. 469. *Mentd. Re Beales' Settlement, Barrett v. Beales*, [1905] 1 Ch. 256; *Re Wright, Whitworth v. Wright*, [1906] 2 Ch. 288; *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1; *Re Macartney, Macfarlane v. Macartney*, [1918] 1 Ch. 300; *Re Ogilvie, Ogilvie v. Ogilvie*, [1918] 1 Ch. 492.

1651. ————*When words of limitation supplied.*—*An equitable estate of inheritance in real property cannot be passed by grant or assignment without proper words of limitation, & the intention of the grantor or assignor to pass it, even although manifest, is not sufficient, except in two cases : (1) where the grant or assignment is expressed to be for the same estate as that for which other*

from the warden & treasurer to ptf., were described therein as 180 acres of the east halves of two lots "commencing at the front east halves of lots, taking the full breadth of each half respectively, & running northwards so far as required, to make 90 acres of each east half"—*Held* : "northwards" might be rejected, being evidently a mistake for westward.—*FERGUSON v. FREEMAN* (1879), 27 Gr. 211.—*CAN.*

1639 iv. ————*To reject words having a definite signification, & treat them as insensible, would be manifestly to take such a liberty as neither law nor reason could justify, unless it be absolutely necessary to do so for the purpose of preventing the defeat of the object which the parties have clearly shown they had in view.*—*O'DONNELL v. RYAN* (1854), 4 I. C. L. R. 44, 56, 57.—*IR.*

1639 v. ————*If there are general words of the same kind, which, if applied to other general words, would render them insensible, & would avoid the grant of the things granted, these insensible words should not only not be so applied, but further, they should be rejected.*—*M'NEILL v. CROMMELIN* (1858), 8 I. C. L. R. 61, 68; 10 Ir. Jur. 297.—*IR.*

1. ————*Mere surplusage.*—*A policy of marine insurance provided that L. & Co., on account of owners, in case of loss to be paid to L. & Co., do cause to be insured, lost or not lost, the sum of \$2,000, on advances, upon the body, etc., of the L. The rest of the policy was applicable to insurances on the ship only. L. & Co. were managing owners who had expended considerable money in repairs on the vessel. In an action on the policy the insurers claimed that the insurance*

was on advances by the owners which were not insurable :—*Held* : the instrument must, if possible, be construed as valid & effectual, & to do so the words "on advances" might be treated as surplusage or as merely a reference to the inducement which led the owners to insure the ship.—*BRITISH AMERICA ASSURANCE CO. v. LAW & CO.* (1892), 21 S. C. R. 325.—*CAN.*

m. ————*Cases in which it was held that the irritant clause in a strict entail was not rendered nugatory by the use of a word which, though unhappily chosen, expressed nevertheless with sufficient distinctness the meaning required for validity. The irritant clause, after nullifying all contraventions, closed with these words : "suchlike as if the same had never been made"—Held : the entire passage quoted was not restrictive of what went before, but was rather emphatic, or at the worst amounted to no more than mere illustration or surplusage.*—*HOWDEN v. FLEMING* (1866), L. R. 1 Sc. & Div. 40.—*SCOT.*

PART III. SECT. 5, SUB-SECT. 2.—B.

1640 i. General rule.—*Where an indenture was drawn artificially, the ct. altered a word, & constituted the residue according to the necessary intention of the parties.*—*WEISMAN v. ROBERTSON* (1875), 1 V. L. R. 124.—*AUS.*

1640 ii. ————*To import into an instrument words which the parties themselves have not thought fit to use, would be manifestly to take such a liberty with it as neither law nor reason could justify, unless it be absolutely necessary to do so for the purpose of preventing the defeat of the object which the parties have clearly shown they had in view.*—*O'DONNELL*

v. RYAN (1854), 4 I. C. L. R. 44, 56, 57.—*IR.*

n. Name supplied.—Of covenantor.—*Where it is sufficiently clear from the instrument itself, & the acts of the parties, that debts were the parties covenanting with the ptf., & the instrument was intended so to operate, the omission of the names of the parties can be supplied.*—*COGHLIN v. TILBURY EAST SCHOOL TRUSTEES* (1874), 35 U. C. R. 575.—*CAN.*

1651 i. Words or clauses—When words of limitation supplied.—*A limitation, in a deed, of an equitable estate without words of limitation, may confer the equitable fee where the intention to do so appears from the deed.*—*Re CROSS'S TRUSTS, CROSS v. CROSS*, [1915] 1 I. R. 304.—*IR.*

1651 ii. ————*An estate was settled to A., B., & C., as tenants in common for life, with successive remainders to their issue male & female in tail, remainder "in case one or two of A., B., & C. should happen to die without issue of her or their bodies, then as to the share or shares of such one or two so dying without issue, to the use of all & every the daughter & daughters of such survivor or survivors, as tenants in common in tail"—Held : the word "survivors" might be construed "others," & the daughters of one of the tenants for life, who did not survive, were entitled under the limitation.*—*COLE v. SEWELL* (1843), 6 I. Eq. R. 66; 2 Con. & Law. 344; 4 Dr. & War. 1.—*IR.*

o. Ascertainment of goods previously described.—*A lease was made between three parties—ptf. of first part, one B. of second part, & deft. of third part. Ptf. leased to B. an hotel, with certain goods & chattels, & B. covenanted, among other things,*

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property has been granted or assigned, where this latter grant or assignment has been in terms absolute; & (2) where the grant or assignment is expressed to be for the whole estate which the grantor has in the property.—*Re IRWIN, IRWIN v. PARKES*, [1904] 2 Ch. 752; 73 L. J. Ch. 832; *sub nom. Re IRWIN'S SETTLEMENT*, 53 W. R. 200; 48 Sol. Jo. 640.

Annotations:—*Fold. Re Monckton's Settmt.*, *Monckton v. Monckton*, [1913] 2 Ch. 556. *Consd. Re Nutt's Settmt.*, *McLaughlin v. McLaughlin*, [1915] 2 Ch. 431. *Reid. Re Bostock's Settmt.*, *Norriah v. Bostock*, [1921] 2 Ch. 469.

1652. — — — — —.]—Words of limitation are unnecessary in disposing of the equitable interest either in personal property subject to a trust for conversion into land or in the prospective proceeds of sale of land which is under a trust for conversion into money. The conveyance can have regard to either the interest in the existing property or the interest in the property which is ultimately to represent the existing property after conversion; & if either the existing property or the ultimate property is of the nature of personality he can properly deal with the equitable interest in that property without using the word "heirs" or its equivalent "in fee simple."—*Re MONCKTON'S SETTLEMENT, MONCKTON v. MONCKTON*, [1913] 2 Ch. 636; 83 L. J. Ch. 34; 109 L. T. 624; 57 Sol. Jo. 836.

Annotations:—*Reid. Re Nutt's Settmt.*, *McLaughlin v. McLaughlin*, [1915] 2 Ch. 431; *Re Bostock's Settmt.*, *Norriah v. Bostock*, [1921] 2 Ch. 469; *Re Dickson's R.*, [1921], 90 L. J. Ch. 453.

1653. — — — — — Whether assigns supplied.]—F., a builder, bought one lot of an estate laid out for building, & covenanted with the vendors that "he, his heirs, executors, administrators, & assigns," would make certain payments & do certain acts in respect of the property purchased, & the covenant proceeded " & F. on erecting any building on the land shall only erect " buildings of a certain description:—*Held*: the restrictive covenant was only a personal covenant binding on F., & a purchaser from F.'s devisees could not object to the title on the ground that this covenant had not been disclosed.

When we look at the conveyance we find that it contains a covenant by F. that "he, his heirs, executors, administrators, & assigns," will do a number of acts, but when we come to the restrictions on building the words of limitation are omitted. It may be that in some conveyances those words though left out might be implied, but here the circumstances point to the opposite view (*LORD ESHER, M.R.*).—*Re FAWCETT & HOLMES'*

at the end of the lease to pay pltf. the difference between £550 & the value of such goods, which value should be ascertained by arbitration. Deft. covenanted with pltf. that B. should pay the difference between £550 & the value of such goods & chattels, etc., not adding "to be ascertained as aforesaid":—*Held*: these words were to be understood.—*HAYES v. ADDY* (1853), 3 C. P. 282.—CAN.

p. — — — — — Consideration.]—A. on Jan. 4, 1858, conveyed his real estate absolutely to defts. in consideration of 5s. This deed was not executed by defts., & was registered on Jan. 6. On Jan. 5, A. made an assignment for creditors generally, which deed was executed by defts. & other creditors of the assignor, but was not registered, & in the latter deed the trusts, on which the real estate was conveyed by the

former one, were fully declared. The conveyance being impeached on the ground of fraud:—*Held*: it was competent to those upholding it to show the existence of considerations other than the 5s. expressed, although the common words, " & for other considerations," were omitted.—*BANK OF TORONTO v. BOYLES* (1860), 10 C. P. 282.—CAN.

q. — — — — — Words of transfer.]—Where there was a contract for the sale of a reversion & the deed purported to relinquish & quit claim the property, with no other words of transfer:—*Held*: in order to remove any doubt the vendee was entitled to have proper technical words introduced.—*COLLYER v. SHAW* (1873), 19 Gr. 599.—CAN.

r. — — — — — So long as performance is legal.]—In 1911, deft. conveyed to G. land in a village together with a

CONTRACT (1889), 42 Ch. D. 150; 58 L. J. Ch. 763; 61 L. T. 105; 5 T. L. R. 515, C. A.
Annotation:—*Mentl. Jacobs v. Revell*, [1900] 2 Ch. 558.

1654. — — — — —.]—In certain cases the word "assigns," when not expressed, may be read into a document, but whether it is proper to do so depends on the context in each case.—*ANGLO-NEWFOUNDLAND DEVELOPMENT CO. v. NEWFOUNDLAND PINE & PULP CO.* (1913), 83 L. J. P. C. 50; 110 L. T. 82, P. C.

1655. — — — — — Memorial of annuity.]—Memorial of annuity sufficient notwithstanding the omission of the word "life" in the clause "Person for whose life the annuity is granted,"—*RIGHT v. LAKE (LORD)* (1835), 2 Bing. N. C. 74; 10 Modg. 190; 2 Scott, 126; 4 L. J. C. P. 263; 10 D. R. 28.

Annotation:—*Reid. Re Ethel & Mitcheells & Butlers' Contract*, [1901] 1 Ch. 945.

1656. — — — — — Appointment of funds—Provisions "hereinbefore declared"—Read as "hereinbefore recited to have been declared."—A father who had a power to appoint to his children & their issue born in his life, appointed £5,000 to his daughter O., who, on the next day, settled it on herself, her husband & her children generally. Afterwards, by a deed, stating the appointment of £5,000 to O., for her separate use, with power to appoint it, the father appointed another fund to O. " & her children," "upon the trusts & subject to the same provisions as are hereinbefore declared of & concerning the sum of £5,000 hereinbefore appointed unto & for the benefit of O., or as near thereto as circumstances will admit":—*Held*: O. took the second fund for her separate use, with power to appoint it, & the children took nothing.

Now it is no great strain or latitude of construction, instead of "hereinbefore declared" & "hereinbefore appointed" which, taken literally, have no meaning, to say "hereinbefore recited to have been declared" which would make the thing plain (*ROMILLY, M.R.*).—*HANBURY v. TYRELL* (1866), 21 Beav. 322; 52 E. R. 883.

— — — — — Bond.]—See BONDS, Vol. VII., p. 185, Ncr 235, 236.

1657. — — — — — Conveyance of property—Cross remainders cannot be implied.]—A. a grandfather after the marriage of his son B. who had t. children then living, by deed conveyed lands to trustees to the use of himself for life, remainder to B. for life; remainder to trustees, etc., remainder to the use of such child or children of B. & in such shares, etc. as B. should appoint, & in default of such appointment, "to the use of all & every the children of B. & the heirs of their several & respective bodies as tenants in common, but if only one such child, to the use of such only child & the heirs of his or her body"; remainder to the right heirs of A. in fee. Then A. conveyed the

right of way over a road. In the deed of conveyance deft. covenanted "to maintain the road & bridges thereon in as good condition as the same are now." In 1913, G. conveyed a portion of the land to pltf. The road having ceased to exist by reason of the encroachment of the waters of Lake E., this action was brought for a declaration that deft. was bound by his covenant to restore the road & for damages for breach of the covenant in not maintaining the road:—*Held*: the covenant must be read as though it contained the words "when & so long as the maintenance is legal."—*KERRIGAN v. HARRISON* (1930), 47 O. L. R. 548; 54 D. L. R. 258; 18 O. W. N. 363.—CAN.

s. — — — — — Warrant of attorney to enter up judgment—Whether joint & several.]—The words, "to enter up one or

reversion in fee to C. Afterwards B. had other children, & died without appointing:—*Held*: B.'s children took vested interests as tenants in tail, & on the death of each child without issue, his share fell into the reversion conveyed to C. Cross remainders cannot be implied in the construction of a deed.—*DOE d. TANNER v. DORVELL* (1794), 5 Term Rep. 518; 101 E. R. 291.

Annotations:—*Foll.* *Doe d. Foggett v. Worsley* (1801), 1 East, 416. *Reid. Watson v. Foxon* (1801), 2 East, 36; *Driver v. Frank* (1814), 3 M. & S. 25; *Doe d. Scott v. Roach* (1816), 5 M. & S. 482; *Doe d. Long v. Prigg* (1828), 8 B. & C. 281.

1658. ————*]*—Cross remainders cannot be implied in a deed; & can only be raised by proper words of limitation; however plainly expressed the intention of the parties may be. Under a limitation in a marriage settlement to the use of all & every the daughter & daughters of etc. to be begotten, share & share alike, equally to be divided between them & of the heirs of the body & bodies of all & every such daughter & daughters; & for default of such issue to the right heirs, etc.:—*Held*: there were no cross remainders between the daughters or their issue.—*DOE d. FOQUETT v. WORSLEY* (1801), 1 East, 416; 102 E. R. 161.

Annotations:—*Reid.* *Doe d. Littledale v. Smiddle* (1818), 2 B. & Ald. 126; *Doe d. Clift v. Birkhead* (1849), 4 Exch. 110.

1659. ————*"Successors" omitted.*—*JOHN BROTHERS ABERGARW BREWERY Co. v. HOLMES*, [1900] 1 Ch. 188; 69 L. J. Ch. 149; 81 L. T. 771; 64 J. P. 153; 44 W. R. 236; 44 Sol. Jo. 132.

Annotation:—*Mentl.* *Wilkes v. Spooner*, [1911] 2 K. B. 473.

1660. ————*"Simple" after "fee."*—Upon payment off by the mtgor. of a mtge. debt created in 1895, the property which had constituted the security for the debt was conveyed by the mtgees. unto the mtgor. "to hold the same unto & to the use of" the mtgor. "in fee freed & discharged" from the mtge. debt secured by, & all claims & demands under, the mtge. deed:—*Held*: to supply the word "simple" after "fee" from the obvious intention as appearing by other parts of the deed of reconveyance would not be a compliance with the terms of the Conveyancing & Law of Property Act, 1881 (c. 41); & in the absence of the words "& his heirs," as words of limitation in the *habendum*, the deed could not operate to pass the legal estate in fee-simple, & therefore only a legal estate for life passed under the deed to the mtgor., having the legal estate in remainder outstanding in the mtgees.—*Re ETHEL & MITCHELLS & BUTLERS' CONTRACT*, [1901] 1 Ch. 945; 70 L. J. Ch. 498; 84 L. T. 459; 17 L. T. R. 392.

1661. ————*Marriage settlement—Words to save*

more judgment or judgments," in a warrant to enter judgment against two, sufficient to enter up a separate judgment against one.—*MAXWELL v. JOHNSON* (1832), Glascock, 216.—*IR.*

t.—*Expressed in some covenants but omitted in others—Whether supplied.*—*Held*: the full covenant for quiet enjoyment & freedom from incumbrances, contained in a deed for the ordinary statutory conveyance of land, was not controlled by the restrictive words preceding the earlier covenants.

—*WALLBRIDGE v. EVERITT* (1871), 22 C. P. 28.—*CAN.*

a. ————*]*—A lease contained two distinct covenants, with distinct penalties. One of the covenants was, that the lessee should not build any house on the ground at the rear of the premises demised, whereby the value of the premises would be deteriorated, or whereby such buildings might be considered a nuisance. The other covenant was not to open any

road or passage whereby the same might be made a public thoroughfare. In covenant on this lease, *pltf.* assigned as a breach that *deflt.* built certain houses upon the ground in the rear of premises, & did then & there open a certain public thoroughfare, whereby the demised premises are considerably deteriorated or lessened in value:—*Held*: this was not a breach of any covenant in the lease, & was therefore *bad*.—*RYAN v. M'MASTER* (1843), 6 I. L. R. 195.—*IR.*

b. ————*General words construed distributively—Unless not applicable.*—Where there are general words of description following an enumeration of particular things, such general words are to be construed distributively, *reddendo singula singulis*; & if the general words will apply to some things & not to others, the general words are to be applied to those things to which they will, & not to those to which they will not apply.—*M'NEILL*

interests of children.]—Articles construed against the words for the sake of the intent. As where the wife's portion was to be laid out in land, to be settled on husband & wife, & the heirs of their bodies; & if not laid in land during their joint lives, & the wife should die first, that the money should go to the wife's brother & sister; wife dies first, leaving issue, & the money is not laid out in a purchase, yet the issue, & not the wife's brother & sister, shall have it; equity supplying the words, "if the wife die without issue."—*KENTISH v. NEWMAN* (1713), 1 P. Wms. 284; 24 E. R. 368.

Annotations:—*Reid.* *Targus v. Puget* (1751), 2 Ves. Sen. 194; *Lloyd v. Lloyd* (1837), 2 My. & Cr. 192; *Abbott v. Middleton, Ricketts v. Carpenter* (1858), 7 H. L. Cas. 69.

1662. ————*]*—Trust money in marriage articles in power of the ct., & construed against the words for sake of the intent, by supplying the words, if wife should die without issue.—*TARGUS v. PUGET* (1751), 2 Ves. Sen. 194; 28 E. R. 126.

Annotation:—*Reid.* *Abbott v. Middleton, Ricketts v. Carpenter* (1858), 7 H. L. Cas. 68.

1663. ————*Words to save interest of wife.*—A marriage settlement omitted, in an event which happened, to declare a life interest in the settled fund for the intended wife. The ct., being of opinion that the settlor did not intend to reserve any portion of the fund for himself, declared the wife to be entitled by implication to a life interest in the settled property.—*ALLIN v. CRAWSHAY* (1851), 9 Hare, 382; 21 L. J. Ch. 873; 68 E. R. 555.

Annotations:—*Reid.* *Re Thursby's Settltmt.*, *Grant v. Littledale*, [1910] 2 Ch. 181; *Re Stanley's Settltmt.*, *Maddocks v. Andrews*, [1916] 2 Ch. 50.

1664. ————*Warrant of attorney to enter up judgment—Executors & administrators not mentioned.*—If a warrant of attorney authorises a person to enter up judgment without mentioning his exors. & administrators, the ct. will not allow his exor. to enter it up, although the defeasance states that on non-payment of a certain sum, the person, his exors. & administrators may enter it up. An authority of this nature must be strictly pursued & we cannot supply any supposed omission of the parties (*WILLIAMS, J.*).—*FOSTER v. CLAGGET* (1838), 1 Will. Woll. & H. 182; 2 Jur. 442.

C. Transposition.

1665. *Marriage settlement—Term to secure position—Subsequent to limitation in tail.*—*UVEDALE v. HALFPENNY* (1723), 2 P. Wms. 161; 24 E. R. 677.

Annotations:—*Reid.* *Heneage v. Hunloke* (1742), 2 Atk.

v. CROMMELIN (1858), 8 I. C. L. R. 61, 68; 10 Ir. Jur. 297.—*IR.*

c. ————*Not supplied when language clear.*—Where a contract was in writing & the language clear, the word "daily" could not be read into the language of the contract by any forced construction, so as to enlarge the obligation of the Crown, & the words "approximately 20,000 men" could not be read "approximately 20,000 men daily."—*R. v. ROY* (1919), 19 Exch. C. R. 365.—*CAN.*

PART III. SECT. 5, SUB-SECT. 2.—C.

d. General rule.—To transpose words so as to alter the meaning of a legal instrument would be manifestly to take such a liberty with it as neither law nor reason would justify, unless it be absolutely necessary to do so for the purpose of preventing the defeat of the object which the parties have clearly shown they had in view.—

Sect. 5.—Correction of errors by intrinsic evidence:
Sub-sect. 2, C.; sub-sects. 3 & 4.]

456; *Brown v. Jones* (1744), 1 Atk. 188; *Worsley v. Grenville* (1751), 2 Ves. Sen. 331; *Mentd. Mansell v. Mansell* (1757), Wilm. 36; *Rogers v. Earl* (1757), Dick. 295.

1666. Recovery—Transposition of names.]—Recovery amended by transporting the christian name of the demandant.—*SHEPHERD v. JAMES* (1812), 4 Taunt. 226; 128 E. R. 315.

1667. ———.]—Recovery amended by transporting the names of demandant & tenant.—*HAMILTON v. FARRER* (1831), 8 Bing. 10; 1 Moo. & S. 43; 1 L. J. C. P. 5; 131 E. R. 303.

Bonds.]—See BONDS, Vol. VII., p. 184, Nos. 225, 226.

SUB-SECT. 3.—REFERENCE TO COLLATERAL DOCUMENTS & COUNTER PARTS.

1668. Collateral documents—Second bond securing same debt as first.]—A. having been indebted to the estate of B. in a sum of money, but from which he had been discharged under a commission of bkpt., voluntarily executed to C., the widow of B., a bond for the payment of part of such debt, for the use of herself & children, but at her disposal. Two years afterwards A. executed to C. another bond for the payment of the remainder of such debt, for the use & benefit of herself & children only, in what proportions among the latter she may think proper to direct, but for no other use, purpose or intent whatsoever. Though generally

speaking, an instrument must be construed by the provisions contained in it, & not by anything dehors, yet, under the circumstances of this case:—*Held*: the ct. might call the language of the second bond into aid in construing the effect of the first.—*FOWLER v. HUNTER* (1829), 3 Y. & J. 506; 148 E. R. 1279, Ex. Ch. in Eq.

1669. ———.]—Lease—Instrument containing power to lease.]—*SMITH v. DOE d. JERSEY*, No. 724, ante.

1670. ———.]—Original draft.]—Where the landlord's copy of an agreement contained a clause which was not in the tenant's copy, the original draft signed agreement was looked at to ascertain the contract between the parties.—*INGLEBY v. SLACK* (1890), 6 T. L. R. 284.

1671. Counterparts — Lease.]—The rule that where there is a discrepancy between the *habendum* & the *reddendum* in a lease the *habendum* is to prevail does not apply to cases where it appears upon the face of the deed that the *habendum* is wrong. & the rule that where there is a discrepancy between the lease & the counterpart the lease is to prevail does not apply when the mistake is clearly in the lease.—*BURCHELL v. CLARK* (1876), 2 C. P. D. 88; 46 L. J. Q. B. 115; 35 L. T. 690; 42 J. P. 132; 25 W. R. 334, C. A.

Annotations:—*Apld. Matthews v. Smallwood*, [1910] 1 Ch. 777. *Reid. Ingleby v. Slack* (1890), 6 T. L. R. 284.

1672. ———.]—A patent ambiguity in a lease may be explained by a reference to the counterpart.—*MATTHEWS v. SMALLWOOD*, [1910] 1 Ch. 777; 79 L. J. Ch. 322; 102 L. T. 228.

Annotations:—*Mentd. Hurd v. Whaley*, [1918] 1 K. B. 448; *Davenport v. Smith*, [1921] 2 Ch. 270; *Atkin v. Rose*, [1923] 1 Ch. 522; *Fuller's Theatre & Vaudeville Co. v. Rofe*, [1923] A. C. 435.

O'DONNELL v. RYAN (1854), 4 I. C. L. R. 44.—IR.

e. ———.]—Deeds are to be read in their grammatical & ordinary sense, & the ct. should not transpose the words of a clause, unless it is absurd, or repugnant to, or inconsistent with the rest of the deed.—*CLEMENTS v. HENRY* (1859), 10 I. Ch. R. 79.—IR.

f. Second habendum transposed to be read first.]—By a patent from the Crown, after a recital of one J. L. having contracted for the purchase of certain land from the Crown lands department at a price specified, the land, in consideration of the payment of said sum by J. L., was granted "to the said J. L. upon the conditions below stated," etc.: "To have & to hold to the said J. L. for the use & benefit of herself & children, Margaret, Robert & Mary, their heirs & assigns for ever. & also to have & to hold the said parcel or tract of land heroby granted," etc., "unto the said J. L. upon the conditions above stated, her heirs & assigns for ever"—*Held*: in order to carry out the intent of the Crown the second habendum must be transposed, & read as the first & thereby a fee simple under the Statute of Uses was created in J. L., & her three children named, as the grantees of the first use declared.—*LONG v. ANDERSON* (1880), 30 C. P. 516.—CAN.

PART III. SECT. 5, SUB-SECT. 3.

g. Collateral documents—Mortgage—Separate deed of covenant.]—A mtge. of a brewery of an hotel held upon a lease contained a covenant by the mtgor. that during the continuance of the lease he would deal exclusively with the mtgee. At the same time as this mtge. was executed the mtgor. executed a separate deed of covenant to the same effect.—*Held*: in deed of covenant & the mtge. were both parts of one transaction & were to be read as if in the same deed.—*PARTII*

BREWERY Co. v. SIMS (1903), 3 W. A. L. R. 24.—AUS.

h. ———.]—Special agreement excluding covenant in conveyance.]—Pltf. declared on covenants for seisin & quiet enjoyment in a conveyance of land, alleging as a breach the prospective claim for dower of def.'s wife. Def. by his plea set up a special agreement with pltf., by which the claim for dower was excluded from the operation of the covenants, & provided for by a certain bond. *Qv.*: whether, taking the bond & award together as one instrument, the covenant might not be read as containing an exception of the claim for dower.—*THORNHILL v. JONES* (1854), 12 U. C. R. 231.—CAN.

k. ———.]—Preliminary contract explaining term in final agreement.]—A bond containing the agreement between the parties, in pursuance of which the conveyance appeared to have been made, defined "high-water mark" to be "where the water has already or may hereafter be flowed for mill conveniences or other machinery"—*Held*: the language of the deed was explained by the bond & high-water mark was the line to which the water was flowed for the purposes therein mentioned.—*GRAHAME v. BROWN* (1862), 12 C. P. 418.—CAN.

l. ———.]—Trust deed—Will.]—A trustee having executed, on the same date with his trust deed, a will disposing of the rest of his property.—*Held*: the terms of the will might be looked at in order to explain the trust-deed.—*CAMPBELL v. CAMPBELL OF Melfort's TRUSTEES* (1866), 5 Macph. (Ct. of Sess.) 206; 39 So. Jur. 96.—SCOT.

m. Counterparts — Conveyance.]—The question was whether there was the offer of one performance for another, & whether the continuous performance of services on the one side was the presupposition of the continuous existence of a gift on the other, or whether there was a mere

gift with the charge upon it, the primary intent being to give.—*Held*: this was a question of construction, & taking the agreement & counterpart together, there was clearly a covenant for the hereditary performance of the services.—*KACHUR SURRAYA v. BENGAL SANTAPPAYIA* (1872), 7 Mad. 167.—IND.

n. ———.]—Though provisions for payment by instalments & of the whole amount in default of instalments were contained in a counter-deed signed only by the transferee of the land.—*Held*: they were equivalent to a covenant by the transferor so to repay, because the two documents being parts of one transaction, both parties were bound by or could take advantage of every stipulation.—*RAMAYYA v. KRISHNAMMA* (1899), 1 L. R. 23 Mad. 114.—IND.

o. Marginal note.]—By referring to the mtge. in the receipt in the margin of a mtge. deed deft. had made the receipt part of the mtge., & it clearly showed him to be the mtgr., & that possession of the deed by pltf. delivered to him by deft. & the acknowledgment in the receipt showed pltf. to be the mtgee.—*MCDONALD v. CLARKE* (1870), 30 U. C. R. 307.—CAN.

p. ———.]—Upon a proper construction of a contract pltf. were to be discharged from liability if prevented from performance by any of the causes specified in a marginal note to their letter of acceptance.—*ALGOA MILLING CO., LTD. v. ARKELL & DOUGLAS*, [1918] App. D. 145.—S. AF.

q. Prior deed of similar nature.]—A party who was served heir of line to the grantor of an entail & trust-deed, was not prevented from reducing them by the existence of a prior entail & trust-deed, under which he was called as an heir of entail, but excluded from possessing during his life.—*DUFF v. FIFE'S (EARL) TRUSTEES* (1823), 1 Sh. Sc. App. 498.—SCOT.

SUB-SECT. 4.—DOCUMENTS PARTLY PRINTED AND PARTLY WRITTEN.

1873. Written words prevail.—In case of inconsistency.—Policy of assurance.]—ROBERTSON v. FRENCH, No. 626, ante.

1874. ———.]—The ordinary & general rule in the case of a policy of insurance of course is, that we must take the policy as we find it; it is in a printed form, with written parts introduced into it, & we are to take the whole together, both the written & the printed parts. And although it has been said that we ought to bestow no more attention on the written parts than on those printed parts which are alike in the common form of policies of insurance, there is no doubt that we do, & ought to make a difference between them. The part which is actually & specially inserted in a printed instrument is naturally more in harmony with what the parties are intending than the other parts although it must not be used so as to reject the residue (BLACKBURN, J.).—JOYCE v. REALM INSURANCE CO. (1872), L. R. 7 Q. B. 580; 41 L. J. Q. B. 350; 27 L. T. 144; 1 Asp. M. L. C. 390.

1875. ———.]—A policy of reinsurance was in the form of an ordinary Lloyd's policy, containing in print the usual undertaking by the assurers to contribute to suing & labouring charges. It also contained in writing the following clauses: "Being a reinsurance subject to the same clauses & conditions as the original policy & to pay as may be paid thereon"; & "No claim to attach to this policy for salvage charges."

"If I am right in supposing as I do that "salvage charge" is an equivalent for suing & labouring expenses, then the printed clause & written clause are inconsistent & the latter must prevail (BIGHAM, J.).—WESTERN ASSURANCE CO. OF TORONTO v. POOLE, [1903] 1 K. B. 376; 72 L. J. K. B. 195; 88 L. T. 362; 9 Asp. M. L. C. 390; 8 Com. Cas. 108.

Annotations:—Mentd. Crouan v. Stanier, [1904] 1 K. B. 87; Street v. Royal Exchange Assce. (1914), 111 L. T. 235; British Dominions General Insce. v. Duder, [1915] 2 K. B. 394.

See, generally, INSURANCE.

1876. ——— Bill of lading.]—GLYNN v. MARGETSON & Co., No. 1607, ante.

1877. ——— Charterparty.]—Defts. chartered a vessel from plffs. to convey a cargo of coal to Spezia. The charter provided in a printed

clause that in case of strikes, lock-outs, civil commotion, or any other causes beyond the control of the consignees which should delay discharging such time should not count in the unloading. The charter also contained a written clause whereby the charterers guaranteed, notwithstanding congestion caused by the European war, to pay demurrage if a certain number of tons were not discharged per day. The unloading was delayed by congestion owing to the war, & the owners brought an action against the charterers for demurrage:—*Held*: the written clause overruled the printed clause, & even if it did not the rule of *ejusdem generis* prevented the "other causes" mentioned in the printed clause from including delay caused by too much business.—**HADJIPATERAS v. WEIGALL (S.) & Co. (1918), 34 T. L. R. 360.**

1878. Effect given to both provisos.—Where consistent reading possible.]—Defts. were charterers of a steamship engaged in the Mediterranean trade, & had ship's agents or consignees at the ports of call. It is the custom for a ship's agent or consignee to sign bills of lading instead of the master, & no difference is recognised in trade usage between the efficacy of his signature & that of the master. Defts.' agents at Genoa signed a bill of lading for manganese, shipped in bulk & not weighed at the time of shipment, which described the manganese as of a certain weight, but contained in print the words, "weight, contents, & value unknown." Pltf. was assignee for full value of this bill, & the whole of the manganese shipped was, on the arrival of the ship, delivered to him, but was found to be short of the weight stated in the bill. In an action brought by him to recover damages for non-delivery of the full weight:—*Held*: (1) the printed words controlled the statement of weight; (2) defts. were not bound by the signature of their agents to a bill of lading for a greater quantity than was actually shipped.—JESSEL v. BATH (1867), L. R. 2 Exch. 267; 36 L. J. Ex. 149; 15 W. R. 1041.****

Annotations:—As to (1) *Held*, Lebeau v. General Steam Navigation Co. (1872), L. R. 8 C. P. 88; Hogarth Shipping Co. v. Blyth, Greene, Jourdain, [1917] 2 K. B. 534; New Chinese Antimony Co. v. Ocean S.S. Co., [1917] 2 K. B. 564. As to (2) *Consd.* Hogarth Shipping Co. v. Blyth, Greene, Jourdain, [1917] 2 K. B. 534. *Reid*. Brown v. Powell Duffryn Steam Coal Co. (1875), L. R. 10 C. P. 562; Thorman v. Burt, Boulton (1886), 59 L. T. 349. *Generally*, *Mentd.* The Ida (1873), 29 L. T. 623, n.; Parsons v. New Zealand Shipping Co., [1900] 1 Q. B. 714.

See, generally, SHIPPING & NAVIGATION.

PART III. SECT. 5, SUB-SECT. 4.

1873 i. Written words prevail.—In case of inconsistency.]—In construing a contract containing terms, some of which are in writing & others printed in a common form, if there is any doubt as to the meaning of the whole, greater weight should be given to the written portion, inasmuch as it embodies the language & terms selected by the parties themselves as best suited to express their meaning.—RYAN v. FERGUSON (1909), 8 C. L. R. 731.—AUS.****

1873 ii. ———.]—SUTTON v. CARY (1916), 16 S. R. N. S. W. 254.—AUS.

1873 iii. ———.]—Pltf. brought action to recover possession of leasehold premises for breach of covenant to pay taxes. The lease was in the short form & contained in the printed form a covenant "to pay taxes." There was also a later covenant in writing "to pay taxes on any building that he, the lessee, may hereafter see fit to erect." The trial judge found that the first covenant, in print, had been retained in the lease by mistake:—*Held*: the lease should be rectified by striking out the printed words "& to pay taxes."—BOOTH v. CALLOW (1913), 18 B. C. R. 499.—CAN.****

1873 iv. ———.]—Where a contract is partly printed & partly written, & there is a conflict between the printed & written part, the written part must be taken to control the printed part.—CARLISLE v. NUTTMAN, NOWLUCKEE (1864), 2 Hyde, 242.—IND.****

1873 v. ———.]—HALLY v. MCDUFF, [1922] N. Z. L. R. 1180.—N.Z.

1873 vi. ——— Policy of assurance.]—A condition clause written across the face of a marine policy of insurance must prevail over the printed parts of the policy which are at variance with it.—MEAGHER v. HOME INSURANCE CO. (1861), 11 C. P. 328.—CAN.****

1873 vii. ———.]—The blank in the body of a printed form of a marine policy of insurance was filled up with the words, in writing, "on colonial produce as per bill of lading. Warranted free from average unless general." In the conditions in the printed memorandum following, certain provisions were made about wool & cotton, & then the following printed words occurred: "& all other goods or merchandise, except live-stock, are warranted free from average

unless general or the ship be wrecked";—*Held*: the written & printed matter could not be taken as cumulative, but must be treated as so discrepant that the written matter must prevail, as expressing the immediate intention of the contracting parties, & therefore that the assured could not recover for a partial loss on the wreck of the ship.—**BELCHER v. SOUTHERN INSURANCE CO., LTD. (1872), 2 C. A. 59.—N.Z.**

r. Blank left in printed form.—Presumption of intention not to take effect.]—Where a printed form of agreement contains a space which it is necessary to fill up in order to make an effective contract, & where the parties intentionally leave this space a blank, they must be taken as meaning that the clause is not to take effect.—CANADIAN PORT HURON CO. v. FAIRCHILD (1910), 3 Sask. L. R. 228.—CAN.****

s. Printed words in margin.—Form part of contract.]—A contract partly written & partly printed, on a form usually employed by defts., contained printed words in the margin:—*Held*: these words formed part of the contract.—DICKINSON & FISHER v. ARNDT & COHN (1909), 30 N. L. R. 172.—S. AF.****

Sect. 5.—Correction of errors by intrinsic evidence:
Sub-sect. 5. Sects. 6 & 7: Sub-sect. 1, A. (a).]

SUB-SECT. 5.—MISTAKE.

See MISTAKE.

SECT. 6.—DATE.

Deed speaks from date of delivery.]—See Part I., Sect. 7, ante.

Whether date essential—Part of deed.]—See Part I., Sect. 4, sub-sect. 4.

1679. Whether date on document *prima facie* true date.]—ANON. (1609), 2 Brownl. 300; 123 E. R. 954.

1680. —.]—In an action by drawer against acceptor of a bill of exchange for £101, deft. proved that he was under age when he accepted the bill. Pltf. then produced in deft.'s handwriting, purporting by its date to have been written after he came of age, addressed to a third person, in these words: "I request you to pay H.," pltf., "£101 at your earliest convenience after the date of this letter, from the money left me by my late grandfather, for which I have given my bill." This letter was proved to have been delivered to pltf.'s clerk, but it did not appear when:—Held:** the letter must, *prima facie*, be taken to have been written & issued at the time when it bore date; & that, having been written after deft. came of age, & before the bill became due, it would support a count on a promise to pay according to the tenor & effect of the bill.—**HUNT v. MASSEY** (1834); 5 B. & Ad. 902; 3 Nev. & M. K. B. 109; 110 E. R. 1025.**

Annotations:—**Raid.** *Anderson v. Weston* (1840), 6 Bing. N. C. 296. **Mentd.** *Owen v. Waters* (1836), 2 Gale, 208.

1681. —.]—In ejectment by mtgee. against assignee of the mtge.:—Held:** a letter from mtgor. to mtgee. dated previously to the assignment was evidence against deft., & would be presumed to have been written at the time of its date, until the contrary was shown.—**GOODTITLE d. BAKER v. MILBURN** (1837), 2 M. & W. 853; **Murp. & H.** 207; 6 L. J. Ex. 209; 150 E. R. 1004.**

Annotation:—**Mentd.** *Williams v. Eyton* (1858), 27 L. J. Ex. 176.

1682. —.]—A written paper containing a statement of mutual accounts between a creditor & a bkpt. by whom it was signed & bearing date previous to the bkpcy. is *prima facie* evidence as against the assignees, in an action brought by them against the creditor, that it was written at the time it bore date.—SINCLAIR v. BAGGALEY** (1838), 4 M. & W. 312; 1 Horn & H. 194; 7 L. J. Ex. 305; 2 Jur. 683; 150 E. R. 1448.**

Annotations:—**Foll.** *Anderson v. Weston* (1840), 6 Bing. N. C. 296; *Potez v. Glossop* (1848), 2 Exch. 191; *Angell v. Worley* (1849), 12 L. T. O. S. 428. **Raid.** *Gibson v. King* (1842), Car. & M. 458. **Mentd.** *Doe d. Clarke v. Stillwell* (1838), 8 Ad. & El. 645.

1683. —.]—In the absence of evidence to the contrary a bill of exchange must be taken to have

been issued at the time it bears date.—**ANDERSON v. WESTON** (1840), 6 Bing. N. C. 296; 8 Scott, 588; 9 L. J. C. P. 194; 4 Jur. 105; 133 E. R. 117.

Annotations:—**Consd.** *Foll.* *Potez v. Glossop* (1848), 2 Exch. 191. **Foll.** *Angell v. Worley* (1849), 12 L. T. O. S. 428. **Consd.** *Morgan v. Whitmore* (1851), 6 Exch. 716; *Butler v. Mountgarret* (1859), 7 H. L. Cas. 633. **Raid.** *Davies v. Lowndes* (1843), 6 Man. & G. 471; *Roberts v. Bethell* (1852), 22 L. J. C. P. 69.

1684. —.]—The date a letter bears is *prima facie* its true date.—POTEZ v. GLOSSOP** (1848), 2 Exch. 191; 154 E. R. 460.**

Annotations:—**Foll.** *Angell v. Worley* (1849), 12 L. T. O. S. 428; *Malpas v. Clements* (1850), 19 L. J. Q. B. 435. **Consd.** *Morgan v. Whitmore* (1851), 6 Exch. 716; *Butler v. Mountgarret* (1859), 7 H. L. Cas. 633.

1685. —.]—The date which appears on the face of a document is *prima facie* its true date.—MALPAS v. CLEMENTS** (1850), 19 L. J. Q. B. 435; 15 L. T. O. S. 343.**

Annotation:—**Foll.** *Morgan v. Whitmore* (1851), 6 Exch. 716.

1686. —.]—Certain documents purporting to be a receipt of & a delivery order for the goods, in the handwriting of the bkpt., & dated as of the day of the sale, were delivered to a witness by the bkpt. after his bkpcy., & about a month after the alleged sale. There was no evidence, independent of the documents themselves that they existed before the bkpcy.:—Held:** the documents were admissible as evidence of their existence at the time they bore date.**

It is to be presumed that *prima facie* a document is written at the time it bears date (**MARTIN, B.**).—**MORGAN v. WHITMORE** (1851), 6 Exch. 716; 20 L. J. Ex. 289; 155 E. R. 733.

1687. —.]—*Qu.*: whether the date a letter bears is *prima facie* its true date.—BUTLER v. MOUNTGARRETT** (1859), 7 H. L. Cas. 633; 11 E. R. 252.**

Annotation:—**Mentd.** *R. v. Fanning* (1866), 10 Cox, C. C. 411.

1688. Dominical year—Relation to year of reign.]—If certain figures are put after the day of a particular month which can be supposed to refer to the year of Christ, it shall be intended that it does refer to it. The cts. will take notice of the correspondence between the Dominical year & the year of any King's reign. Therefore a deed which really is dated according to the Dominical year only may be represented to bear date in the year of the reign of the King with which that Dominical year corresponds.—HOLMAN v. BURROW** (1702), 2 Ld. Raym. 791, 794; 2 Salk. 658; 92 E. R. 28, 30.**

Annotation:—**Mentd.** *Waugh v. Bussell* (1814), 1 Marsh. 214.

1689. Date referred to in body of deed—Whether day of date or of delivery.]—Where a deed has no date, or an impossible date, as Feb. 30, & in the deed reference is made to the date, that word must be construed delivery, but if it has a sensible date, the word date occurring in other parts of the deeds, means the day of the date & not of the delivery.—STYLES v. WARDLE** (1825), 4 B. & C. 908; 7 Dow.**

PART III. SECT. 6.

1679 i. Date on document *prima facie* true date.]—Deft. distrained, on Mar. 25, for a quarter's rent due by pltf., who brought an action of replevin, & put in evidence a deed from deft. to W., conveying away the reversion, dated Mar. 1. The grantee in the deed, called by pltf., proved that the deed was not delivered for some days, perhaps a fortnight or a month, after the date it bore, & deft. said she did not know on what date she signed the deed, that it was some weeks after Mar. 1; that the grantee had not on Mar. 25 got possession, & pltf. was still her tenant:—Held:** the pre-**

sumption arising from the date of the deed had been rebutted, & it was the duty of pltf. to establish the fact of the delivery of the deed before the date of the distress.—**MEAGHER v. COLEMAN** (1880), 1 R. & G. 271.—**CAN.**

i. — Whether extrinsic evidence admissible.]—A new trial was granted in ejectment with costs to abide the event, where there was reason to doubt upon the evidence whether the deed under which pltf. claimed was not executed after the issuing of the writ.—BARTLE v. BENSON** (1861), 21 U. C. R. 143.—**CAN.****

a. — — —.]—The party founding

on a document is bound to support or adminiculate its date, which he may do by facts & circumstances of an indirect nature, & the deed itself & the date expressed in it, are not to be thrown out of consideration.—**WADDELL v. WADDELL'S TRUSTEES** (1845), 7 Dunt (Ct. of Sess.) 605, 1017; 17 Sc. Jur 542.—**SCOT.**

b. Extrinsic evidence as to date—Whether admissible.]—In a suit to recover possession of immovable property under a grant from the Raja of P. on the ground that the grant was prior in time to the grant from the same grantor under which defts. professed to hold, it was found that pltf.

Ry. K. B. 507; 107 E. R. 1297; *sub nom.* VARDEN v. STYLES, 4 L. J. O. S. K. B. 81.

Annotation.—*Reid*. Buckridge v. Flight (1826), 5 L. J. O. S. K. B. 21.

1690. Deed made in leap year—Meaning of next 9th February.]—An indenture having been made on Aug. 29, 1882, being leap year, the words Feb. 29 then next ensuing were construed to mean Feb. 29 in the next leap year.—CHAPMAN v. BEECHAM (1842), 3 Q. B. 723; 3 Gal. & Dav. 71; 2 L. J. Q. B. 42; 6 Jur. 968; 114 E. R. 683. *Annotations*.—*Mentd.* Pollitt v. Forrest (1847), 11 Q. B. 949; Brown v. Metropolitan Counties, etc., Soc. (1859), 1 E. & E. 832.

1691. Computation of time—Whether day of execution included.]—A lease *habendum*, from henceforth, includes the day of the making; & a lease *habendum* from the day of the date excludes the day of the date.—CORNISH v. CAWSY (1648), 1 Jeyn, 75; Sty. 118; 82 E. R. 923.

Annotation.—*Reid*. Pugh v. Leeds (1777), 2 Cowp. 714.

1692. ——— *Habendum* "from henceforth."—MERCER v. OGILVIE (1796), cited in 15 Ves. at 254; 33 E. R. 751, H. L.

Annotation.—*Reid*. Lester v. Garland (1808), 15 Ves. 248.

1693. ——— Whether day of date included.]—CORNISH v. CAWSY, No. 1691, *ante*.

1694. ———.]—By a settlement dated May 13, 1892, real estate was conveyed to two trustees on trust that during a term of 21 years from the date of the settlement they or the survivor of them or other the trustees or trustee for the time being thereafter referred to as "the said trustees or trustee," should make certain payments, that "at the expiration of the said term of 21 years" "the said trustees or trustee" should sell the property:—*Held*: the term of 21 years determined & the trust for sale arose, at the same identical moment; on the construction of the deed the day of the date was included in the term; & the trust for sale was therefore valid & effectual.—ENGLISH v. CLIFF, [1914] 2 Ch. 376; 83 L. J. Ch. 50; 111 L. T. 751; 30 T. L. R. 599; 58 Sol. Jo. 87.

1695. ——— *Habendum* from day of date.]—CORNISH v. CAWSY, No. 1691, *ante*.

1696. Vesting of interest—Delivery after date expressed—Reference back to date.]—Under a power to demise for 21 years in possession, & not in reversion, a lease dated in fact on Feb. 17, 1802, *abundum* from Mar. 25 next ensuing the date hereof, is good if not executed & delivered till after Mar. 25, for it then takes effect as a lease in possession with reference back to the date actually expressed.—DOE d. COX v. DAY (1809), 10 East, 27; 103 E. R. 838.

1697. Extrinsic evidence as to date—Whether admissible—To prove execution subsequent to date fixed.]—HOWARD'S CASE (1588), Owen, 138; 74 R. 958.

Annotation.—*Reid*. Garrick v. Williams (1811), 3 Taunt. 540.

It was dated "25th Falcoun in the year 16."—*Held*: the meaning of the words "in the year 16" might, for the purpose of showing it to be a document more than 30 years old, be shown by reference to another grant made by the same officer, from which appeared that the "year 37" meant the 37th year of the Raja of P., & that corresponded with 1186 B.S.—JUTABLE COAL CO., LTD. v. GONESH BUNDER BANERJEE (1881), 9 C. L. R. 6.—*IND*.

e. 37, *abundum* from May 1 then next:—*Sensd*: evidence was admissible for the purpose of showing that the lease was executed on May 1, though the tenant had stated, in

his answer in a suit in chancery brought to impeach the lease, that it had been "executed" on Mar. 27.—JACK d. WHEATLEY v. CREED (1828), 2 Hud. & B. 128.—*IR*.

d. ———.]—The memorial of a deed lodged in the Registry Office omitted to state the day of the month when the deed was dated. As there was evidence outside the deed itself, that the day of the month had been inserted in it when it was executed:—*Held*: it could not be presumed that the deed corresponded with the statement of it in the memorial, & had no date, when they were produced to the Registrar.—*Re* MONSMILL (1856), 5 I. Ch. R. 539.—*IR*.

e. ———.]—Save in certain

1698. ———.]—CAMPBELL v. LEACH (1775), Amb. 740; 27 E. R. 478, L. C.

Annotations.—*Mentd.* Medwin v. Sandham (1789), 3 Swan. App. 685; *Re* Smyth, *Ex p.* Smyth (1818), 1 Swan. 337; Morgan v. Millman (1852), 10 Hare, 279; Daly v. Beckett (1857), 24 Beav. 114; Clegg v. Rowland (1866), L. R. 2 Eq. 160.

1699. ———.]—The question, on a plea of insolvency, being, whether the debt was contracted before the final order, a deed given at the time by way of security being dated before the order, parol evidence on part of plff. to explain this, & to show that the real date of the transaction was later, was admitted, he not being a party to the deed, although drawn & attested by his agent in the business.—EDWARDS v. PHILIPS (1860), 2 F. & F. 102, N. P.

1700. ——— To show that date incorrect.]—GARRICK v. WILLIAMS (1811), 3 Taunt. 540; 128 E. R. 214.

Annotations.—*Consd.* R. v. Hopper (1817), 3 Price, 495. *Mentd.* De Ponthieu v. Pennyfeather (1814), 5 Taunt. 634.

1701. ——— To supply missing date.]—The day upon which an acknowledgment was taken, which was left blank, permitted to be supplied by affidavit.—LANE v. FEWTRISS (1812), 4 Taunt. 589; 128 E. R. 461.

1702. ———.]—DAVIS v. JONES, No. 1456, *ante*.

1703. ——— Acknowledgment of debt.]—Where a letter acknowledging the existence of a debt, which was produced for the purpose of taking the case out of Stat. Limitations, did not contain any date:—*Held*: the time when the letter was written might be supplied by parol evidence.—EDMUNDS v. DOWNES (1834), 1 Cr. & M. 459; 4 Tyr. 173; 3 L. J. Ex. 98.

Annotations.—*Reid*. Hartley v. Wharton (1840), 11 Ad. & El. 934; McGuffie v. Burleigh (1898), 78 L. T. 264; Mowbray v. Appleby (1899), 80 L. T. 805. *Mentd.* Evans v. Nicholson (1875), 32 L. T. 778.

1704. Reference to deed of specified date—Two deeds bearing same date.]—WADESON v. RICHARDSON (1812), 1 Ves. & B. 103; 35 E. R. 40.

SECT. 7.—WHEN INSTRUMENT IS VOID FOR UNCERTAINTY.

SUB-SECT. 1.—UNCERTAINTY REMOVABLE BY ELECTION.

A. When Election may be made.

(a) In General.

Mode of performance of contract—Alternative promises.]—*See* CONTRACT, Vol. XII., pp. 305, 306, Nos. 2515-2525.

1705. Grant of one of definite things—"One of my horses."—In an action for waste for cutting & selling trees, defts. pleaded a bargain & sale to them of all those trees growing in & upon the lands,

exceptional circumstances, the ct. may consider the real date of the execution of an instrument, when that date is different from the date appearing by the instrument itself.—*Re* MAHER & NUGENT'S CONTRACT, [1910] 1 I. R. 167.—*IR*.

PART III. SECT. 7, SUB-SECT. 1.—A. (a).

1. Grant of land—Defined as to position—Indefinite in amount.]—R. gave a bond to B. to convey to B. a water privilege on lot 17, & to convey also so much land as he might require for the purpose of making a roadway or for erecting buildings on the lot at the rate of \$10 per acre:—*Held*: the selection of such land must be made

Sect. 5.—Correction of errors by intrinsic evidence:
Sub-sect. 5. Sects. 6 & 7: Sub-sect. 1, A. (a).]

SUB-SECT. 5.—MISTAKE.

See MISTAKE.

SECT. 6.—DATE.

Deed speaks from date of delivery.]—See Part I., Sect. 7, ante.

Whether date essential—Part of deed.]—See Part I., Sect. 4, sub-sect. 4.

1679. Whether date on document *primâ facie* true date.]—ANON. (1609), 2 Brownl. 300; 123 E. R. 954.

1680. —.]—In an action by drawer against acceptor of a bill of exchange for £101, deft. proved that he was under age when he accepted the bill. Pltf. then produced in deft.'s handwriting, purporting by its date to have been written after he came of age, addressed to a third person, in these words: "I request you to pay £1." pltf., "£101 at your earliest convenience after the date of this letter, from the money left me by my late grandfather, for which I have given my bill." This letter was proved to have been delivered to pltf.'s clerk, but it did not appear when:—*Held*: the letter must, *primâ facie*, be taken to have been written & issued at the time when it bore date; & that, having been written after deft. came of age, & before the bill became due, it would support a count on a promise to pay according to the tenor & effect of the bill.—HUNT v. MASSEY (1834), 5 B. & Ad. 902; 3 Nev. & M. K. B. 109; 110 E. R. 1025.

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Annotations:—*Follid.* Anderson v. Weston (1810), 6 Bing. N. C. 296; *Potez v. Glossop* (1818), 2 Exch. 191; *Angell v. Worsley* (1849), 12 L. T. O. S. 428. *Refd.* Gibson v. King (1842), Car. & M. 438. *Mentd.* Doe d. Clarke v. Stillwell (1838), 8 Ad. & El. 645.

1683. —.]—In the absence of evidence to the contrary a bill of exchange must be taken to have

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Annotations:—*Consd. & Follid.* *Potez v. Glossop* (1818), 2 Exch. 191. *Follid.* *Angell v. Worsley* (1849), 12 L. T. O. S. 428. *Consd.* *Morgan v. Whitmore* (1851), 6 Exch. 716; *Butler v. Mountgarret* (1859), 7 H. L. Cas. 633. *Refd.* *Davies v. Lowndes* (1843), 6 Man. & G. 471; *Roberts v. Bethell* (1852), 22 L. J. C. P. 69.

1684. —.]—The date a letter bears is *primâ facie* its true date.—POTEZ v. GLOSSOP (1818), 2 Exch. 191; 154 E. R. 460.

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1685. —.]—The date which appears on the face of a document is *primâ facie* its true date.—MALPAS v. CLEMENTS (1850), 19 L. J. Q. B. 435; 15 L. T. O. S. 343.

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1688. Dominical year—Relation to year of reign.]—If certain figures are put after the day of a particular month which can be supposed to refer to the year of Christ, it shall be intended that it does refer to it. The cts. will take notice of the correspondence between the Dominical year & the year of any King's reign. Therefore a deed which really is dated according to the Dominical year only may be represented to bear date in the year of the reign of the King with which that Dominical year corresponds.—HOLMAN v. BURROW (1702), 2 Ld. Raym. 791, 794; 2 Salk. 658; 92 E. R. 28, 30.

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c. ——— ——— ————A lease bore date Mar. 27, *habendum* from May 1 then next:—*Seemle*: evidence was admissible for the purpose of showing that the lease was executed on May 1, although the tenant had stated, in

his answer in a suit in chancery brought to impeach the lease, that it had been “executed” on Mar. 27.—JACK d. WHEATLEY v. CREED (1828), 2 Hud. & B. 128.—*IR*.

d. ——— ——— ————The memorial of a deed lodged in the Registry Office omitted to state the day of the month when the deed was dated. As there was evidence outside the deed itself, that the day of the month had been inserted in it when it was executed:—*Held*: it could not be presumed that the deed corresponded with the statement of it in the memorial, & had no date, when they were produced to the Registrar.—*Re* MONSELL (1856), 5 L. Ch. R. 529.—*IR*.

e. ——— ——— ————Save in certain

1698. ——— ——— ————CAMPBELL v. LEACH (1775), Amb. 740; 27 E. R. 478, L. C.

*Annotations:—*Mentd. Medwin v. Sandham (1789), 3 Swan. App. 685; *Re* Smyth, *Ex p.* Smyth (1818), 1 Swan. 337; Morgan v. Milman (1852), 10 Hare, 279; Daly v. Beckett (1857), 24 Beav. 114; Clegg v. Rowland (1866), L. R. 2 Eq. 160.

1699. ——— ——— ————The question, on a plea of insolvency, being, whether the debt was contracted before the final order, a deed given at the time by way of security being dated before the order, parol evidence on part of plff. to explain this, & to show that the real date of the transaction was later, was admitted, he not being a party to the deed, although drawn & attested by his agent in the business.—EDWARDS v. PHILIPS (1860), 2 F. & F. 102, N. P.

1700. ——— ——— ——— To show that date incorrect.—GARRICK v. WILLIAMS (1811), 3 Taunt. 540; 128 E. R. 214.

*Annotations:—*Consd. R. v. Hopper (1817), 3 Price, 495. Mentd. De Ponthieu v. Pennyfeather (1814), 5 Taunt. 634.

1701. ——— ——— ——— To supply missing date.—The day upon which an acknowledgment was taken, which was left blank, permitted to be supplied by affidavit.—LANE v. PEWTRISS (1812), 4 Taunt. 589; 128 E. R. 461.

1702. ——— ——— ————DAVIS v. JONES, No. 1156, *ante*.

1703. ——— ——— ——— Acknowledgment of debt.—Where a letter acknowledging the existence of a debt, which was produced for the purpose of taking the case out of Stat. Limitations, did not contain any date:—*Held*: the time when the letter was written might be supplied by parol evidence.—EDMONDS v. DOWNES (1834), 1 Cr. & M. 459; 4 Tyr. 173; 3 L. J. Ex. 98.

*Annotations:—*Refd. Hartley v. Wharton (1840), 11 Ad. & El. 934; McGuffie v. Burleigh (1898), 78 L. T. 261; Mowbray v. Appleby (1899), 80 L. T. 805. Mentd. Evans v. Nicholson (1875), 32 L. T. 778.

1704. Reference to deed of specified date—Two deeds bearing same date.—WADESON v. RICHARDSON (1812), 1 Ves. & B. 103; 35 E. R. 40.

SECT. 7.—WHEN INSTRUMENT IS VOID FOR UNCERTAINTY.

SUB-SECT. 1.—UNCERTAINTY REMOVABLE BY ELECTION.

A. When Election may be made.

(a) In General.

Mode of performance of contract—Alternative promises.—*See* CONTRACT, Vol. XII., pp. 305, 306, Nos. 2515-2525.

1705. Grant of one of definite things —“One of my horses.”—In an action for waste for cutting & selling trees, defts. pleaded a bargain & sale to them of all those trees growing in & upon the lands,

exceptional circumstances, the ct. may consider the real date of the execution of an instrument, when that date is different from the date appearing by the instrument itself.—*Re* MAHER & NUGENT'S CONTRACT, [1910] 1 L. R. 167.—*IR*.

PART III. SECT. 7, SUB-SECT. 1.—A. (a).

1. Grant of land —Defined as to position—Indefinite in amount.—R. gave a bond to B. to convey to B. a water privilege on lot 17, & to convey also so much land as he might require for the purpose of making a raceway or for erecting buildings on the lot at the rate of £10 per acre:—*Held*: the selection of such land must be made

Sect. 7.—When instrument is void for uncertainty:
Sub-sect. 2. Sect. 8: Sub-sect. 1, A. (a).]

there were several strata of coal, demised one of the upper strata to pltf., reserving to himself & his lessees the right of working any coal not included in that demise, provided always, that in exercising such powers & privileges the working of the coal then demised should not be prevented or unnecessarily interfered with:—**Held:** the proviso in the lease was unintelligible & could not determine the rights of the parties; that if a lessor wished to reserve rights in derogation of his grant, he must do so in plain terms.—**MUNDY v. RUTLAND (DUKE)** (1883), 23 Ch. D. 81; 31 W. R. 510, C. A.

Annotation:—Mentd. Re Mundy's S. E. (1890), 63 L. T. 311.

1735. Proviso against "buildings of unseemly description"—Clause void.—A condition against the erection of buildings of "an unseemly description" is too vague & indefinite to be valid as a permanent restraint on the use of property.—**MURRAY v. DUNN**, [1907] A. C. 283; 97 L. T. 112, H. L.

1736. Covenant to settle—Amount left blank—Omission insufficient to make deed unintelligible.—A. covenanted that if he should at any time become entitled to property exceeding the value of —

an actual demise of the soil or to a grant of turbarry, it was in either case too vague & uncertain to maintain an action.—**M'KENNA v. MOUTRAY** (1863), 15 Ir. Jur. 233.—**IR.**

p. Mortgage of ship—Covenant to pay enhanced interest—Unintelligible.—The owners of a vessel for the purpose of repairing it borrowed a sum of £10,000 from pltf. & executed an instrument stating the purpose of the loan & hypothecating the vessel to him & promising to repay the principal with interest by Mar. 12, 1891. The instrument proceeded as follows:—"You have no connection with the security or seaworthiness of the ship up to the above stipulated time. If the money is not paid in the stipulated time, we shall add vattam at £20 per cent *per annum* on the amount of principal & interest accruing on that date, adding vattam once in twelve months until date of payment after the stipulated time on the hypothecation security of the ship, & shall get back this mtge. bond." The money was not repaid on the stipulated date, & the vessel, after making several voyages, foundered in port:—**Held:** pltf. was not entitled under the instrument, regarded as an instrument of hypothecation merely, to recover the enhanced interest referred to in the passage above quoted, because that part of the agreement was void for uncertainty.—**ASAN KUTHU SAHIB MEROYAR v. RAMANATHAN CHETTI** (1898), 1 L. R. 22 Mad. 26.—**IND.**

q. Sum hereafter to be agreed upon.—An agreement provided that pltf. should receive, under certain circumstances, a "sum hereafter to be agreed upon," & an extra sum or bonus for every load of blue ground hauled:—**Held:** there was nothing to show what the parties meant by such sum, & as there was no definite completed agreement upon this point, pltf. was not entitled to any payment thereunder.—**KENRICK v. CENTRAL D. M. Co.** (1885), 3 H. C. 414.—**S. AF.**

r. Where meaning not in dispute—Ambiguity will not avoid.—Where there is in point of fact no dispute between the parties to an agreement in writing as to the real meaning of the agreement, it is not open to one of the parties to object that the agreement is void for uncertainty even though there may be ambiguity in the method of expression used by the

parties in the agreement.—**KELL v. HARRIS** (1915), 15 S. R. N. S. W. 473; 32 N. S. W. W. N. 133.—**AUS.**

s. Uncertainty in description.—If the description of the whole land in a deed be so blended together that one cannot distinguish between what was sold & what was not, the deed will be bad.—**DOE d. MILLER v. TIFFANY** (1848), 5 U. C. R. 79.—**CAN.**

t. —.—Doft. agreed in writing not under seal to sell to pltf. certain buildings specified, "with the land which they occupy, with the whole of the dam & water privilege":—**Qd.**: as to the effect of the uncertainty in the agreement with regard to the description of the premises.—**SPYDE v. PROUDFOOT** (1858), 15 U. C. R. 532.—**CAN.**

u. —.—In ejectment for land described as being formerly a public highway from W. to C., it appeared that before 1835 there had been a trespass road between those places, running across doft's lot. In that year a road was laid out & sanctioned by the sessions, intended as a substitute for the former one. Doft. then enclosed a portion of the old road, & had possessed it for more than twenty years, but a small piece remained not enclosed, & pltf. claimed this under a deed which he received from the surveyor of highways in 1837, purporting to convey to him "the public highway or road from W. to C." as described by metes & bounds:—**Semble:** the description in the deed to pltf. was too uncertain to convey anything.—**CLAPP v. HAIGHT** (1859), 19 U. C. R. 94.—**CAN.**

v. —.—In the sheriff's deed of land sold, land was described as "25 acres of lot 31 in the 12th concession of the township of K.":—**Held:** the description was insufficient.—**CAYLEY v. FOSTER** (1866), 25 U. C. R. 405.—**CAN.**

w. —.—Where there were two lots on a street with the same number, one on the south side & one on the north side, & neither the assessment nor the sheriff's deed on a tax sale thereof distinguished the one from the other:—**Held:** the sale was void for uncertainty.—**LOUNT v. WALKINGTON** (1868), 15 Gr. 332.—**CAN.**

x. —.—A sheriff's deed for "about fifteen acres, more or less, being the whole of a block or piece of land adjacent to the Grand Trunk Ry.,

which was left in blank, he would settle it upon certain specified trusts. Before any such property accrued, he filed a bill to have it declared that the covenant was void for uncertainty:—**Semble:** there was no such uncertainty as to render the covenant void.—**FYFE v. ARBUTHNOT** (1857), 1 De G. & J. 406; 26 L. J. Ch. 646; 29 L. T. O. S. 306; 3 Jur. N. S. 651; 5 W. R. 793; 44 E. R. 780, L. C.

Annotations:—Refd. Re Clarke, Coombe v. Carter (1887), 35 Ch. D. 109. **Mentd. Carroll v. Graham** (1865), 11 Jur. N. S. 1012.

SECT. 8.—RECITALS.

SUB-SECT. 1.—VARIANCE BETWEEN RECITALS AND OPERATIVE PART.

A. Where Operative Part Clear.

(a) General Rule.

1737. General rule.—Where the recital & the operative part of a deed are at variance, the latter must be acted on until the deed has been reformed. In a suit to reform the instrument, the ct. would be enabled, from the circumstances, to judge which was erroneous.

being a part of lot 27 in the 1st concession of E., now in the town of S.":—**Held:** this was an insufficient description, & the deed was void.—**DAVIDSON v. KIELY** (1871), 18 Gr. 494.—**CAN.**

e. —.—In advertising lands for sale for taxes they were described as "lace lands, Paris Hydraulic Co.," no further specification of the locality or quantity to be sold being given:—**Held:** the description was insufficient, & the sale void.—**GREENSTREET v. PARIS** (1874), 21 Gr. 229.—**CAN.**

f. —.—In a chattel mtge. made by M. & Co., the goods were described as "Two sets of blacksmithing & one set of wagon maker's tools complete, together with all their floating capital, stock in trade, to the value of \$1,000, connected with the business they carry on in the village of W., as wagon & carriage builders, general blacksmiths, etc., under the name & firm of M. & Co.":—**Held:** this was an insufficient description as regarded the tools.—**MASON v. MACDONALD** (1875), 25 C. P. 435.—**CAN.**

g. —.—The property in an agreement for exchange was described as "135 feet on G. avenue, the same being 337 feet west from R. avenue, Parkdale, on the north side of the avenue. It was shown that R. avenue was the west boundary of Parkdale, & G. avenue a street in it, which, as such street, would have its termination at R. avenue, but it extended across R. avenue as a road or way outside of Parkdale, & no further description was given, such as the depth or by reference to a plan or otherwise:—**Held:** the property was not sufficiently described.—**STEVENSON v. MCHENRY** (1888), 16 O. R. 139.—**CAN.**

h. —.—A sheriff's deed of lands sold at a tax sale described them as "45 acres of the south half of lot 17 in the 4th concession" of K., & a deed given to S. contained an exception, "save & excepting out of the same 45 acres sold for taxes":—**Held:** the exception was void for uncertainty.—**PEARSON v. MULHOLLAND** (1889), 17 O. R. 502.—**CAN.**

k. Agreement completely unintelligible.—**SMITH v. LIVINGSTON** (1908), 8 W. L. R. 242.—**CAN.**

l. Absence of necessary part.—An agreement as a deed is from the absence of schedules (such as plan & specifications in a building contract) insensible.—**WALSH v. ST. JOHN** (1864), 5 Nfld. L. R. 30.—**NFLD.**

A marriage settlement recited an agreement that the future property of the wife should be settled, but the covenant to settle was on the part of the husband alone, to execute all necessary deeds, as that such property should so far as he was concerned be vested in the trustees on the trusts of the settlement:—*Held*: property afterwards given to the separate use of the wife was not liable to be settled.—*HAMMOND v. HAMMOND* (1854), 19 Beav. 29; 3 Eq. Rep. 119; 23 L. T. O. S. 161; 3 W. R. 36; 52 E. R. 259.

Annotation:—*Follis*. *Young v. Smith* (1865), 35 Beav. 897.

1738. Not controlled by recitals.—When the words in the operative part of a deed of conveyance are clear & unambiguous, they cannot be controlled by the recitals or other parts of the deed. On the other hand, when those words are of doubtful meaning, the recitals & other parts of the deed may be used as a test to discover the intention of the parties, & to give the true meaning of those words (*PATTESON, J.*).—*WALSH v. TREVANION* (1850), 15 Q. B. 733; 19 L. J. Q. B. 458; 15 L. T. O. S. 433; 14 Jur. 1134; 117 E. R. 636.

Annotations:—*Consd.* *Fowler v. Fowler* (1859), 4 D. G. & J. 250. *Mentd.* *Rooke v. Kensington* (1856), 2 K. & J. 753; *Mellor v. Porter* (1883), 25 Ch. D. 158.

1739. —[The plain effect of the operative part of a deed cannot be cut down by the recitals.—*HOLLIDAY v. OVERTON* (1852), 14 Beav. 467; 15 Beav. 480; 21 L. J. Ch. 769; 19 L. T. O. S. 211; 16 Jur. 316; 51 E. R. 366, 623; *affd.*, 16 Jur. 751, L. J.J.]

Annotations:—*Consd.* *Lucas v. Brandreth* (1860), 2 L. T. 785. *Refd.* *Tatham v. Vernon* (1861), 29 Beav. 604; *Re Hudson, Kühne v. Hudson* (1892), 72 L. T. 892; *Re Tringham's Trusts, Tringham v. Greenhill*, [1904] 2 Ch. 487. *Mentd.* *Osborn v. Bellman* (1860), 3 L. T. 265; *Re Whiston's Settmt., Lovatt v. Williamson*, [1894] 1 Ch. 661; *Re Irwin, Irwin v. Parkes*, [1901] 2 Ch. 752; *Re Bostock's Settmt., Norrish v. Bostock*, [1921] 2 Ch. 469.

1740. —[A marriage settlement recited an agreement that the after-acquired property of the wife should be settled, but the covenant to settle was on the part of the husband only:—*Held*: the wife was not bound by it. Where the operative part of a deed is at variance with the recital, the proper mode of dealing with the case is, to act on the operative part, unless & until the deed has been reformed (*ROMILLY, M.R.*).—*YOUNG v. SMITH* (1865), L. R. 1 Eq. 180; 35 Beav. 87; 11 Jur. N. S. 963; 55 E. R. 827.]

Annotations:—*Refd.* *Re De Ros Hardwicke v. Wilmot* (1885), 55 L. J. Ch. 73; *Crouch v. Crouch*, [1912] 1 K. B. 378. *Mentd.* *Lee v. Lee* (1876), 4 Ch. D. 175; *Re Macpherson, Macpherson v. Macpherson* (1886), 55 L. J. Ch. 922; *Buckland v. Buckland*, [1900] 2 Ch. 534.

1741. —[When the operative clause in a

deed is unambiguous, it is not right to resort to the recitals for the purpose of interpreting it, but if there is any ambiguity in the operative part of a deed then it is allowable to have recourse to other parts of the deed in order to ascertain what is the real meaning of the author of the deed (*MELLISH, L.J.*).—*Re DANIEL'S SETTLEMENT TRUSTS* (1875), 1 Ch. D. 375; 45 L. J. Ch. 105; 34 L. J. 308; 24 W. R. 227, C. A.]

Annotations:—*Mentd.* *Re Redfern, Redfern v. Bryning* (1877), 6 Ch. D. 133; *Re Litchfield, Horton v. Jones* (1911), 104 L. T. 631.

1742. —[*LEGGOTT v. BARRETT*, No. 1515, ante.]

1743. —[A marriage settlement recited that it was agreed that all property which during the marriage should vest in the wife or the husband in her right, should be settled on the trusts of the settlement; & the husband did covenant, that he would make & concur in making all such assurances as would vest the same in the trustees on the trusts of the settlement. After the marriage the wife became entitled to property for her separate use:—*Held*: the wife's separate estate was not bound by the covenant.]

The rule is, that a recital does not control the operative part of a deed when the operative part is clear (*JESSEL, M.R.*).—*DAWES v. TREDWELL* (1881), 18 Ch. D. 354; 45 L. T. 118; 29 W. R. 793, C. A.]

Annotations:—*Consd.* *Re D'Estampes' Settmt., D'Estampes v. Crowe* (1884), 53 L. J. Ch. 1117; *Re De Ros' Trust, Hardwicke v. Wilmot* (1885), 31 Ch. D. 81; *Re Rickman, Stokes v. Rickman* (1899), 80 L. T. 518. *Apld.* *Re Smith, Robson v. Tidy*, [1900] W. N. 75. *Consd.* *Crouch v. Crouch*, [1912] 1 K. B. 378. *Refd.* *Hancock v. Hancock* (1888), 38 Ch. D. 78; *Re Haden, Colling v. Haden*, [1898] 2 Ch. 220. *Mentd.* *Re Macpherson, Macpherson v. Macpherson* (1886), 55 L. J. Ch. 922.

1744. —[A deed of composition executed by a debtor who had filed a bkpcy. petn. recited that the debtor was possessed of or entitled to the real & personal estate specified in a schedule to the deed, & that in accordance with his desire to pay his creditors 20s. in the pound, & in order that the composition should be secured, he had agreed with the trustee to assign to him all the property set forth in the schedule, upon the trusts thereafter contained. By the operative part the debtor, for effectuating the desire, & in pursuance of the agreement, assigned to the trustee all & singular the several properties, chattels, & effects set forth in the schedule thereto, & all the estate, right, title, interest, claim, & demand, of the debtor in, to, & upon the chattels, properties, & effects, & all other the estate if any, of the debtor. The debtor was, under the trusts of a post-nuptial settlement,

PART III. SECT. 8, SUB-SECT. 1.— A. (a).

1738 i. Not controlled by recitals.—*BANK OF BRITISH NORTH AMERICA v. CUVILLIER* (1861), 5 L. C. J. 57; 14 Moo. P. C. 187.—*CAN.*

1738 ii. —[The construction of an ambiguous stipulation in a written agreement may be governed or qualified by a recital, but, if the intention is clearly to be collected from the operative words, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital.—*MARGAR v. SIGG* (1880), 1 L. R. 2 Mad. 239.—*IND*

1738 iii. —[A testator's residuary estate was by his will given in trust for his four step-children, F., H., A., & E. In certain shares, subject to a life interest given to his widow. The share of H. was, however, settled upon trusts under which it would, in certain events, become divisible amongst F., A., & E. A deed of family arrangement was executed

under which A. received his original share during the lifetime of the testator's widow, the share being fixed at a certain sum, & the deed providing that the whole residuary estate remaining vested in the trustees should belong exclusively to & be available for division between F., H., & E. only, in the proportions mentioned in the will, A. surrendering & releasing all his beneficial right, title, & interest therein & thereto. The recitals in the deed did not show that A. might in certain events become entitled to participate in the share of H., & there was a clause in the operative part of the deed which indicated that the intention was that the sum paid to A. should be received by him in discharge of his original share only:—*Held*: the surrender & release by A. must be construed as applying only to his original share, & not as affecting his right to participate in H.'s share in the events mentioned in the will.—*DYER v. BAKER* (1898), 16 N. Z. L. L. 714.—*N.Z.*

1738 iv. —[A recital in a power of attorney that the person executing it is about to leave the colony & is desirous of appointing some one to act for him does not limit the powers of the person appointed to acting during his absence where it is not stated, either in the recital or elsewhere, that the appointment is to act during his absence.—*FELL v. PUPONGA COAL & GOLDMINING CO. OF NEW ZEALAND, LTD.* (1904), 24 N. Z. L. R. 758.—*N.Z.*

1738 v. —[In construing an agreement, no weight should be attached to epexegetical matter in the recitals, which formed no part of the operative portion of the agreement.—*MACMULROW v. SALISBURY MUNICIPALITY*, [1916] App. D. 252.—*S. AF.*

1738 vi. —[The recital in a deed cannot control the operative part, where the latter is unambiguous.—*CLAYTON v. METROPOLITAN & SUBURBAN RY. CO.* (1893), 10 S. C. 291.—*S. AF.*

o. Recitals mentioning five denominations of land—*Operative part omitting two.*—An indenture of settlement, after reciting that the settlor was possessed of five distinct denominations of land, specifically described, & that it had been agreed to settle the said lands upon the trusts thereafter

L. J. Ch. 660; *Smith v. Lucas* (1881), 18 Ch. D. 531; *Re D'Estampes' Settlement*, *D'Estampes v. Crowe* (1884), 53 L. J. Ch. 1117; *Re Vardon's Trusts* (1885), 31 Ch. D. 275. **Mentd.** *Coventry v. Coventry* (1863), 8 L. T. 819; *Brown v. Brown* (1866), L. R. 2 Eq. 481; *De Serre v. Clarke* (1874), L. R. 18 Eq. 587; *Re Wheatley, Smith v. Spence* (1884), 27 Ch. D. 606; *Re Queado's Trusts* (1885), 54 L. J. Ch. 786; *Bateman v. Faber*, [1898] 1 Ch. 144.

1753. — By both spouses—Operative part binding husband.—*HAMMOND v. HAMMOND*, No. 1737, *ante*.

1754. — — — — —.—*YOUNG v. SMITH*, No. 1740, *ante*.

1755. — — — — —.—*DAWES v. TREDWELL*, No. 1743, *ante*.

1756. — — — — — & all other necessary parties.—*Re GRAY, PAKENHAM v. MACLEAN* (1899), cited in, [1900] W. N. 75.

Annotation:—Consd. *Re Smith, Robson v. Tidy*, [1900] W. N. 75.

1757. Recital fixing amount of liquidated damages for breach—Operative part covenanting to refrain.—Where a deed contains an absolute covenant not to do an act, such covenant will not be controlled by a recital in the deed from which it appears that the parties intended that such act might be done on payment of a fixed sum for liquidated damages.—*BIRD v. LAKE* (1863), 1 Hem. & M. 111; 8 L. T. 632; 71 E. R. 49; *subsequent proceedings*, 1 Hem. & M. 338.

Annotations:—Mentd. *Smith v. Hancock*, [1894] 2 Ch. 377; *Cory v. Harrison* (No. 2) (1901), 48 Sol. Jo. 350.

1758. Recital showing less interest to pass.—Upon the marriage of T. with S. in 1773, certain estates of T. & other estates of S. not including estate P., were agreed to be settled upon certain uses. In 1802, T. & S. & W. the first son of the marriage, conveyed all their estates including P., upon uses declared:—*Held*: the reference to the limitations in the articles was void, estate P. not being comprised therein, & there being no legal declaration of the use by the articles.—*YOUDE v. JONES* (1845), 14 Sim. 131; 1 Holt, Eq. 258; 9 Jur. 910; 60 E. R. 307.

Annotation:—Mentd. *Culsha v. Cheese* (1849), 7 Hare, 236.

1759. — — —. *Re LAWRENCE (DECEASED)* (1900), 45 Sol. Jo. 78.

B. Where Operative Part Ambiguous.

(a) General Rule.

1760. Construction may be governed by recitals.

PERRY v. EDWARDS (1721), 1 Stra. 100; 93 E. R. 592.

1761. — — —.—*DORAN v. ROSS* (1789), 3 Bro. C. C. 27; 1 Ves. 57; 29 E. R. 388, L. C.

1762. — — —.—The recital of a deed is a key to the construction, where the operative part is doubtfully expressed, & not otherwise.—*BAILEY v. LLOYD* (1829), 5 Russ. 330; 7 L. J. O. S. Ch. 98; 38 E. R. 1051.

Annotations:—Refd. *Banks v. Banks* (1853), 17 Beav. 352; *Cowse v. Foster* (1860), 1 John. & H. 30; *Graham v. Wickham* (1863), 1 De G. J. & Sm. 474. **Mentd.** *Cooke v. Cunliffe & Cooke* (1851), 15 Jur. 1076; *Hope v. Hope* (1854), 5 Glf. 15; *Pouquet v. Perring* (1854), 5 De G. M. & G. 775; *Payne v. Mortimer* (1859), 28 L. J. Ch. 716; *Maunsell v. Maunsell* (1871), 24 L. T. 698; *Re Denton, Hannerman v. Toosey* (1890), 63 L. T. 105; *Re Ackerley, Chapman v. Andrew*, [1913] 1 Ch. 510.

declared, proceeded to grant to trustees three of the denominations, but omitted altogether two from the operative part:—*Held*: the omitted denominations were not bound by the trusts of the settlement.—*MCNAMARA v. CAREY* (1866), 1 R. 1 Eq. 9.—**IR.**

p. Recitals referring to beneficial interest only—Operative part conveying all the estate.—An exor., who had a beneficial interest in the testator's estate, joined with other beneficiaries in the sale & conveyance of a part of the estate to *bond fide* purchasers for

value. The exor. did not purport to convey in his capacity as exor., but the deed stated that all the estate, & title of the vendors were conveyed:—*Held*: the deed conveyed the whole title vested in the exor., & it was not proper to infer from the conduct of the parties & from recitals in the deed that the intention was only to convey the beneficial interest, since that inference was contrary to the terms of the conveyance.—*BJRAJ NOPANI v. PURA SUNDARY DASSEE* (1914), L. R. 41 Ind. App. 189.—**IND.**

1763. — — —.—An indenture of mtge., of 1817, recited that, by a former indenture, of 1815, A., in consideration of £200 conveyed the premises, of which he was tenant in fee, to C. & H. for 1,000 years, subject to a proviso of redemption; that P., at the request of A., had paid C. & H. the £200 & advanced a further sum to A., & that, in consideration thereof, C. & H., at A.'s request, did assign, & A. did grant, etc., to P. the premises comprised in the original mtge., from thenceforth for all the residue of the term of 1,000 years, subject to a new proviso of redemption. In ejectment brought by the representatives of P. against those of A.:—*Held*: if the recital of the deed of 1817 were admissible it must be taken all together, & showed a right in C. & H. to assign the term; & if it were rejected, as proof of a right in C. & H. to assign, it might still be looked to for the purpose of ascertaining what term was intended to pass by the deed.

Recitals may legitimately be looked to as completing the description of the premises (*DENMAN, C.J.*).—*DOE d. ROGERS v. BROOKS* (1835), 3 Ad. & El. 513; 1 Har. & W. 400; 4 L. J. K. B. 222; 111 E. R. 509.

Annotation:—Refd. *Doe d. Brame v. Maple* (1837), 3 Hodg. 213.

1764. — — —. *WALSH v. TREVANION*, No. 1738, *ante*.

1765. — — —.—In 1841 B. agreed to give to his creditor a security on the debt then due, or which might thereafter become due to him from a co. This was carried into effect by a deed in 1845, which, after reciting the agreement, assigned all sums claimed to be due, & which he might thereafter recover:—*Held*: the deed passed all sums due at its date, but nothing subsequent.—*SCOTT v. SCOTT* (1857), 24 Beav. 263; 53 E. R. 359.

1766. — — —.—A mtge. deed recited an agreement to secure the money with interest, but the proviso for redemption on a day certain, & the covenant to pay & the trusts of the produce of a sale, were restricted to the principal only:—*Held*: the interest was payable.—*ASHWELL v. STAUNTON* (1861), 30 Beav. 52; 51 E. R. 808.

1767. — — —.—A covenant in a deed, if ambiguous, will be controlled by the recitals.—*SRLBY v. CRYSTAL PALACE GAS CO.* (1862), 30 Beav. 606; 31 L. J. Ch. 595; 8 Jur. N. S. 422; 10 W. R. 132; 54 E. R. 1025; *on appeal*, 4 De G. F. & J. 246, L. J.J.

1768. — — —.—As to the construction of the settlement, I do not dispute the proposition which was argued, that if you find in a settlement recitals indicating various parcels enumerated, from whence it is to be inferred, from reading the recital alone, that these parcels, & these alone, are to be included in & made subject to the provisions of the deed, but yet you find that in the operative part of the deed one or two of these parcels are omitted, the ct. may be of opinion, upon the construction of the deed, that the parcels which are omitted in the operative part are omitted by mistake, & are not included in the provisions of the deed (*ROMILLY*,

PART III. SECT. 8, SUB-SECT. 1.—B (a).

1760 i. Construction may be governed by recitals.—A mtgee. is concluded by recitals in his own deeds showing the sum due, that the estate is redeemable, or the like, but such recitals must be taken altogether.—*CAREW v. JOHNSTON* (1805), 2 Sch. & Lef. 288, 295.—**IR.**

1760 ii. — — —.—*GRATTAN v. LANGDALE* (1883), 11 L. R. Ir. 473.—**IR.**

M.R.).—BARRATT *v.* WYATT (1862), 30 Beav. 442; 31 L. J. Ch. 652; 6 L. T. 801; 8 Jur. N. S. 1045; 10 W. R. 454; 54 E. R. 960.

1770. —.]—A mtge. deed, dated June 15, 1825, contained a covenant to pay the mtge. debt twelve months after date with a power of sale in case of default. A transfer of the mtge., dated July 2, 1830, recited that the old power of sale had not been & was not intended to be exercised, & contained a covenant to pay the mtge. debt seven years after that date, with a power of sale in case of default, & also assigned the debt & all powers & remedies for recovering the same & all the benefit of the previous mtge :—*Held* : the old power was not extinguished.

1771. — —.]— *Re* DANIEL'S SETTLEMENT TRUSTS,
No. 1741, *ante*.

Annotations:— *Mentd. Re* Garnett, Robinson v. Gandy (1885), 31 Ch. D. 648; *Shelfer v. City of London Electric Lighting Co.*, *Meux's Brewery Co. v. City of London Electric Lighting Co.* (1894), 12 R. 112; *Lloyd v. Prichard*, [1908] 1 Ch. 265; *Re Williams' Settlements*, *Williams v. Williams*, [1911] 1 Ch. 441.

1774. Operative part sufficiently ambiguous.]

—A marriage settlement contained a recital of an agreement that all such personal estate above a certain value as should during the coverture be given or bequeathed to or otherwise vest in the wife, should be settled, & that the husband should enter into the covenant in that behalf thereafter contained. The corresponding operative part of the deed was a covenant by the husband alone without the usual words, it is hereby agreed that he & his wife would settle such property, & that until such settlement the husband & wife should stand possessed of the same upon the trusts of the settlement. The wife as well as the husband executed this settlement, & during the coverture property was given to the wife for her separate use :- *Held* : the operative words were sufficiently ambiguous to enable the ct. to look at the recitals, & that on the whole instrument the wife's after-acquired separate property was bound by the covenant.- *Re De Ros' TRUST, HARDWICKE v. WILMOT* (1885), 31 Ch. D. 81 ; 55 L. J. Ch. 73 ; 53 L. T. 524 ; 34 W. R. 36.

Annotations.—**Consd.** *Re Coghlan, Broughton v. Broughton*, [1891] 3 Ch. 76. **Refd.** *Re Rickman, Stokes v. Rickman* (1899), 80 L. T. 518. **Mentd.** *Re Macpherson, Macpherson v. Macpherson* (1886), 55 L. J. Ch. 922; *Re Haden, Coling v. Haden*, [1898] 2 Ch. 220.

1780 i. *Operative part ambiguous—*
Property affected shown by recital—
Recitals which were necessary if the
executant, a Hindu widow, were
disposing of her absolute interest, but
serving no purpose if the object was
to convey merely the limited interest

of a widow, were held to show that the circumstances were such as to give her power to dispose of her absolute interest, & from which the inference could reasonably be drawn that it was her intention so to dispose of it.—**VASONJI MORARJI v. CHANDA BIBI (1915). 1. L. R. 37 All 369.—IND.**

1780 ii. ———.]—A written contract

The wife survived the husband, & after his death became entitled to a fund in ct. as next of kin of an intestate:—*Held*: the wife's covenant was to be read as operative during coverture only, & that this construction was assisted by the recital, which might be referred to in order to explain the ambiguity in the covenant.

I quite agree that if I am obliged or at liberty to read this covenant grammatically, there is no ambiguity at all. But the authorities tell me that is by no means the case. According to the legal authorities, this is not a plain use of language, about the meaning of which a lawyer reading the document can have no doubt. Directly you have got as far as that, & have found the ambiguity raised by the decisions, then also you have this power of referring to the recitals (KEKEWICH, J.).—*Re COGHLAN, BROUGHTON v. BROUGHTON*, [1894] 3 Ch. 76; 63 L. J. Ch. 671; 42 W. R. 634; 8 R. 384.

1777. ———.—ORR v. MITCHELL, No. 1745, *ante*.

1778. --- -.]--Resp. with others gave a joint & several guarantee to applt. bank limited to £2,500 in respect of overdrafts by a customer. Subsequently he with others gave a joint & several bond reciting a desire for advances to the same customer over & above that amount, & securing repayment of the balance of account current:—*Held*: the condition of the bond, being plainly to secure repayment of all moneys advanced by the bank & not merely those in excess of the £2,500, could not be controlled by any recital not plainly inconsistent therewith. — **AUSTRALIAN JOINT STOCK BANK v. BAILEY**, [1899] A. C. 396; 68 L. J. P. C. 95. P. C.

1779. —.] —By a deed of separation, after reciting an agreement by the husband to make a payment of 5s. a week to the wife during her life so long as she should remain chaste, the husband covenanted generally to pay the sum to the wife :—*Held*: the covenant, being ambiguous, was controlled by the recital, & the husband's liability ceased on the wife's failure to remain chaste.—*CROUCH v. CROUCH*, [1912] 1 K. B. 378; 81 L. J. K. B. 275; 106 L. T. 77; 28 T. L. R. 155; 50 Sol. Jo. 188, D. C.

1780. Operative part ambiguous — Property affected shown by recital.] — WALSH v. TREVANION, No. 1738. ante.

was executed which, after reciting that deft. co. was engaged in mining operations & required supplies of fuel & timber for mining purposes, stipulated that plffs. should cut fuel & timber in certain lengths, in consideration of certain payments to be made for such cutting:—*Held*: in the absence of anything in the operative

1781. — — —.]—By a settlement on the marriage of A., after reciting an agreement that a moiety of all such property as A. should at any time, during the intended coverture, be or become seised or possessed of, or interested in, or entitled unto, should be settled as thereafter mentioned, A. covenanted that in case any lands should at any time during the coverture accrue unto or vest in him upon the death or by the settlement or devise of any person, he should convey one moiety thereof to the trustees upon the trusts of the settlement. At the date of the settlement A. was, under a previous settlement, tenant in tail in remainder of certain lands, subject to the life estate of his father, & defeasible in the event of his father exercising a power of appointment. A. on the death of his father, who had not defeated the estate tail by appointment, barred the entail:—*Held*: upon the true construction of the covenant, coupled with the recital, this estate accrued to A. on the death of his father, & was included in the covenant.—*McLURCAN v. LANE, MELHUISE v. McLURCAN* (1858), 32 L. T. O. S. 172; 5 Jur. N. S. 56; 7 W. R. 135.

Annotations:—*Refd.* *Archer v. Kelly* (1860), 1 Drew. & Sm. 300; *Reid v. Reid* (1886), 31 Ch. D. 402.

1782. General words in operative parts—Recitals referring to specific property.—*MOORE v. MAGRATH*, No. 883, *ante*.

1783. — — —.]—*OLIVER v. DANIEL* (1814), 1 Mer. 500; 35 E. R. 757.

1784. — — —.]—By a recovery deed of 1816, M., tenant in tail of the Cefn Coch estate, declared his intention to convey the property thereafter particularly mentioned; & then conveyed all those, the capital mansion house, messuage, or tenement, with the several out-offices, gardens, plantations, & hereditaments thereunto belonging, commonly called or known by the name of Cefn Coch, situate, etc.; & also eight fields, particularly named, parts & parcels of the demesne land of Cefn Coch, together with all & singular houses, etc., lands, etc., hereditaments & appurtenances whatsoever, to the said capital messuage appertaining, etc., or therewith set, let, etc. The Cefn Coch estate consisted of the capital mansion house, the eight fields, named in the recovery deed, & five other fields, containing in quantity about thirty-four acres, & also of two mills, called Melin Cefn Coch, & Pandi Cefn Coch, with the lands thereunto belonging. Melin Cefn Coch was surrounded by the five fields, & the lands belonging thereto consisted of about eleven acres. On the death of M., T. took possession of the property not comprised in the recovery deed of 1816; & in 1821 conveyed all that water-corn-mill, with the appurtenances, called Melin y Cefn Coch, & the lands thereunto belonging, etc., called or known by the name of Tyddyn y felyn Cefn Coch; & all that fulling mill, with the appurtenances, commonly called by the name of Pandi Cefn Coch, etc.; & all those five fields, closes, or parcels of land, or ground, part of Tyddyn y felin Cefn Coch aforesaid, situate, etc., containing by estimation thirty-four acres, or thereabouts:—*Held*: the mansion house & eight fields only passed by the deed of 1816, as the general words in that deed were limited & qualified by the particular description

& enumeration; & that the other five fields, parcel of the estate of Cefn Coch, passed by the deed of 1824, under the description of all those five fields, etc.—*DOE d. MEYRICK v. MEYRICK* (1832), 2 Cr. & J. 223; 2 Tyr. 178; 1 L. J. Ex. 73; 149 E. R. 96.

Annotations:—*Consd.* *Ringer v. Cann & Barnard* (1838), 3 M. & W. 343. *Refd.* *Pomfret v. Perring* (1854), 18 Beav. 618; *Jenner v. Jenner* (1866), L. R. 1 Eq. 361.

1785. — — —.]—It is to be collected from the recitals of a lease what is intended by the parties to be demised; & where a lease referred to a former demise of premises described as fifty-nine acres provincial measure; & after reciting an intention to demise the estate, went on to demise the same, being forty-five acres statute measure:—*Held*: the soil of a road which was set out & made between the times of the making the first & second leases & was part of the premises demised by the first lease, passed by the second.—*DOE d. WHITE v. OSBORNE* (1840), 9 L. J. C. P. 313; 4 Jur. 941.

1786. — — —.]—An assignment of one equal eighth part or share, or other part or share, parts or shares, to which the assignor became entitled:—*Held*: upon the construction of the recitals & of the whole instrument, to pass only one-eighth, although the assignor was entitled to a larger share.—*GRAY v. LIMERICK (EARL)* (1848), 2 De G. & Sm. 370; 17 L. J. Ch. 443; 11 L. T. O. S. 533; 12 Jur. 817; 64 E. R. 166.

Annotation:—*Refd.* *Ellison v. Thomas* (1862), 2 Drew. & Sm. 111.

1787. — — —.]—A. being possessed of the K. estate & the manor of E., both in the county of M., mortgaged to G. the K. estate by particular description, & all other the hereditaments, lands, & premises, comprised in a previous mtge. of the K. estate, & all other the lands, tenements, & hereditaments if any, in the county of M., whereof or whereto A. is seised or entitled, for an estate of inheritance:—*Held*: the manor of E., which included copyhold property & manorial rights, & was a property of a different description from that already conveyed, was not comprised in this mtge. under the general words of conveyance.—*ROOKE v. KENSINGTON (LORD)* (1856), 2 K. & J. 753; 25 L. J. Ch. 795; 28 L. T. O. S. 62; 2 Jur. N. S. 755; 4 W. R. 829; 69 E. R. 986.

Annotations:—*Consd.* *Crompton v. Jarratt* (1885), 30 Ch. D. 298. *Refd.* *Jenner v. Jenner* (1866), L. R. 1 Eq. 361; *Neam v. Moorsom* (1866), 36 L. J. Ch. 274; *Danby v. Counts* (1885), 29 Ch. D. 500; *Early v. Iatthbone* (1888), 57 L. J. Ch. 652. *Mentd.* *Sells v. Sells* (1860), 29 L. J. Ch. 500; *Cox v. Barker, Barker v. Cox* (1876), 3 Ch. D. 359; *Clark v. Girdwood* (1877), 7 Ch. D. 9; *Barracough v. Brown*, [1897] A. C. 615; *Williams v. Pinckney* (1897), 67 L. J. Ch. 34; *Dyson v. A-G*, [1911] 1 K. B. 410; *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536.

1788. — — —.]—Where the operative part appeared to be intended to follow, but did not accurately follow the words of a recital, the effect of the operative part will be limited to the extent pointed out by the recital.

A marriage settlement recited the treaty to be, to settle all property which may come to the wife from H. by will, or codicil or codicils, or otherwise. The husband subsequently covenanted to settle all property which thereafter might come to the wife by any will or codicil or codicils of H., or otherwise:—*Held*: a gift to the wife by the will

part of the contract showing the quantity to be cut, the recital might be referred to for the purpose of ascertaining the purposes for which the fuel & timber were required & the quantity which plts. were justified in cutting.—*WILLOUGHBY'S CONSOLIDATED CO. v. PENNANT* (1899), 16 S. C. 184.—*S. AF.*

1782 i. General words in operative part—Recitals referring to specific property.—A. whose house was damaged by a gas explosion sued the Gas Co. for damages for the whole injury. A release by A. recited that for part of A.'s loss for which he was uninsured, he had claimed £100. The release

discharged debts. in consideration of £100 from all claims, & covenanted that he would allow no action to be brought in his name:—*Held*: the release was confined by the recitals to the uninsured loss.—*SMITHMORE v. AUSTRALIAN GAS LIGHT CO.* (1881), 2 N. S. W. L. R. 219.—*AUS.*

Sect. 8.—Recitals: Sub-sect. 1, B. (b); sub-sect. 2.]

of one of the trustees of this marriage settlement not being H., was not bound by this covenant; & that the covenant only bound the husband to settle such property as should be derived by the wife from H.—*Re NEAL'S TRUSTS* (1857), 4 Jur. N. S. 6.

1789. ———.]—A mother had an exclusive power of appointment over a fund, in favour of her children, & which, in default, was divisible equally, the share of the daughters to vest at twenty-one or marriage. She had a son & a daughter, & she appointed £10,000 to her son on his marriage. His marriage settlement recited that he was entitled to the £10,000 & was also contingently entitled to the other moiety, in the event of his sister dying unmarried under twenty-one, & it recited an agreement to settle the £10,000 & all other his part, share & interest, as well vested as contingent, in the trust funds. He then assigned his interest in the same terms. The daughter attained twenty-one, & died, & the mother afterwards appointed the residue of the fund to her son:—*Held*: such residue did not pass under his settlement.—*CHILDERS v. EARDLEY* (1860), 28 Beav. 648; 3 L. T. 166; 6 Jur. N. S. 690; 8 W. R. 698; 51 E. R. 515.

1790. ———.]—By a marriage settlement, after recitals showing that the intended wife was interested under her father's will in certain bank annuities, all that the one-fifth share of the wife, & all other her shares by survivorship or otherwise in such bank annuities were assigned to trustees:—*Held*: this assignment did not include a share in these bank annuities to which she became entitled upon the death intestate of one of her brothers.—*EDWARDS v. BROUGHTON* (1863), 32 Beav. 667; 2 New Rep. 476; 9 L. T. 41; 11 W. R. 1038; 55 E. R. 262.

1791. ———.]—A trustee for a banking co. had vested in him, as such trustee, property held by the bank as security for moneys advanced, & also property belonging to the bank absolutely. The trustee, upon retiring from the trust, executed a deed, which contained various recitals showing an intention to pass to new trustees for the bank the property vested in him by way of security only. There was also a general recital of request by the bank to transfer the trust property generally vested in the trustee. At the time the deed was executed it was not present to the minds of the parties that there was any property vested in the trustee other than the securities:—*Held*: certain leaseholds of great value, which were the absolute property of the bank, did not pass.—*HOPKINSON v. LUSK* (1864), 34 Beav. 215; 3 New Rep. 357; 10 L. T. 122; 10 Jur. N. S. 288; 12 W. R. 392; 55 E. R. 617.

*Annotations:—**Refd.* *Howard v. Shrewsbury* (1874), L. R. 17 Eq. 378; *Crompton v. Jarratt* (1885), 30 Ch. D. 298; *Re Durham, Grey v. Durham* (1887), 57 L. T. 164; *Williams v. Pinckney* (1897), 67 L. J. Ch. 34.

1792. ———.]—A marriage settlement recited that by virtue of certain specified instruments, certain specified hereditaments, & all other the freehold hereditaments in the county of York thereafter expressed to be appointed & released, were limited as the settlor should appoint, & subject thereto, to him in fee.

The settlor, at the date of the conveyance was seised of a fee simple estate in Yorkshire, called the L. estate, which was not comprised in the above specified instruments, & was not recited nor mentioned in the conveyance:—*Held*: the general words must be restricted by the recital, & the L. estate did not pass.—*JENNER v. JENNER* (1866),

L. R. 1 Eq. 361; 35 L. J. Ch. 329; 12 Jur. N. S. 138; 14 W. R. 305.

*Annotations:—**Refd.* *Crompton v. Jarratt* (1885), 30 Ch. D. 298; *Danby v. Coultis* (1885), 29 Ch. D. 500; *Williams v. Pinckney* (1897), 67 L. J. Ch. 34; *Crouch v. Crouch*, [1912] 1 K. B. 378. *Mentd.* *Guaranty Trust Co. of New York v. Hannay*, [1915] 2 K. B. 536.

1793. ———.]—C., the owner of leaseholds, renewable by custom, contracted, in 1798, to redeem the land tax thereon, under 38 Geo. 3, c. 60, & transferred to the comrs. a sum of consols for that purpose, but did not exercise the option under sect. 17 of the Act. After the death of C., T. & M. who were entitled in equal shares to the leaseholds under his will which contained no reference to the land tax, & also to his residuary personal estate, by a settlement made in 1818, assigned the leaseholds & all their estate & interest therein, to trustees upon the trusts of the settlement. The recitals did not refer to the land tax. T. died in 1821, having made no claim to a moiety of the charge in respect of the land tax. On the death of M., the personal representative of T. & M. claimed, as against those entitled under the settlement, a charge in respect of the land tax:—*Held*: C., on redeeming the land tax, became entitled to the interest on the consols transferred by him as a rentcharge on the leaseholds for his own benefit; that it did not pass under the general words of the settlement of 1818, but remained as a separate property in the settlors, as residuary legatees of C.; that their representative was now entitled to it as a charge on the leaseholds; & that the fact of T. not having made any claim was no bar.

Where the recital is that you intend to convey certain specific property & the general words in the *habendum* including interest & the like, are sufficiently large to convey other property which is not specified in the recital, that other property does not pass (*ROMILLY, M.R.*).—*NEAME v. MOORSOM* (1866), L. R. 3 Eq. 91; 36 L. J. Ch. 274; 12 Jur. N. S. 913; 15 W. R. 51.

1794. ———.]—Though words of specific description are not easily dealt with, yet general words are; & though general words may be in themselves large enough, yet if, upon the whole scope of the instrument, as to which special regard is to be had to what I call introductory recitals, it appears it was not the intention of the parties to pass these properties, it will not pass them (*JESSEL, M.R.*).—*HOWARD v. SHREWSBURY (EARL)* (1874), L. R. 17 Eq. 378; 43 L. J. Ch. 495; 29 L. T. 862; 22 W. R. 290.

*Annotations:—**Refd.* *Crompton v. Jarratt* (1885), 30 Ch. D. 298; *Re Durham, Grey v. Durham* (1887), 57 L. T. 164; *Williams v. Pinckney* (1897), 67 L. J. Ch. 34. *Mentd.* *Wall v. Stanwick* (1887), 34 Ch. D. 763; *Garner v. Wingrove*, [1905] 2 Ch. 233.

1795. ———.]—A marriage settlement contained a recital that the land intended to be dealt with was subject to a certain charge, & to a term of 1,500 years. The operative part of the deed referred to a schedule in which certain lands situate in four townships in the County of Durham, & subject to this charge, were particularly described. The operative part also contained general words referring to all other lands belonging to the settlor in these townships. The settlor at the time of the settlement was entitled to other lands in two of these townships of about the same value as the scheduled property, but subject to a different set of charges to those mentioned in the recitals:—*Held*: these last lands did not pass by the deed, & the operation of the general words was confined to the lands which were subject to the charges mentioned in the recitals.—*Re DURHAM (EARL)*,

GREY (EARL) v. DURHAM (EARL) (1887), 57 L. T. 164.

1796. ———.—[ORR v. MITCHELL, No. 1745, ante.

Condition on bond—Limitation of time shown by recital.]—See BONDS, Vol. VII., p. 183, Nos. 212, 213.

——— Limitation declared by recital.]—See BONDS, Vol. VII., pp. 182, 190, Nos. 204, 301.

1797. Construction of covenant—Meaning shown by recital.]—BARTON v. FITZGERALD, No. 720, ante.

1798. Omission in operative part of name of person executing deed—Omission supplied by recital.]—W., a married man, entitled in fee simple in possession to real estate, became bankrupt. On a sale of his estate by the assignee, the deed of conveyance, after reciting that W. & his wife joined for the purpose thereafter mentioned, the operative part, omitting altogether the name of the wife, proceeded as follows: "the said W., & by this present deed intended to be acknowledged by the said wife as her act & deed, doth bargain, sell," etc. The deed was executed & acknowledged by the wife in accordance with the provisions of Fines & Recoveries Act, 1833 (c. 74). The wife survived W.:—*Held*: the wife had effectually barred her right to dower.—DAET v. CLAYTON (1864), 4 New Rep. 221; *sub nom.* DENT v. CLAYTON, 33 L. J. Ch. 503; 101 L. T. 865; 10 Jur. N. S. 671; 12 W. R. 903.

1799. Omission of some parcels in operative part—Omission supplied by recitals.]—BARRATT v. WYATT, No. 1768, ante.

General powers.]—See AGENCY, Vol. I., p. 297, No. 247.

SUB-SECT. 2.—MISRECITALS.

1800. Governed by clear intention shown in operative part—Lease misreciting date of earlier lease.]—A second lease which recited a former one under a false date being pleaded, & the true date alleged in the pleading, is good on *non demisit modo et formā*, & the variance immaterial.—MOUNT v. HODGKIN (1551), 2 Dyer, 116 a; 73 E. R. 255.

Annotations:—*Refd.* Wrottesby v. Adams (1560), II. Dyer,

PART III. SECT. 8, SUB-SECT. 2.

a. Governed by clear intention shown in operative part—Deed of appointment.]—MINCHIN v. MINCHIN (1871), 5 L. R. Eq. 258.—*IR.*

r. *Misrecitals*—*Effect of*.]—K., having agreed with plffs. for the purchase of some lumber, depts. consented to guarantee his punctual payment for the same, but inadvertently the first agreement, in which K. bound himself to pay for the lumber, was recited in the agreement signed by the sureties, as bearing date Dec. 22, 1851, whereas it was dated on Jan. 8, 1852:—*Scutle*: if it were shown that there was but one agreement between the parties relating to the matter, the error in the recital of it would not be fatal, & plff. might recover.—WADSWORTH v. TOWNLEY (1853), 10 U. C. R. 579.—*CAN.*

s. ———.—[Ejectment on a sheriff's deed, which recited that by a *ven. ec.* he had seized the lands, & since the seizure made by virtue of the said writ, had exposed them to public sale, etc., & then granted to the purchaser. It appeared that the lands had been seized under a *fi. fa.* previously issued, & that the *ven. ec.* ordered him to sell the lands so seized:—*Held*: the misrecitals did not

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177 b; Palmer v. Humphrey (1597), Cro. Eliz. 584; Miller v. Manwaring (1635), Cro. Car. 397; Foot v. Berklay (1670), 2 Keb. 654.

1801. ——— Second lease takes effect at once.]—A lease intended to commence in *futuro* which misrecites the prior lease on which it depends in a material point, shall begin immediately.—MILLER v. MANWARING (1635), Cro. Car. 397; 70 E. R. 947.

Annotations:—*Distd.* Lloyd v. Gregory (1638), Cro. Car. 501. *Refd.* Foot v. Berklay (1670), 2 Keb. 654; Blackmore v. Cumberford (1680), Freem. K. B. 527. *Mentd.* Ward v. Lunley (1860), 24 J. P. 150.

1802. ———.—[FOOT v. BERKLAY (1670), 2 Keb. 654; 1 Lev. 231; 1 Sid. 400; 1 Vent. 83; 84 E. R. 385.

1803. ——— Misrecital of parties to fine.]—A grant of a manor is good although in reciting a fine it mistakes plff. for defendant.—MOODY v. LEWEN (1593), Cro. Eliz. 127; 78 E. R. 381.

Annotation:—*Consd.* Foot v. Berklay (1666), O. Bridg. 527.

1804. ——— Grant of reversion on misrecited lease.]—WITHERS v. CASSON (1615), Hob. 128; 80 E. R. 278.

Annotation:—*Refd.* Foot v. Berklay (1670), 1 Vent. 83.

1805. Misrecital of title—Showing intention of parties.]—A deed to lead the uses of a recovery, by mistake treated an advowson as in gross, & as vested, as to one moiety in A. for life, with remainder to his first & other sons in tail general; & as to the other moiety, as vested in A. in fee. The whole advowson was, in fact, appendant to a manor; & the manor & appendant advowson were, with other hereditaments, vested in A. for life, with remainder to his first & other sons in tail male. A's eldest son joined with A. in making a tenant to the *precipe*:—*Held*: notwithstanding the language of the recovery deed was large enough to have passed the whole advowson as an advowson appendant, yet, by reason of the apparent intention of the parties, although arising out of a mistake, the tenancy in tail was not barred in one moiety of the advowson.—MOSELEY v. MOTTEUX (1842), 10 M. & W. 533; 12 L. J. Ex. 130; 152 E. R. 582.

Annotation:—*Refd.* Hicks v. Sallitt (1851), 18 Jur. 915.

1806. Misrecital of consideration.]—A deed which incorrectly recites the consideration of a contract on which a conveyance was executed, does not thereby warrant a suit to set aside the

invalidate the deed, & the plffs. might show what the facts were.—ROE v. MCNEILL (1864), 14 C. P. 424.—*CAN.*

t. ———.—[A testator devised property to his wife, who conveyed to D. in fee. Afterwards D., & S., his wife, joined in a deed for valuable consideration, to M. & his wife, reciting that she was entitled to the property as co-heiress of the testator. Subsequently M. & his wife conveyed to a trustee for S. Plff. claimed under S., & notwithstanding the erroneous recital:—*Held*: she was entitled to a conveyance.—LAWLOR v. MURCHISON (1853), 4 Gr. 284.—*CAN.*

u. ———.—[Crown cannot, any more than a private individual, when it has parted with its interest in land, by means of a recital in a subsequent instrument, derogate from such grant or give any other person any right or equity in such land.—BOEKNER v. HITTLE (1912), 11 E. L. R. 222; 46 N. S. R. 231; 6 D. L. R. 548.—*CAN.*

v. ———.—*Real intention may be proved by parol evidence.*—Lands being re-settled, £2,500 was charged for younger children by a deed reciting that estates were charged with £1,000 for them under a previous settlement

which really charged the lands with £2,000. Those children claimed both sums:—*Held*: this was a mere misrecital, & the real intention, if it had been to charge £2,500, besides only £1,000, should have been proved by parol evidence.—RUBY v. FOOT & BEAMISH, [1817] Beat, 581.—*IR.*

w. ———.—[The recital described premises as let by one lease at one rent, whereas they were let by two leases at two separate rents, together equal to that stated in the recital:—*Held*: although there was misdescription it was not such as affected the title.—SPURNER v. WALSH (1847), 10 L. Eq. R. 386.—*IR.*

x. *Uncertain recital—Effect of.*—A grant of land from the Crown to A. in 1505 recited that a prior grant of the same land had been made to B. in 1765, & that such grant had not been registered in this province, & also recited that it had been represented to the Govt. of the province that the land had been sold & conveyed by B. to A.:—*Held*: in the absence of any other evidence of the grant to B., & of the conveyance by him to A., the title of A., under the grant of 1805, was not disapproved by the recital of the prior grant to B.—

B B

Sect. 8.—Recitals: Sub-sects. 2, 3, 4, 5 & 6. Sect. 9: Sub-sect. 1, A. & B.]

contract, but only to reform the conveyance.—**HARRISON v. GUEST** (1860), 8 H. L. Cas. 481; 11 E. R. 517.

Annotations:—Mentd. *Denton v. Donner* (1856), 23 Beav. 285; *Clark v. Malpas* (1862), 31 Beav. 80; *Baker v. Monk* (1864), 33 Beav. 419; *Summers v. Griffiths* (1865), 35 Beav. 27; *Baker v. Loader* (1872), L. R. 16 Eq. 49; *Hilliard v. Kiffe* (1874), L. R. 7 H. L. 38; *Rosher v. Williams* (1875), L. R. 20 Eq. 210; *Fry v. Lane, Re Fry, Whittet v. Bush* (1888), 40 Ch. D. 312.

SUB-SECT. 3.—RECITALS OPERATING AS COVENANTS.
See Part IV., Sect. 1, sub-sect. 2, B., post.

SUB-SECT. 4.—RECITAL AS EXECUTION OF POWER.
See POWERS.

SUB-SECT. 5.—RECITALS AS ESTOPPEL.
See ESTOPPEL.

SUB-SECT. 6.—RELEASES AND POWERS OF ATTORNEY.

Releases.]—See BONDS; CONTRACT; REAL PROPERTY & CHATTELS REAL; TRUSTS & TRUSTEES.

Powers of attorney.]—See AGENCY, Vol. I., p. 297, Nos. 247-251.

SECT. 9.—RECEIPT CLAUSE—SUFFICIENCY OF DISCHARGE.

SUB-SECT. 1.—BEFORE CONVEYANCING ACT, 1881.
A. At Common Law.

See, generally, ESTOPPEL.

Releases generally, see CONTRACT, Vol. XII., pp. 497 et seq.

1807. Receipt endorsed—Sufficient discharge.]—In an action for money had & received, if deft. shows a deed of assignment of the money to himself, & a receipt for the consideration money indorsed, it is a good discharge.—**TOWNTREE v. JACOB** (1809), 2 Taunt. 141; 127 E. R. 1030.

Annotations:—Refd. *Lampon v. Corke* (1822), 5 B. & Ald. 606; *Baker v. Dewey* (1823), 1 B. & C. 704.

DOE d. DES BARRES v. WHITE (1812), 1 Kerr, 595.—**CAN.**

e. Presumption as to accuracy—Notwithstanding recitals in other deeds—Produced by same party.]—Lands were conveyed, in 1804, by deed to W. By deed poll indorsed upon the deed of 1804, & dated in 1823, W. described as "the within named W." granted the same lands to trustees of a marriage settlement executed in 1820 under which plffs. claimed:—**Held:** the W. who executed the deed poll would be presumed to have been the grantee of the deed of 1804, notwithstanding recitals in other deeds, produced by plffs. as part of their chain of title, tending to show that the grantee of the deed of 1804 was dead before 1820.—**THOMSON v. BENNETT** (1872), 22 C. P. 393.—**CAN.**

PART III. SECT. 9, SUB-SECT. 1.—A.

1807 i. Receipt indorsed—Sufficient discharge.]—The body of a deed acknowledged the payment of the purchase money in the usual form, & a receipt therefor signed by plff. was also

indorsed, but subsequent to the sale a dispute arose as to whether the amount stated in the deed included a mtgce. existing on the property, or whether the purchaser was to pay that also. Plff. having sued for the amount of the mtgce.:—**Held:** in the face of the indorsed receipt, & of certain evidence adduced in confirmation thereof, he could not recover.—**MCDONALD v. BLOIS** (1873), 9 N. S. R. 283.—**CAN.**

1807 ii. —.]—Receipt indorsed upon deed bearing date 1728, would alone in 1791 be evidence of payment of the consideration.—**CHANDOS v. BROWNLOW** (1791), 2 Ridg. Parl. Rep. 345.—**IR.**

1807 iii. —.]—In the deed of conveyance, the consideration-money was stated to have been paid by deft. to plff., & there was a receipt to the same effect endorsed on the deed. The deed was executed, & the receipt signed by plff.:—**Held:** it was not competent for plff. to show by evidence *dehors* the deed that the execution & signature aforesaid were procured by

1808. — Under hand—Not conclusive.]—A deed containing a general release of all debts, etc., recited that the releasee had previously agreed to pay to the releasor the sum of £40 for the possession of certain premises, & that in "consideration of the £40 being now so paid as hereinbefore is mentioned," & also in consideration of the sum of 10s. a piece, well & truly paid to the said releasor & J. S., the receipt of which several sums of money they did thereby acknowledge, did release, etc. There was also a receipt for the £40 indorsed on the release. But it appeared on action afterwards brought for this sum that, in fact, it had never been paid:—**Held:** this deed of release was no estoppel, inasmuch as the general words of release were qualified by the recital, which stated only an agreement to pay, & not an actual payment of the sum of £40.

The receipt clause, not being under seal, is no estoppel, & its truth may be disputed (**BEST, J.**).—**LAMPON v. CORKE** (1822), 5 B. & Ald. 606; 106 E. R. 1312; *sub nom.* **LAMBOURNE v. CORK**, 1 Dow. & Ry. K. B. 211.

Annotations:—Consd. *Bottrell v. Summers* (1828), 2 Y. & J. 407. **Refd.** *Baker v. Dewey* (1823), 1 B. & C. 704.

1809. Receipt in body of deed—May be qualified by recital of agreement to pay.]—**LAMPON v. CORKE**, No. 1808, *ante*.

1810. —.]—A deed of conveyance, after reciting that it had been agreed that £1,400, part of the purchase-money, should be paid to the mtgee. of the premises, & that the residue of the purchase-money £400, should be paid to the vendor, witnessed, that in consideration of the sum of £1,400 paid to the mtgee. at or before the sealing & delivery of the deed, the receipt whereof the mtgee. acknowledged, & from the mtgce. money & every part thereof acquitted & discharged the vendor & purchaser, & also in consideration of the sum of £400 paid to the vendor as before-mentioned, the receipt whereof & also the payment of the mtgce. money, making the whole of the sum of £1,800, the vendor thereby acknowledged & from the same & every part thereof acquitted, released, & discharged the purchaser, etc.:—**Held:** to be no estoppel upon the vendor, the release by the words "as before mentioned," etc., referring to & being qualified by the recital, which stated an agreement to pay the £400 & not an actual payment.—**BOTTRELL v. SUMMERS** (1828), 2 Y. & J. 407.

1811. — Conclusive proof.]—**BAKER v. DEWEY**, No. 1202, *ante*.

fraud, & that plff. could be relieved against such fraud in a ct of equity only, & not in the Civil Bill Ct.—**PHILLIPS v. HANLON** (1841), 2 Craw. & D. 96.—**IR.**

1. Receipt in body of deed—Whether conclusive proof.]—**READ v. MCLELLAN** (1848), 1 All. 81.—**CAN.**

e. —.]—In an action for the purchase money of land conveyed, a receipt under seal in the conveyance is conclusive evidence under the plea of payment.—**KETCHUM v. SMITH** (1861), 20 U. C. R. 313.—**CAN.**

h. —.]—Receipt of the consideration money in a deed is conclusive at common law.—**NELSON v. CONNORS** (1863), 1 Old. 406.—**CAN.**

k. —.]—Plff. assigned to deft. his interest in a certain lease by deed, containing a receipt for the consideration money, \$350. This deed was placed in K.'s hands to hold till deft. deposited this sum. K. delivered it to deft. on his promise that he would pay, & deft. afterwards paid him \$75, saying he would hand him the balance as soon as he obtained it. On being

1812. ———.]—A policy was sold subject to a condition that the purchaser should pay down a deposit of 20 per cent. & sign an agreement for payment of the remainder on June 8, 1835, but should the completion of the purchase be delayed, the purchaser was to pay interest on the balance. Deft. paid the purchase-money in full with interest from June 8, & an assignment containing a release & having a receipt for the whole purchase-money indorsed was handed to deft. It was afterwards discovered that pltf.'s attorney undercalculated the interest by £34 :—*Held*: the release was a bar to an action for that sum.

Pltf. having executed this deed is estopped from the receipt of any further consideration money. The sum accruing by reason of the non-completion of the contract on the day limited is an additional price, & pltf. has released the consideration money, whatever it was, to the full amount, & cannot now say that more was due (PARKE, B.).—*HARDING v. MABLE* (1838), 3 M. & W. 279; 1 Horn & H. 48; L. J. Ex. 132; 2 Jur. 305; 150 E. R. 1149.

1813. ———.]—A. transferred shares to B. by a deed executed by both parties, which admitted the payment of the consideration money. The money not having really been paid, A. filed a bill against B. to compel payment :—*Held*: B. was bound to pay the purchase-money.

It is true the deed does estop the parties at law, because at law you cannot contradict the deed, but it is settled by abundance of authority, that in this ct. you can contradict the statement of the payment of the purchase-money (ROMILLY, M.R.).—*WILSON v. KEATING* (1859), 27 Beav. 121; 28 J. Ch. 895; 33 L. T. O. S. 325; 5 Jur. N. S. 15; 7 W. R. 484; 51 E. R. 47; *on appeal*, 4 G. & J. 588, L. C. & L. JJ.

1814. ———.]—May be rebutted in case of dishonoured cheque.]—The usual acknowledgment of a deed of the receipt of a sum of money, may be rebutted by evidence of some subsequent & distinct circumstances; as, for instance, if a cheque were given at the executing of the instrument, & were dishonoured on presentment.—*DEVERELL*.

WHITMARSH (1841), 5 Jur. 963.
See, now, Jud. Act, 1873 (c. 66).

B. In Equity.

See, generally, ESTOPPEL.

Release generally.]—*See* CONTRACT, Vol. XII., p. 497 *et seq.*

1815. Receipt indorsed.]—*COPPIN v. COPPIN*

(1725), 2 P. Wms. 291; *Cas. temp. King*, 28; 24 E. R. 735, L. C.

Annotations :—*Mentd.* Mackreth v. Symmons (1808), 15 Ves. 329; Selby v. Selby (1828), 4 Russ. 336; Sproule v. Prior (1836), 3 Sim. 189; Courtenay v. Williams (1844), 3 Hare, 539; Phillips v. Phillips (1844), 3 Hare, 281; Turner v. Martin (1857), 7 De G. M. & G. 429.

1816. ———.]—A brickmaker entered into an agreement with a tradesman to adopt his son; & by an indenture made in pursuance of such agreement, the brickmaker, in consideration of £100 expressed to be paid to him by the father, covenanted to apprentice the son, & that he should have the whole of his property at his decease if he left no child. The brickmaker died, without issue, having, by his will, given his estate amongst his own family. The son instituted this suit to have the benefit of the covenant :—*Held*: the evidence of an attesting witness, proving the signature of a receipt for the consideration, which was indorsed on the deed, was not sufficient proof of payment; the witness having in his evidence stated a fact, from which it appeared that though there was an apparent intention on the part of the father immediately to pay the money, yet at the time of the signature, it was not actually paid, & he not having witnessed the payment of it afterwards.—*HILL v. GOMME* (1839), 1 Beav. 540; 8 L. J. Ch. 350; 3 Jur. 744; 48 E. R. 1050; *affd.*, 5 My. & Cr. 250, L. C.

Annotation :—*Mentd.* Green v. Paterson (1886), 32 Ch. D. 95.

1817. ———.]—Disproved by recitals in contemporaneous deed.]—Purchase-money proved to have been left in the hands of the purchaser as an indemnity in 1796, but for which a receipt was indorsed on the conveyance, the evidence being in the recitals of a deed contemporaneous with the purchase, & executed in order to enable the purchase to be completed, & these recitals stating trusts of the fund under which pltf's. were entitled in remainder after two life estates, the last of which expired in 1845 :—*Held*: as pltf's. title in possession did not accrue till 1845 they were entitled on a bill filed in 1852, to have the trust fund made good out of the assets of the purchaser who had died in 1811.—*HAWKINS v. GARDINER* (1854), 2 Sm. & G. 441; 65 E. R. 472.

1818. ———.]—Conclusive in favour of transferee for value.]—On a mtge. to secure £250, a receipt for that amount was indorsed, signed by the mtgor. The mtge. was subsequently transferred by the mtgee. without the mtgor. being made a party

and again he said he had the money, & that pltf. should pay part of the price of a bond which he had to do respecting the title. Pltf. then acted upon the common counts, for the release money of land & on an account stated :—*Held*: he was estopped by the receipt under seal, & could recover on either count.—*SPARLING v. SAVAGE* (1866), 25 U. C. R. 259.—N.

———.]—Pltf. sold & conveyed to deft. certain land, the deed containing a receipt for the purchase money, \$800, with a receipt for the purchase money also indorsed. Pltf. then sued deft. upon the common counts for the purchase money of the land, on an account stated. Deft. pleaded, among other pleas, payment of the sale debt. told one M. that had only paid pltf. \$41, & offered to pay M. whatever pltf. was willing to accept. It also appeared, though very clearly, that pltf. was present at this conversation :—*Held*: pltf. was concluded by the receipt in the deed & he could not recover on either count.—*CASEY v. McCALL* (1868), 19 P. 90.—CAN.

m. ———.]—An admission of the execution of the mtge. was held clearly to include the signature to the receipt, & the receipt of the money as there stated.—*McDONALD v. CLARKE* (1870), 30 U. C. R. 307.—CAN.

n. ———.]—Pltf. in Aug. 1867, conveyed to deft. certain land, by deed containing a receipt for the purchase money. It appeared, however, that when this conveyance was made, some question being raised as to pltf.'s title, deft. retained \$100 of the purchase money, & in Oct. following, gave pltf. the following agreement: "Fifteen months after date, I promise to pay to the order of H., or bearer, the sum of \$100, providing that the title is good, on lots known as etc., for value received." Pltf. sued deft. on this agreement, & on the common counts, to which deft. pleaded payment :—*Held*: pltf. was estopped by the receipt in the deed, which included this \$100, & he could not recover.—*HARRISON v. PRESTON* (1873), 22 C. P. 576.—CAN.

o. ———.]—*Held*: a mtge. which contains an acknowledgment of receipt of the mtge. money, but no

covenant for repayment of money, does not of itself afford conclusive evidence of a debt so that the mtgee. or his assigns can maintain an action for its recovery.—*LONDON LOAN CO. v. SMYTH* (1882), 32 C. P. 530.—CAN.

p. ———.]—*WEBSTER v. SNIDER* (1911), 45 S. C. R. 296; 20 W. L. R. 239.—CAN.

q. ———.]—Where a mortgage deed is proved to have been executed & the document contains an acknowledgment of the receipt of the consideration, this is strong *prima facie* evidence that the consideration has been actually received & the evidence not only against the mortgagors, but also against persons claiming under them subsequent to the date of the mortgage.—*RAMBU v. SITA RAM* (1914), 1 L. L. 36 All. 478.—IND.

r. ———.]—*Whether balance admitted to be unpaid recoverable.*—*Qu.*: whether one who has conveyed land & acknowledged in the deed the receipt of the purchase money, can recover a balance unpaid, on an admission by the purchaser that he owes it.—*McALLISTER v. DAY* (1858), 4 All. 37.—CAN.

1825. Receipt clause conclusive—In favour of

1825. Receipt clause conclusive—In favour of

transferee for value without notice.]—SAUNDERS v. KENT, [1885] W. N. 147.

[Annotation:—*Apprvd.* Powell v. Browne (1907), 97 L. T. 854.

1826. ———.]—If the owner has not only transferred property to an agent or trustee, but as acknowledged that the transferee has paid all consideration for it, he is estopped from asserting his equitable title against a person to whom the transferee has disposed of the property or value.

The statement, in a transfer of mtge. made in a form prescribed by statute, that the mtge. is transferred in consideration of £—— paid by A. to B., without any express receipt clause, is sufficient to create this estoppel.—RIMMER v. WEBSTER, [1902] 2 Ch. 163; 71 L. J. Ch. 561; 6 L. T. 491; 50 W. R. 517; 18 T. L. R. 548.

[Annotations:—*Mentd.* Weiner v. Gill, Weiner v. Sraith, [1906] 2 K. B. 574; Burgis v. Constantine, [1908] 2 K. B. 484; Truman v. Attenborough (1910), 103 L. T. 218; Lloyd v. Grace, Smith, [1911] 2 K. B. 489; Fry v. Smellie, [1912] 3 K. B. 282; Lloyds Bank v. Swiss Bankverein, Union of London & Smiths Bank v. Swiss Bankverein (1912), 107 L. T. 309.

1827. ———.]—A mtge. deed was prepared & executed by depts., purporting to be in consideration of the specified amount, the receipt whereof was acknowledged in the body of the deed. The mortgage debt was subsequently assigned to the testator. Testator of plffs. not having had actual or constructive notice that the amount specified in the mtge. deed had not been paid:—*Held*: plffs. were entitled to rely on the acknowledgment contained in that deed, & to recover the amount therein stated to have been received.—BATEMAN HUNT, [1904] 2 K. B. 530; 73 L. J. K. B. 782; 1 L. T. 331; 52 W. R. 609; 20 T. L. R. 628, A.

[Annotations:—*Refd.* Burchell v. Thompson, [1920] 2 K. B. 80. *Mentd.* Powell v. Browne (1907), 97 L. T. 167.

1828. ———.]—A client executed in favour of his solr. a mtge. which contained the usual receipt clause, but no money was in fact ever advanced by the solr. to the client. The solr. subsequently executed a sub-mtge. in favour of a third party:—*Held*: the original mtgee. was topped by the receipt, as against the sub-mtgee., on denying that he had received the advance.—JEWELL v. BROWNE (1907), 97 L. T. 854; 21 L. R. 71; 52 Sol. Jo. 42, C. A.

1829. What amounts to receipt in body of deed under Conveyancing Act, 1881 (c. 41), s. 55.]—to constitute a receipt in the body of a deed within the meaning of sect. 55 of above Act, is the statement of consideration, express words acknowledging the receipt of such consideration being necessary.—RENNER v. TOLLEY (1893), 68 T. 815; 37 Sol. Jo. 477; 3 R. 623.

1830. ———. Statutory transfer of mortgage.] RIMMER v. WEBSTER, No. 1826, ante.

1831. In mortgage—Proof of non-payment.]—1887 freeholds were mortgaged to a building society by H. to secure advances. In Oct. 1892, H. died, having devised these freeholds to N. upon trust for sale. In Dec. 1892, C., the solr. who acted for the society, & also for H., & after his death, for N., having fraudulently represented to the society that notice to pay off their mtge. had been given, procured the statutory receipt to be endorsed on the mtge. of 1887, & obtained possession of the title deeds of the property: the money owing to the society was never paid off, N. at this time being unaware of the existence of the mtge. Shortly afterwards agreed to sell the property to C., who was at this time in good repute & supposed to be well off, & by a deed of Dec. 20,

1892, which recited the trust for sale in H.'s will, N., in consideration of £700 paid to him by C. at or before the execution of the deed the receipt whereof N. thereby acknowledged, conveyed the property to C. in fee. The purchase-money was not in fact paid. This conveyance & the other title deeds, except the mtge. of 1887 & the statutory receipt, were shortly afterwards deposited by C. with plffs. as security for an advance of £650. In 1893 C. was adjudicated bkpt., his frauds were discovered, & he was convicted & sentenced. Plffs. now claimed to enforce their security against the society & against C. & his *cestui que trust*. It was admitted that the society had priority over N. & his *cestui que trust*, & the main contention was between plffs. & the society & plffs. & N. & his *cestui que trust*:—*Held*: the society were entitled under the circumstances to show that they had never been paid off, the statutory receipt & the mtge. of 1887 were delivered only as an escrow, & the mtge. not having been paid off, & the legal estate being still in the society, they had priority over plffs.—LLOYDS BANK, LTD. v. BULLOCK, [1896] 2 Ch. 192; 65 L. J. Ch. 680; 74 L. T. 687; 44 W. R. 633; 12 T. L. R. 435; 40 Sol. Jo. 545.

[Annotations:—*Distd.* Capell v. Winter, [1907] 2 Ch. 376. *Refd.* King v. Smith, [1900] 2 Ch. 425. *Mentd.* Hunt v. Luck (1900), 49 W. R. 155.

1832. ———.]—A testator died in 1895, having by his will given his real estate to his son C., & one L., upon trust to sell, & divide the proceeds among his four children, including C., each share being settled on trusts for a child for life, & afterwards for the children of that child. L. having died in Aug. 1904, from then till Jan. 1905, C. was the sole exor. & trustee of the will. In Sept. 1904, C. & another severally owed money to one M. on promissory notes for £2,000. C. & M., in fraud of the rights of the beneficiaries under the will, M. having full notice of the breach of trust, arranged that the £2,000 should be further secured on part of the trust estate, & to carry out the arrangement C. on Sept. 29, 1904, executed & delivered to M. what purported to be a conveyance on sale of part of the land held in trust to M. in consideration of £2,000. The deed contained the usual receipt for the purchase-money, but no part of the £2,000 was ever paid, it being arranged that the deed was to be held as security for the money due on the notes to the extent to which they should be dishonoured. In Apr. 1905, M. deposited the deed with B., & gave him a memorandum charging the land conveyed with £1,000 lent by B., who had no actual or constructive notice that any breach of trust had been committed, or that the £2,000 had not been paid by M., & had not been guilty of any conduct which would have made his equity inferior to that of the beneficiaries:—*Held*: there was no contract of sale, & therefore no vendor's lien, but an equity in the beneficiaries to have the property sold & the proceeds divided; the beneficiaries were not estopped by the receipt from saying that the money had not been paid or that the real transaction was not a sale & purchase; & the equities of the beneficiaries & B. being equal in every other respect, the equity of the beneficiaries must prevail by reason of its priority in point of time.—CAPELL v. WINTER, [1907] 2 Ch. 376; 76 L. J. Ch. 496; 97 L. T. 207; 23 T. L. R. 618; 51 Sol. Jo. 570.

Omission of receipt in bill of sale.]—See BILLS OF SALE, Vol. VII., pp. 54, 55, Nos. 291, 292.

Under Workmen's Compensation Acts.]—See MASTER & SERVANT.

SECT. 10.—THE PROPERTY CONVEYED.

SUB-SECT. 1.—THE PARCELS.

A. In General.

1833. Parcel or no parcel—Question for jury.]—

Parcel or no parcel is always a question for the jury (ELLENBOROUGH, C.J.).—GOODTITLE *v.* RADFORD *v.* SOUTHERN (1813), 1 M. & S. 299; 105 E. R. 112.

Annotations.—*Consd.* Press *v.* Parker (1825), 2 Bing. 456. *Refd.* Paddock *v.* Fradley (1830), 1 Cr. & J. 90; Doe *d.* Ashforth *v.* Bower (1832), 3 B. & Ad. 453; Smith *v.* Ridgway (1865), 14 W. R. 207. *Mentd.* Doe *d.* Beach *v.* Jersey (1818), 1 B. & Ald. 550; Miller *v.* Travers (1832), 8 Bing. 244; Richardson *v.* Watson (1833), 4 B. & Ad. 787; Hall *v.* Fisher (1844), 1 Coll. 47; Doe *d.* Hubbard *v.* Hubbard (1850), 15 Q. B. 227; Slingsby *v.* Grainger (1859), 7 H. L. Cns. 273; Stanley *v.* Stanley (1862), 2 John. & H. 491; Webber *v.* Stanley (1864), 16 C. B. N. S. 698; White *v.* Birch (1867), 36 L. J. Ch. 174; Hardwick *v.* Hardwick (1873), L. R. 16 Eq. 168.

1834. ———.]—MANNING *v.* FITZGERALD, No. 944, *ante*.

183. ———.]—Duty of judge.]—LYLE *v.* RICHARDS, No. 603, *ante*.

1836. Reputed parcel—Question for court.]—

The king grants a manor, & every part & parcel, or that is reputed parcel thereof. This reputation is not a question for the jury, but for the ct.—LEE *v.* BROWNE (1676), 1 Freem. K. B. 207; 2 Mod. Rep. 69; 89 E. R. 147; *sub nom.* LEA *v.* BROWNE, Poll. 410.

Annotation.—*Refd.* Delacherols *v.* Delacherols (1864), 4 New Rep. 501.

B. Falsa demonstratio non nocet.

See Sect. 3, sub-sect. 13, *ante*.

PART III. SECT. 10, SUB-SECT. 1.—D.

t. *Monuments control courses.*]—If reference is made by a deed to monuments & boundaries, they control, though they may call for courses, distances, or computed contents which do not agree with those in the deed.—GRASSETT *v.* CARTER (1880), 10 S. C. R. 105.—CAN.

a. ———.]—In construing documents of title, giving the length of a course in feet or other denomination, with the addition "or until it comes to an object," that object, be it less or more than the length given, is the boundary.—MILMORE *v.* WOODSTOCK (1907), 3 E. L. R. 204; 38 N. B. R. 133.—CAN.

b. ———.]—Cox *v.* DAY (1913), 12 E. L. R. 524.—CAN.

c. ———.]—Where the description of lands in a grant is found to be erroneous & something must be rejected, courses & distances will be controlled by monuments & fixed lines.—BLACKADER *v.* HART (1917), 51 N. S. R. 449.—CAN.

d. ———.]—Course from ascertained monument controls an unascertained one.]—DIXON *v.* McLAUGHLIN (1854), 1 E. & A. 370.—CAN.

e. ———.]—The deed to plff. purported to convey the lot as containing 200 acres, bounded in front by the river T.; then 58 chains to an allowance for road between the 1st & 2nd concessions:—*Held*: plff. was restricted in his claim to a space of 58 chains from the river T., & had no title to lands to the north thereof.—CROW *v.* MARTIN (1883), 2 E. & A. 425; 22 U. C. R. 485.—CAN.

f. ———.]—Where a course is described as running from a fixed monument, "north along the rear line of lots 16, 17 & 18, 180 rods," the dimension 180 rods conclusively determines the distance to be run & not the reference to lot 18.—MILLET *v.* BEZANSON (1910), 9 E. L. R. 16.—CAN.

g. *Monuments unascertainable.*]—

C. *Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram.*

See Sect. 3, sub-sect. 14, *ante*.

D. Boundaries.

Boundaries generally, see BOUNDARIES, FENCES & PARTY-WALLS, Vol. VII., p. 263.

1837. Abutments—How construed.]—Abuttal in its strict sense includes the idea of contiguity. Abutments are not in general to be construed strictly. But if the description of abutments be such, that, if correct, it might increase the value of the premises, & induce the purchaser to take the land on that account, the deed is not merely evidence that the land abuts according to the description, which may be answered by contrary evidence, but it shall amount to a grant that the land abuts as it is described.—ROBERTS *v.* KARR (1809), 1 Taunt. 95; 127 E. R. 926; *previous proceedings* (1808), 1 Camp. 262, n. N. P.

Annotations.—*Consd.* Espley *v.* Wilkes (1872), L. R. 7 Exch. 298; Mellor *v.* Walmsley, [1905] 2 Ch. 164. *Refd.* Lempreire *v.* Humphrey (1835), 3 Ad. & El. 181; Furness *It.* *v.* Cumberland Co-op. Bldg. Soc. (1884), 52 L. T. 144; Roe *v.* Siddons (1888), 22 Q. B. D. 224; Cooke *v.* Ingram (1893), 68 L. T. 671; International Tea Stores Co. *v.* Hobbs, [1903] 2 Ch. 165. *Mentd.* Healey *v.* Batley Corp. (1875), L. R. 19 Eq. 376; Brockman *v.* Folkestone Corp. (1911), 76 J. P. 99; White *v.* Grand Hotel, Eastbourne (1912), 107 L. T. 695.

Misdescription of boundaries.]—See No. 948, *ante*.

Medium filum rule.]—See, generally, HIGHWAYS, STREETS & BRIDGES; WATERS & WATERCOURSES.

When the position of the natural boundaries described in a grant cannot be ascertained, & there is no proof of the original survey, the limits of the grant cannot be extended by implication beyond the courses & distances mentioned in it.—TWINING *v.* STEVENS (1863), 1 Old. 366.—CAN.

h. *Astronomical line.*]—Deft. claimed under a timber licence, which described his limits as bounded on the south by "the continuation of a line from the head of Mud Lake on the course N. 54° E., formerly the boundary between T. C. & A. R. M." The plff. claimed under a licence which gave his northerly limit as the same line, describing it also as running N. 54° E.:—*Held*: the boundary between them was the true astronomical line N. 54° E.; & plff. could not claim according to a line run in 1874 N. 54° E. magnetically, making no allowance for the variation of the compass.—THIBAudeau *v.* SKEAD (1876), 39 U. C. R. 387.—CAN.

k. "Centre line of the railway."]—In an action of ejectment, the question in dispute was one of boundary between adjoining lots, & turned on the meaning of the words "the centre line of the railway" in the description of the lands taken & dedicated for the E. & N. A. ry.:—*Held*: the centre line of the railway meant the centre of the railway track itself, & not the centre of the lands taken for the railway track.—DOR *d.* BARNES *v.* BELYEA (1880), 19 N. B. R. (P. & B.), 541.—CAN.

l. *How ascertained when doubtful*—*Crown grant.*]—Where a particular "parcel or lot" is conveyed by a Crown grant, the boundaries of it are to be determined by the official plan or survey of the particular district.—RE LAND REGISTRY ACT (1913), 25 W. L. R. 429; 5 W. W. R. 99; 13 D. L. R. 790.—CAN.

m. *Intersection.*]—In a deed conveying land on which was erected a house which immediately adjoined another house to the north, one of the metes & bounds was, commencing

from the intersection with the street line of the northern face of the wall of the house upon the land conveyed & running westerly along the production & limit between the house conveyed & the adjoining one, to the westerly limit of the lot. Where the wall of the house conveyed extended beyond the rear wall of the adjoining house, it was cased with brick, nine inches thick, so as to cause it to project that distance beyond what would otherwise have been the division line between the two houses:—*Held*: "intersect" here meant "to divide or separate" & the northerly face of the wall must be followed no matter how devious its course might be so as to include the northerly face of the brick casing.—WESTON *v.* SMYTHE (1905), 5 O. W. R. 537; 10 O. L. R. 1.—CAN.

n. *Error in lay out.*]—An oblong tract of land, 20 by 100 chains, containing 200 acres, was sub-divided into smaller lots, with a lane laid out & staked, as was supposed, through the centre of the tract, which it really was according to the then understood boundaries. Part of the tract lying to the east of the lane was sold & conveyed; & in the deed of that part reference was made to a plan, which showed the lane as laid out through the centre of the whole tract, & the lane was therein declared to be the western boundary of such piece. Afterwards it was discovered that the eastern & western boundaries of the whole 200 acre lot, as of all the lots adjoining, should lie more to the west than was formerly supposed; & if those boundaries were shifted to their proper places as had been done by the owners of adjoining lots, the lane as originally laid out could not remain in the centre of the lot when shifted. A piece to the east of the lane was purchased by B.:—*Held*: his western limit could not extend beyond the east side of the lane as staked out before the execution of his deed.—DUNN *v.* TURNER (1852), 3 C. P. 104.—CAN.

E. Plans.

See, generally, BOUNDARIES, FENCES & PARTY-WALLS, Vol. VII., p. 263.

1838. Plan must be looked at to explain parcels.]—We must make out by looking at the map & the description in the lease whether this small portion of land is or is not included in the demise. If we come to a part too small to be laid down in the map, we must look at the words of the lease which describe the boundary (TINDAL, C.J.).—TAYLOR v. PARRY (1840), 1 Man. & G. 604; 1 Scott, N. R. 576; 9 L. J. C. P. 298; 4 Jur. 967; 133 E. R. 474.

Annotations:—Mentd. Fishmongers Co. v. Dimsdale (1852), 22 L. J. C. P. 44; Holmes v. Powell (1856), 8 De G. M. & G. 572; Humphrey v. Nowland (1862), 15 Moo. P. C. C. 343.

1839. —.]—LYLE v. RICHARDS, No. 603, ante.

1840. Where discrepancy between plan & description—Description prevails.]—General words in a conveyance are to be construed in the same manner as other words, according to their meaning, & not as conveying easements only.

By the parcels in a conveyance, a freehold house & the yards, etc., therewith, occupied or enjoyed, & delineated, & coloured on a plan annexed to the deed were granted to a purchaser. Among the general words was the word yards. On the plan a yard, which had always been enjoyed with the house, was not coloured:—*Held:* the deed passed the fee simple in the yard to the purchaser.—WILLIS v. WATNEY (1881), 51 L. J. Ch. 181; 45 L. T. 739; 30 W. R. 421.

1841. —.]—M. conveyed to W. a piece of freehold ground, with a messuage thereon, adjoining a covered gateway, together with the exclusive use of the gateway. The dimensions of the gateway or passage as to length, breadth, & height, were mentioned in the deed; & the piece of ground & premises were stated to be more particularly delineated by the portion in the plan thereto, & coloured pink. The covered gateway was not coloured on the plan:—*Held:* the conveyance to W. did not merely confer on W. & his successors in title a right of way through the covered gateway, but enabled them to use the gateway for all purposes.—REILLY v. BOOTH (1890), 44 Ch. D. 12; 62 L. T. 378; 38 W. R. 484, C. A.

Annotations:—*Reid.* Met. Ry. v. Fowler, [1893] A. C. 416; Phelps v. City of London Corp., [1916] 2 Ch. 255. *Mentd.* Taft Vale It. v. Cardiff It., [1917] 1 Ch. 299.

1842. —.]—In a grant of land with certain specified boundaries "as will further appear by the diagram framed by the surveyor":—*Held:*

where the diagram was repugnant to the terms of the grant, the latter would prevail.—HORNE v. STRUBEN, [1902] A. C. 454; 71 L. J. P. C. 88; 87 L. T. 1, P. C.

Annotations:—*Reid.* Mellor v. Walmesley, [1904] 2 Ch. 525; Watcham v. A.-G. of East Africa Protectorate, [1919] A. C. 533.

1843. —.]—W. agreed to sell to P. land situate in & fronting 133 ft. upon Walpole Road, having a depth next Oak Hill Grove of 124 ft. more particularly delineated, together with the abutments, boundaries, & dimensions thereof upon the plan thereto. The plan showed a piece of land with a slightly rounded corner at the junction of Walpole Road & Oak Hill Grove with frontage lines, marked respectively 133 ft. & 124 ft. produced in a straight line so as almost to meet at the corner:—*Held:* the purchaser, according to the representations in the contract, was entitled to a conveyance of land having 257 ft. frontage, measured round the bend of the corner of Walpole Road & Oak Hill Grove, the vendor not being entitled to have the lines of frontage produced in straight lines to their point of intersection, outside the bend in measuring the 133 ft. & 124 ft. respectively.—*Re* WELLINGS & PARSONS' CONTRACT, *Re* VENDOR & PURCHASER ACT, 1874 (1906), 97 L. T. 165.

1844. — Plan prevails.]—Resp. conveyed land to applt., & in the deed the parcels were described in four different ways: first, by the name which the premises bore; secondly, by their acreage; thirdly, by the names of the occupiers; & fourthly, by delineation & tint on a plan indorsed on the deed. The first three descriptions were all more or less inaccurate. On the plan a small strip of land was coloured which was not the property of resp.:—*Held:* the plan, being a perfectly definite delimitation of the land expressed to be conveyed by the deed, must prevail.—EASTWOOD v. ASHTON, [1915] A. C. 900; 84 L. J. Ch. 671; 113 L. T. 562; 59 Sol. Jo. 560, H. L.

Annotations:—*Consd.* Watcham v. A.-G. of East Africa Protectorate, [1919] A. C. 533. *Reid.* Norman v. Norman, [1919] 1 Ch. 297.

See, also, No. 919, ante.

SUB-SECT. 2.—GENERAL WORDS OF DESCRIPTION.

A. In Grants of Realty Generally.

See, generally, SALE OF LAND; REAL PROPERTY & CHATTELS REAL.

Doctrine of *ejusdem generis*, see Sect. 3, sub-sect. 13, ante.

PART III. SECT. 10, SUB-SECT. 1.—*E.*

o. Reference in deed to plan attached—Incorporation of plan with deed.]—Where a plan is attached to a grant or deed, & referred to in the usual terms, it is to be considered as incorporated with the instrument, & must be construed along with it.—ARCHIBALD v. MORRISON (1868), 7 N. S. R. 272.—CAN.

p. —.]—Where lands are described by reference to a plan, the plan is considered as incorporated with the deed, & the boundaries of the lands conveyed as defined by the plan are to be taken as part of the description.—GRABETT v. CARTER (1883), 10 S. C. R. 105.—CAN.

q. —.]—FULLERTON v. BRUNDIGE (1887), 20 N. S. R. (8 R. & G.) 182; 8 C. L. T. 378.—CAN.

r. —.]—SMITH v. MILLIONS (1889), 16 A. R. 149; 15 O. R. 453.—CAN.

s. —.]—*Re* OTWAY'S ESTATE (1862), 13 I. Ch. R. 222, 234.—IR.

t. —.]—Where there is no obscurity in the description of boundaries as given in a grant, the diagram annexed to the grant may afford valuable evidence of what was really intended to be granted.—*REID v. SURVEYOR-GENERAL* (1897), 14 S. C. 34; 7 C. T. R. 26.—S. AF.

a. —.]—*Not plan forming no part of deed.]*—The ct. is not justified in looking at a plan not a part of a deed merely because an unnecessary reference is made to it in that deed.—LEE v. MELBOURNE & SUBURBAN RY. CO. (1861), 1 W. & W. 34.—AUS.

b. —.]—In an action of trespass to land, plff. gave in evidence a Landed Estates Ct. conveyance to him of the *locus in quo*. Deft. tendered a copy of the ordnance map of the premises, which was attached to the conveyance but not referred to in or by it:—*Held:* the map was not admissible in evidence to explain or control the deed.—WYSE v. LEAHY (1875), 1 I. R. 9 C. L. 384.—IR.

c. — Plan not made with reference to deed.]—In ejectment for 20

acres plff. claimed under a patent. Deft. put in a mtgo. from plff. to P. of 1,300 acres, described as "being comprised in the schedule & map attached." The land in the patent was not mentioned in the schedule, though it was laid down on the map, but it was proved that the map contained other lands belonging to other parties, & was not made with reference to the mtgo., & that the schedule embraced lands not appearing on the map:—*Held:* clearly insufficient to disprove plff.'s claim.—COTTON v. MCCULLY (1862), 21 U. C. R. 550.—CAN.

1840 i. Where discrepancy between plan & description—Description prevails.]—The description of boundaries of property granted by govt., as stated in the deed & on the diagram, when clear & distinct, are to be preferred to the configuration of the ground as shown by the diagram annexed to the grant.—STRUBEN v. COLONIAL GOVERNMENT (1900), 19 S. C. 317.—SCOT.

1844 i. — Plan prevails.]—DOR d. GILDERSLEEVE v. KENNEDY (1848), 5 U. C. R. 402.—CAN.

Sect. 10.—The property conveyed: Sub-sect. 2, A., B. & C.]

1845. Construed with reference to intention.]—WILLIS v. WATNEY, No. 1840, *ante*.

1846. Restricted to what grantor had power to grant—At date of grant.]—General words in a grant must be restricted to what the grantor had power to grant at the date of the grant.—BOOTH v. ALCOCK (1873), 8 Ch. App. 663; 42 L. J. Ch. 557; 29 L. T. 231; 37 J. P. 709; 21 W. R. 743, L. J.

*Annotations:—*Reid. Master v. Hansard (1876), 4 Ch. D. 718; Boddington v. Atlee (1887), 35 Ch. D. 317; Godwin v. Schweppe, [1902] 1 Ch. 926. *Mentd.* Davis v. Town Properties Investment Corp., [1903] 1 Ch. 797; Quicke v. Chapman, [1903] 1 Ch. 659.

1847. Do not amount to warranty by grantor—Object of insertion.]—The introduction of general words into a grant of real estate does not amount to a warranty by the grantor that there is anything to answer them; but they are inserted to cover anything which may have been overlooked or not specifically mentioned.—BARING v. ABINGDON, [1892] 2 Ch. 374; 62 L. J. Ch. 105; 67 L. T. 6; 41 W. R. 22; 8 T. L. R. 576; 36 Sol. Jo. 522, C. A.

*Annotations:—*Mentd. Broome v. Wenham (1893), 68 L. T. 651; Wallis v. Hands, [1893] 2 Ch. 75.

1848. Following precise description—Conveys no other property.]—NORTH (LORD) v. ELY (BP.) (1576), cited in 1 Bulst. at p. 100; 80 E. R. 798.

*Annotation:—*Reid. Doe d. Meyrick v. Meyrick (1832), 2 Cr. & J. 223.

1849. ———.]—DOE d. MEYRICK v. MEYRICK, No. 1784, *ante*.

1850. May pass a manor—If all property comprising manor included.]—LONG v. GLOUCESTER (BP.) (1588), Sav. 103; 123 J. R. 1037.

1851. By way of grant in fee—May include copyholds.]—EARLY v. RATHBONE, No. 950, *ante*.

See, further, COMMONS & RIGHTS OF COMMON, Vol. XI., pp. 28, 74, Nos. 317, 961; COPYHOLDS, Vol. XIII., pp. 14, 15, Nos. 51–71.

1852. By way of release—Whether leaseholds pass.]—A deed of release containing the words all lands, etc., belonging, used, occupied, & enjoyed,

or deemed taken or accepted as part thereof, etc., will pass leasehold lands which answer that description, as well as freehold.—DOE d. DAVIES v. WILLIAMS (1788), 1 Hy. Bl. 25; 126 E. R. 16.

*Annotation:—*Reid. Doe d. Meyrick v. Meyrick (1832), 2 Cr. & J. 223.

1853. ———.]—DOUNGSWORTH v. BLAIR, No. 891, *ante*.

B. In Assignments of Personal Property, Chattels, etc.

See, generally, PERSONAL PROPERTY; SALE OF GOODS; SETTLEMENTS.

Doctrine of ejusdem generis.]—See Sect. 3, sub-sect. 13, *ante*.

1854. General rule.]—ANDERSON v. ANDERSON, No. 893, *ante*.

1855. Will pass land contracted to be sold—Though not conveyed.]—Land belonging to an insolvent, & contracted to be sold, but not conveyed, will pass to the assignee, under the general words of the assignment, although in the schedule, the insolvent described his interest in the land as being a debt due from the intended purchaser.—DOE d. MILBURN v. EDGAR (1835), 2 Bing. N. C. 391; 1 Hodg. 431; 2 Scott, 581; 132 E. R. 153; *subsequent proceedings* (1836), 2 Bing. N. C. 498.

*Annotations:—*Mentd. Hawkins v. Peling (1837), Donnelly, 223; Hodgson v. Hooper (1860), 3 E. & E. 149.

1856. "All goods & chattels"—Whether ad- vovson will pass.]—R. v. FANE (1589), 4 Leon. 107; 74 E. R. 761.

*Annotations:—*Reid. Rennell v. Lincoln Bp. (1825), 3 Bing. 223; Rennell v. Lincoln Bp. (1827), 9 Dow. & Ry. K. B. 810; Mirehouse v. Rennell (1833), 1 Cl. & Fin. 527.

Mentd. R. v. Munden (1719), 1 Stra. 190.

1857. "All other estates & effects"—Whether contingent interest will pass.]—A testatrix gave the interest of the residue to her brother during his life, & after his death, she gave the residue to her exors., in trust for four persons by name, & the survivors & survivor of them, to be paid to them respectively when they should attain twenty-one, with interest in the meantime. During the lifetime of the testatrix's brother, one of the two survivors assigned all her furniture, plate, etc.,

PART III. SECT. 10, SUB-SECT. 2.—A.

1846 i. Restricted to what grantor had power to grant—At date of grant.]—In ejectment it appeared that C. died in 1851, intestate, seized of an unexpired term of years in the land, & leaving an only son, M., who remained in possession, & on his death, in 1857, devised it to his uncle, J. D., for life, & then to the plff., the testator's child. M. D., another uncle of the testator, was appointed exor. He saw J. D. in possession after M.'s death, & was himself living on the place, but in 1858, he, as exor., conveyed the term to one F.; & afterwards, in 1860, J. D. administered to C.'s estate, & as such administrator assigned his interest also to F., under whom deft. claimed. The ct. being left to draw the same inferences as a jury, & the deft.'s claim appearing to be dishonest:—*Held:* plff. must succeed; that on the death of C., her only child, M., remaining in possession, because entitled, so that J. D.'s deed as administrator conveyed nothing.—TEARON v. LEAMY (1861), 21 U. C. R. 216.—CAN.

1846 ii. ———.]—MILLER v. WILEY (1867), 17 C. P. 368.—CAN.

1846 iii. ———.]—The conveyance by an heir-at-law of real estate which had been already granted by his father during his lifetime is an absolute nullity.—POWELL v. WATERS (1897), 28 S. C. R. 133.—CAN.

1846 iv. ———.]—In 1856 the

owner of land by deed conveyed to a railway co., "the gravel situate & being on & comprised within a certain part" of the land, with the right of way for a railway track & the free & unobstructed use thereof, & covenanted for quiet possession of the gravel & other the premises conveyed. Subsequently the co. removed all the gravel which was on the land at the date of the deed:—*Held:* gravel deposited on the land after the date of the deed, owing to the action of the waters of the lake, did not pass by the conveyance.—MANN v. GRAND TRUNK RY. CO. (1900), 32 O. R. 240; *on appeal*, 10 L. R. 487.—CAN.

1846 v. ———.]—Plff. having no title to the lot in dispute, an agreement made by him for the division of the lot was ineffective to pass title.—OGILVIE v. GRANT (1906), 41 N. S. R. 1.—CAN.

1846 vi. ———.]—GILPIN v. MARTIN (1869), 7 Macph. (Cl. of Sess.) 807; 41 Sc. Jur. 430.—SCOT.

1848 i. Following precise description—Conveys no other property.]—Where in a conveyance made in pursuance of Short Forms of Conveyances Act, 1877, a parcel of land is accurately described by metes & bounds, the general words of s. 4 of that Act will not pass lands with buildings thereon not embraced in the specific description, merely because the buildings were previously used, occupied, & enjoyed with the property specifically described by metes & bounds.—HILL v. BROADBENT (1898) 25 A. R. 159.—CAN.

1848 ii. ———.]—The words of an agreement providing for the conveyance of a fee simple & absolute title must control such vague words as "interest" as used in the schedule.—BLACKADDER v. HART (1917), 51 N. S. R. 449.—CAN.

d. Head-denomination includes sub-denomination.]—The conveyance of the head denomination will carry the sub-denomination, unless where the sub-denomination is excluded.—ALEXANDER v. CROSBIE (1835), 1 L. & G. temp. Sugd. 145.—IR.

e. ———.]—Re KNOX (1857), 61 Ch. R. 36.—IR.

f. "All & Singular"—Conveys all rights of each of several grantors.]—Three grantors, & each of them, by deed, granted, etc., released, etc., to the plff. three several plots of ground, with "all & singular . . . ways, paths & passages":—*Held:* the release in the deed was a release by each grantor of his rights of way over the plots conveyed by his co-grantors.—BURKE v. BLAKE (1861), 13 I. C. L. R. 390.—IR.

g. "Town."—"Town" ordinarily means a larger collection of houses "than a village"; but with every town there is commonly attached to be held some small portion of land, & which, properly speaking, is a part of a town, & may pass by a grant or demise under that name, that is, if it be shown to be incorporated with & forming part of the town.—WATERPARK v. FENNELL (1855), 5 I. C. L. R. 120, 127, 128.—IR.

& all other the estate & effects, of or to which she was then possessed or entitled, to trustees, upon trust for her creditors:—*Held*: this assignment did not pass her contingent interest in the testatrix's residuary estate.—*POPE v. WHITCOMBE* (1827), 3 Russ. 124; 6 L. J. O. S. Ch. 53; 38 E. R. 522, L. C.

Annotations:—*Fold. Re Wright's Trusts* (1852), 15 Beav. 367. *Consd. Ivison v. Gassiot* (1853), 3 De G. M. & G. 958. *Mentd. Ranelagh v. Ranelagh* (1834), 2 My. & K. 441; *Wordsworth v. Wood* (1847), 1 H. L. Cas. 129.

1858. ———.]—A. assigned "all his ready money, securities for money," etc., " & all other his personal estate & effects whatsoever or wheresoever of or belonging, or due or owing to him " :—*Held*: the general words passed only property *ejusdem generis* with that specified, & they did not convey a contingent reversionary interest in a legacy.—*Re Wright's Trusts* (1852), 15 Beav. 367; 18 L. T. O. S. 268; 51 E. R. 580.

1859. *Personal estate & effects—Whether leaseholds will pass.*—V., the lessee of a mill & premises at a rack-rent, being in insolvent circumstances, executed an assignment, whereby, after reciting his insolvency, & that he had agreed to assign "all his debts, personal estate, & effects of every description, to C. & B., in trust for the benefit of his creditors," he conveyed & assigned to the said C. & B. all & singular the stock in trade, implements & utensils in trade, corn, grain, hay, horses, carts, & carriages, crops of every kind, as well severed as not, & personal estate whatsoever of him the said V., in, upon, or about the said mill & premises now in his use or occupation, or elsewhere, etc., except the wearing apparel of himself & family; & also all debts, securities, writings, etc., & all other the personal estate & effects of him the said V., whatsoever & wheresoever, or in or to which he is anyway interested or entitled: *habendum*, in trust out of the proceeds, first, to pay the costs of the assignment, etc.; secondly, to pay the rent due & in arrear for the said mill & premises, or accruing due until & at & up to Apr. 6, then next; & thirdly, to distribute the residue for the benefit of his creditors:—*Held*: the words of the assignment were large enough to comprehend the lease of the mill, & the jury having found that the assignees had accepted the lease, it passed to them under the assignment.—*RINGER v. CANN* (1838), 3 M. & W. 313; 1 Horn & H. 67; 7 L. J. Ex. 108; 2 Jur. 256; 150 E. R. 1176.

Annotations:—*Distd. Harrison v. Blackburn* (1861), 17 C. B. N. S. 678. *Consd. Jenner v. Jenner* (1866), L. R. 1 Eq. 361. *Refd. Doe d. Farmer v. Howe* (1840), 9 L. J. Q. B. 352. *Mentd. West v. Steward* (1815), 14 M. & W. 47; *Spitzer v. Chaffers* (1863), 14 C. B. N. S. 686.

1860. ———.]—F., the lessee of a dwelling-house & premises, made an assignment to trustees for the benefit of his creditors, in which, after reciting that he was desirous of satisfying them, "as far as his effects, goods, & chattels would extend," he assigned to them "all his stock & stocks, crop & crops of corn, etc., & household furniture, etc., in & about the farm, lands, & premises occupied by him, the said F., in the parish of M. or elsewhere; & also all debts & securities, goods, chattels, credits, & effects whatsoever &

wheresoever, of him, the said F.; with a covenant, that it should be lawful for the trustees to enter upon the house, farm, & premises occupied by him, the said F. in M. aforesaid or elsewhere, where the said goods, chattels, & effects might be found, & to take away, sell, & dispose thereof":—*Held*: under these words, F.'s term in dwelling-house & premises passed to the trustees.—*DOE d. FARMER v. HOWE* (1840), 9 L. J. Q. B. 352.

1861. ———.]—*STOCKS v. HAYLEY* (1855), 21 L. T. O. S. 256.

1862. ———.]—*Whether interest in policy of insurance will pass.*—A., being possessed of a policy of assurance on his own life, while the same is subsisting, assigns to B. & C. for the benefit of his creditors, in the words stated in full below, all his goods, etc., & all his estate & effects, etc., together with all writings:—*Held*: the words used passed the entire interest in the policy to B. & C., the equitable interest passing by the general words, & the deed & legal interest by the grant of the writings.—*WATSON v. MCLEAN* (1858), E. B. & E. 79; 6 W. R. 721; 120 E. R. 436, Ex. Ch.

1863. ———.]—*Other effects & things thereto belonging set forth in schedule*—*Whether articles used with things mentioned in schedule will pass.*—By an assignment of looms on certain premises, & "other effects & things thereto belonging more particularly set forth in the schedule," articles used therewith, they having been upon the premises, would pass, although the looms only were mentioned in the schedule.—*CORT v. SAGAR* (1858), 3 H. & N. 370; 27 L. J. Ex. 378; 31 L. T. O. S. 170; 157 E. R. 513.

1864. ———.]—*Other goods, chattels & effects in, upon or belonging to the said messuage or its appurtenances*—*Whether horses, carriages, harness, etc., in stables will pass.*—*ANDERSON v. ANDERSON*, No. 893, *ante*.

C. Words Conveying Appurtenances.

See, now, Conveyancing Act, 1881 (c. 41), s. 6.

1865. *Land cannot be appurtenant to land.*—*HILL v. GRANGE*, No. 576, *ante*.

1866. ———.]—*ANON.* (1565), Owen, 31; 74 E. R. 878.

1867. ———.]—It is settled by the earliest authority, repeated without contradiction to the latest, that land cannot be appurtenant to land, & the word appurtenances only includes incorporeal hereditaments such as rights of way, etc., but does not include additional land.—*LISTER v. PICKFORD* (1865), 34 Beav. 576; 6 New Rep. 243; 34 L. J. Ch. 582; 12 L. T. 587; 11 Jur. N. S. 649; 13 W. R. 827; 55 E. R. 757.

Annotations:—*Refd. Cuthbert v. Robinson* (1882), 51 L. J. Ch. 238. *Mentd. Churcher v. Martin* (1889), 42 Ch. D. 312; *East Stonehouse U. C. v. Willoughby*, [1902] 2 K. B. 318.

1868. ———.]—The word appurtenances does not properly in a deed include land where the principal subject of gift is land or a messuage.—*CUTHBERT v. ROBINSON* (1882), 51 L. J. Ch. 238; 46 L. T. 57; 30 W. R. 366.

1869. *What is appurtenant to house or messuage—Curtillage & garden.*—A grant of a messuage, with the appurtenances, passes only what is parcel

PART III. SECT. 10, SUB-SECT. 2.—C.

h. What is appurtenant to land—Whether unprofitable land.—A., by a lease in 1672, demised to B., lands of M., containing profitable land, & unprofitable land. In 1706, A. conveyed to C. the ancestor of the lessor of *pltf.* the town & lands of M., containing the profitable land, & all appurtenances, whatsoever, to the

lands & premises, belonging or in anywise appertaining, in fee-simple. In 1834, *deft.*, heir of the assignee of the lease of 1672, was in the possession of certain land, which he claimed to hold by virtue of the lease of 1672. The surplus quantity of land in *deft.*'s possession was, at the time of the execution of the deed of 1706, used with & appertaining to the lands of M.:—*Held*: the surplus quantity passed

to C. by virtue of the deed of 1706.—*SMYTH v. NANGLE* (1839), 1 Craw. & D. 231.—*IR.*

j. — Not right to use stream for carrying logs.—A deed by which a grantor conveys land, "together with the saw-mill thereon, with all & singular the privileges & appurtenances belonging thereto; together with the mill-pond, mill-dam, & any other privilege connected with, or belonging

Sect. 10.—The property conveyed: Sub-sect. 2, C. & D.]

of the house, viz. the buildings, curtilage & gardens.—**BETTISWORTH'S CASE, HAYWARD v. BETTISWORTH** (1580), 2 Co. Rep. 31-b; 76 E. R. 482; *sub nom.* **HEYWARD v. BETTESWORTH**, Moore, K. B. 250.

Annotations:—*Reid.* **Hewson v. South Western Ry.** (1860), 2 L. T. 369. *Mentd.* **King v. Melling** (1872), 1 Vent. 225; **Ashley v. Branwood** (1734), Kel. W. 201.

1870. — Orchard, yard, curtilage & gardens.]—It is all one in case of a copyhold & freehold & nothing should pass but the house, with the orchards, yards, & curtilage & garden, by these words *cum pertinentiis* (*per Cur.*).—**SMITHSON v. CAGE** (1619), Cro. Jac. 526; 79 E. R. 450.

1871. — Adjoining house.]—The grant of a house *cum appertinentiis* will not pass an adjoining building not accounted parcel of the house.—**BRYAN v. WETHERHEAD** (1625), Cro. Car. 17; 79 E. R. 620.

1872. — Severed room.]—The demise of a messuage with all rooms & chambers thereto belonging & appertaining, will not comprehend a room, which had once formed part of the messuage, but which had been separated from it by means of a wooden partition, & had not been occupied with it for many years previous to the demise.—**KERSLAKE v. WHITE** (1819), 2 Stark. 508, N. P. *Annotation:—**Reid.* **Martyr v. Lawrence** (1864), 2 De G. J. & Sm. 261.

1873. — Adjoining stable.]—Stables will not pass to the lessee if mentioned only in the general words of the lease, & omitted in the parcels.—**MAITLAND v. MACKINNON** (1862), 1 H. & C. 607; 1 New Rep. 103; 32 L. J. Ex. 49; 7 L. T. 427; 9 Jur. N. S. 255; 11 W. R. 237; 158 E. R. 1026. *Annotation:—**Reid.* **Griffiths v. Peaton** (1863), 1 New Rep. 330.

1874. — Adjoining meadows.]—On an agreement for a lease of a furnished house & premises, with gardens, pleasure grounds, coach house, & stabling thereto belonging:—*Held:* by these words a meadow adjoining the said premises did not pass to the lessees.—**MINTON v. GEIGER** (1873), 28 L. T. 449.

1875. Whether appurtenant to mill—Kiln.]—**ARCHER v. BENNET** (1664), 1 Sid. 211; 1 Lev. 131; 1 Keb. 736; 82 E. R. 1062. *Annotations:—**Reid.* **Doe d. Lempiere v. Martin** (1777), 2 Wm. Bl. 1148; **Hinchliffe v. Kinnoul** (1838), 5 Bing. N. C. 1.

to, the premises," does not convey a right to use a stream flowing through the grantor's land, for the purpose of taking logs to & from the mill, though the grantor had used the stream for that purpose previous to the deed.—**ROGERS v. PECK** (1838), Ber. 318.—**CAN.**

k. — Not a road.]—**SHUTTLEWORTH v. SHAW** (1849), 6 U. C. R. 517, 539.—**CAN.**

l. — Mill machinery.]—Mill machinery may pass under the description of land in a deed.—**WINFIELD v. FOWLER** (1887), 14 O. R. 102.—**CAN.**

m. What is appurtenant to house or messuage.]—A. purchased from B. a "cottage & lot on the north-east corner of G. & J. streets, in T.," the conveyance for which was prepared by K. under Short Forms of Conveyances Act, describing the premises by metes & bounds. These premises & a small additional portion of land were occupied by L., as tenant of B., & at the extreme limit thereof was a water-closet, which at the time of the conveyance to A. was used with the premises:—*Held:* the water-closet passed as appurtenant to the cottage, although distant nearly two feet from the extreme limit of the land conveyed

to A., & although B. swore that he had never intended to convey any interest therein to A.—**KERR v. COGHILL** (1877), 25 Gr. 179.—**CAN.**

n. — Door leading to another house.]—Where deft. leased a "shop & premises" to plff., having two doors abutting on two different streets, deft. claimed a common right of way to & from the premises through a third door which specially led to a dwelling house, portion of the same premises & occupied by another tenant of deft. The lease was silent on what the appurtenances to the shop & premises were. Deft. refused plff. the right to use the said door:—*Held:* the third door or passage was appurtenant to the dwelling house only & not to the "shop & premises."—**KEOUGH v. THORBURN** (1892), 7 Nfld. L. R. 662.—**NFLD.**

o. Lease—Intention of parties to be carried out.]—The term "appurtenances," when used in a lease, is flexible, & must be interpreted so as to carry out the intention of the parties.—**DOBBS v. SOMERSET** (1860), 13 L. C. L. R. 293; 13 Ir. Jur. 57.—**IR.**

PART III. SECT. 10, SUB-SECT. 2.—D.

1877 i. "More or less."]—CAIN v.

1876. Whether appurtenant to farm—Allotment in lieu of commons.]—When upon the inclosure of waste lands under Inclosure Act, 1845 (c. 118) the rights of common over them have been extinguished, the allotments awarded in lieu of rights of common are not to be deemed parts of the lands to which the rights of common were annexed, but are to be deemed to have been granted to the owner of those lands; & a lease of land, to which rights of common were formerly attached, will not, after they have been extinguished by an inclosure of the waste lands, pass by general words the right to the possession of the allotment.—**WILLIAMS v. PHILLIPS** (1881), 8 Q. B. D. 437; 51 L. J. Q. B. 102; 46 L. T. 184; 30 W. R. 354. **C. A.**

Common appurtenant.]—See COMMONS, Vol. XI. pp. 8-11, Nos. 41-93.

In transfer or mortgage of ship.]—See SHIPPING & NAVIGATION.

Easements appurtenant to dominant tenement.]—See EASEMENTS & PROFITS A PRENDRE.

D. Words qualifying Extent of Property granted or demised.

1877. "More or less"—Must be construed reasonably.]—DAY v. FYNN (1601), Owen, 133; 74 E. R. 954.

1878. — —.]—ANON. (1609), Yelv. 166; 80 E. R. 111.

1879. — —.]—When land is described in conveyances, it is often mentioned as containing so many acres & roods, "be the same more or less," but it is always understood in those cases that the excess bears a very small proportion to the amount named (**LITTLEDALE, J.**).—**CROSS v. EGLIN** (1831), 2 B. & Ad. 106; 9 L. J. O. S. K. B. 145; 109 E. R. 1083.

*Annotations:—**Mentd.* **Gwillim v. Daniell** (1835), 1 Gale, 143; **Maxwell v. Deane** (1854), 23 L. T. O. S. 1.

1880. — Property demised corresponding with abutments—Small excess over measurement.]—On a demise of a piece of ground on which a tenant has built, if it corresponds with the abutments, though not with the measured distance as stated in the lease & the lessor sees the building going on without objecting to it, he shall not afterwards be allowed to claim the overplus above the measured distance, on the footing of an encroachment.

The words "more or less" in the lease being

JUNKIN (1884), 13 A. R. 528.—**CAN.**

1880 i. — Property demised corresponding with abutments—Small excess over measurement.]—A deed described a lot, after giving metes & bounds, as containing by estimation 200 acres, more or less. It proved to contain only 162 acres:—*Held:* the description in the deed precluded deft. from recovering for any deficiency in the number of acres, no fraud being alleged.—**BROWN v. BANKS** (1889), 21 N. S. R. 388.—**CAN.**

1880 ii. — —.]—In an agreement for the sale of land, the land was described as "the premises situate on the north side of R. street in the city of T. & known as No. 250, R. street, having a frontage on R. street of 36 ft., more or less, by a depth of 110 ft., more or less to a lane." In fact, the depth was 98 ft. 6 ins. Deft. had acted in good faith. The purchase price was a bulk sum, not arrived at by an estimate of the value of the property at a price per ft.:—*Held:* the words "more or less" added to the statement of the depth controlled that statement & as the deficiency was not so great as to raise a presumption of fraud or mistake, plffs. were not

indeterminate, & the space covered, in fact, corresponding with the abutments, the tenant had a fair title to insist that it was meant that so much should pass by the demise (LORD KENYON, C.J.).—*NEALE d. LEROUX v. PARKIN* (1794), 1 Esp. 228, N. P.

1881. — **Deed to lead uses.**—In a deed to lead the uses, the lands were described as 100 acres, more or less. A recovery was suffered for 110. The ct. admitted it to be amended by increasing it to 120, as it would not augment such lands beyond the terms of the deed.—*GWYNNE v. HEATHCOTE* (1818), 2 Moore, C. P. 163.

Annotation.—*Consd.* *Adams v. Kinderly* (1826), 5 L. J. O. S. C. P. 17.

1882. — **Strip of land between highway & enclosed land conveyed.**—*SIMPSON v. DENDY*, No. 1420, ante.

1883. — **"Or thereabouts"**—**Must be construed reasonably.**—The owners of land agreed to demise to A. the minerals under it to the west of a certain fault supposed to run through the land in the direction of a line drawn on a certain plan, the quantity of the land being described as supposed to be eighty-three acres or thereabouts. The owners made a similar agreement with B. as to the minerals under the land to the east of the fault, supposed to contain ninety-eight acres or thereabouts. The fault was afterwards found to run so as to leave on the west eight acres only. On a bill filed by B. to restrain A. from working coal to the east of the fault:—*Held*: the ct. would not in a suit by B. for specific performances against the owners have decreed a demise of all the minerals to the east of the fault, & he could not be deemed in constructive possession, so as to maintain his suit against A.

It was said in argument that both the contracting parties knew there was uncertainty as to the extent of what was to be demised. No doubt that is true. But the amount of that uncertainty is indicated, so far as such a matter can be indicated, by the language used. The fault is said to be "supposed to run in the direction shown by the line on the plan." The exact quantity cut off to the east of the line is said to be "supposed to be ninety-eight acres or thereabouts." It is impossible in such a case to define with accuracy what latitude can be allowed as to the quantity to be demised—how much in enforcing the agreement the ct. would compel the lessor to allow beyond ninety-eight acres if the line of the fault should be proved to run to the west of the line shown on the plan. It is impossible, on such a subject, to lay down any general abstract rule, & if the deviation had been such as to include 108 acres, or even 118 acres, instead of 98 acres to the east of the line, it would have been open to fair argument that the excess might be covered by the vague words "or thereabouts." It is certain that neither party contemplated such an addition to the ninety-eight acres as pltf. is now contending for. The lessor had already agreed to demise to the deft. S. all the mine to the west of the fault described as supposed to be eighty-three acres or there-

abouts. This was known to pltf., & when pltf. entered into this agreement, it could not have been in the contemplation of either party that under such loose & vague words as "or thereabouts" it could have been intended to oblige deft. to accept eight acres instead of eighty-three acres; & I see no reason why the same principles which would guide the ct. in construing words of this sort in an agreement for sale or demise of the surface, should not be acted on when we are dealing with minerals, though, no doubt, there is in such subjects more difficulty in fixing a boundary (LORD CRANWORTH, L.C.).—*DAVIS v. SHEPHERD* (1866), 1 Ch. App. 410; 35 L. J. Ch. 581; 15 L. T. 122, L. C. & L. JJ.

Annotation.—*Refd.* *Low Moor Co. v. Stanley Coal Co.* (1875), 33 L. T. 436.

1884. — **—.**—In the conveyance to a purchaser the land sold was described as two parcels, each defined in the most particular manner by metes & bounds, & other details, & each "as containing by estimation one & a half acres or thereabouts." Subsequently to the conveyance the lands were measured & the two parcels together amounted to only 2a. 1r. 12p.:—*Held*: this misdescription as to quantity did not amount to a breach of any warranty so as to entitle a purchaser to maintain an action for damages against the vendor.

It is a question of fact whether the parcels have or have not, in truth & in fact, been estimated to contain the quantity stated or thereabouts, the answer to which will mainly depend on whether the error is so small as to lead to the assumption that it might have been so estimated, or so great as to make the estimate an irrational or impossible one.—*JOLIFFE v. BAKER* (1883), 11 Q. B. D. 255; 48 L. T. 960; 47 J. P. 678; *sub nom.* *JOLIFFE v. BAKER*, 52 L. J. Q. B. 609; 32 W. R. 59.

Annotations.—*Refd.* *Nash v. Wooderson* (1884), 52 L. T. 49; *Saunders v. Cockrill* (1902), 87 L. T. 30. *Mentd.* *Palmer v. Johnson* (1884), 13 Q. B. D. 351.

1885. — **"Or thereabouts be the same more or less"**—**Proviso for allowance to be made—No compensation payable for small surplus.**—Vendors agreed to sell a parcel of land "containing forty acres or thereabouts, be the same more or less, delineated in the plan hereunto annexed, & therein edged pink" for £9,000. The agreement provided for the purchaser taking partial conveyances from time to time at prices fixed with reference to quantity, & also that "if any mistake or omission be made in the description of the property the same shall not vitiate or annul the sale, but a compensation or an allowance shall be made" as therein provided. The purchaser had taken conveyances of part of the land, but the vendors, having discovered that the acreage was 41 acres, 1 rood, 10 perches, instead of 40 acres, refused to convey the residue without compensation being made for the excess of 1 acre, 1 rood, 10 perches:—*Held*: the vendors were not entitled to any compensation, & must convey the residue on payment of the balance of the purchase-money.—*ORANGE*

entitled to compensation for the deficiency.—*WILSON LUMBER CO. v. SIMPSON* (1910), 22 O. L. R. 452.—*CAN.*

p. — **Cannot control description by metes & bounds.**—Appts. claimed the land by virtue of a grant to their predecessors in title. In the grant, which was one of 640 acres "be the same more or less" the land was described as commencing at E. a fixed point, & bounded on the west by a line south 80 chains to D., also a fixed point. The line from E. to D. was in

reality 109 chains, & taking E. to D. as the western boundary the land contained about 1000 acres:—*Held*: the ct., without sending the issue to be tried by a jury, could say that the description of the length of line & quantity of land was *falsa demonstratio*, & the western boundary was from E. to D.—*BANK OF AUSTRALASIA v. A.-G.* (1894), 15 N. S. W. L. R. 256.—*AUS.*

q. — **"Approximately"**—**Words of estimate—No warranty implied.**—The words "approximately 20,000 men" were merely words of estimate or ex-

pectation & contained no warranty as to the exact number of men.—*It. v. ROY* (1919), 19 Exch. C. R. 365.—*CAN.*

r. — **"About"**—**Slight variation permitted.**—The word "about," as used in a contract can have no other meaning than "approximately," which, while it might permit of a slight variation, could not be satisfied otherwise than by a substantial performance of the contract.—*J. F. GERRITY CO. v. BRAGG* (1919), 52 N. S. R. 296; 50 D. L. R. 284.—*CAN.*

Sect. 10.—The property conveyed: Sub-sect. 2, D. & E.; sub-sects. 3, 4, 5 & 6, A.]

TO WRIGHT (1885), 54 L. J. Ch. 590; *sub nom. Re ORANGE & WRIGHT'S CONTRACT*, 52 L. T. 606.

Qualifying words in charterparties & bills of lading.]—See SHIPPING & NAVIGATION.

Qualifying words in contracts for sale of goods.]—See SALE OF GOODS.

Qualifying words in terms of measurement.]—See WEIGHTS & MEASURES.

E. Words Granting or Conveying Easements.

See EASEMENTS & PROFITS A PRENDRE.

SUB-SECT. 3.—PARTICULAR WORDS.

See, generally, WORDS & PHRASES.

Words of grant.]—See SALE OF LAND; REAL PROPERTY & CHATTELS REAL.

Words of demise.]—See LANDLORD & TENANT; BOUNDARIES, FENCES & PARTY WALLS, Vol. VII., pp. 263, 264, Nos. 6-8.

In grants of fisheries.]—See FISHERIES.

In grants of waters.]—See WATERS & WATER-COURSES.

Words under Lands Clauses Consolidation Act, 1845 (c. 18).]—See COMPULSORY PURCHASE OF LAND & COMPENSATION, Vol. XI., pp. 179-182, Nos. 504-610.

In contracts for sale of goods.]—See SALE OF GOODS.

SUB-SECT. 4.—CROWN GRANTS.

See CONSTITUTIONAL LAW, Vol. XI., pp. 568-572, Nos. 675, 726.

SUB-SECT. 5.—GRANTS, LEASES, ETC., OF TREES.

See AGRICULTURE, Vol. II., pp. 94-96, Nos. 742-770.

SUB-SECT. 6.—EXCEPTIONS AND RESERVATIONS.

A. In General.

1886. Exception & reservation distinguished.]—CARDIGAN (EARL) v. ARMITAGE, No. 1062, ante.

PART III. SECT. 10, SUB-SECT. 6.—A.

1886 i. Exception & reservation distinguished.]—In an action of trespass *q.c.f.* debts justified under a reservation or exception in a deed through which *pltf.* claimed title & in which the description of the property was followed by the words, "excepting & reserving a right of way or road allowance of two rods in width along the south side of said lot":—*Held*: this was only a reservation of a right of way to the grantor & not an exception of the soil.—*WRIGHT v. JACKSON* (1886), 10 O. R. 470.—*CAN.*

1886 ii. —.]—A reservation is of some right or profit derivable out of the thing demised, & not parcel of the *corpus* of it, whereas an exception is of some portion of the thing itself theretofore granted.—*ODONNELL v. RYAN* (1854), 4 I. C. L. R. 44, 59.—*IR.*

s. Reservation defined—Construction according to intention of parties.]—A reservation is a clause in a deed whereby the feoffor, donor, lessor, grantor, etc. doth reserve some new thing to himself, out of that he granted

before. In a reservation four things must concur: (1) it must be by apt words; (2) it must be of some other thing issuing or coming out of the thing granted, & not as part of the thing itself, nor of something issuing out of another thing; (3) it must be of a thing whereunto the grantor may have resort to distrain; (4) it must be made to one of the grantors, & not to a stranger to the deed.—*INCHQUIN v. BURNELL* (1795), 3 Ridg. Parl. Rep. 418, 420.—*IR.*

t. What constitutes a good exception.]—R. G., being seized in fee, by an instrument purported to lease to his daughters "three acres, with the right of way to a well, including an orchard & dwelling-house, after the decease of his beloved wife, J. G." to hold to his daughters for & during their lives, or the life of the survivor of them, at the yearly rent of twenty cents, if demanded. Ten days afterwards he conveyed in fee to his son W. G. the land of which the three acres formed part, the son having actual notice of the agreement between his sisters & R. G. Subsequently W. G. conveyed

1887. —.]—In Sheppard's Touchstone, p. 80. "A reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, etc., doth reserve some new thing to himself out of that which he granted before"; & afterwards, "This doth differ from an exception, which is ever of part of the thing granted, & of a thing *in esse* at the time; but this is of a thing newly created or reserved out of a thing demised that was not *in esse* before; so that this doth always reserve that which was not before, or abridge the tenure of that which was before. It must be of some other thing issuing, or coming out of the thing granted, & not a part of the thing itself, nor of something issuing out of another thing."

It may be said, however, that, if the person who creates the power uses the word "reserving" in such a way as to make an exception a reservation, it must be so taken; but we think not necessarily. Powers in many respects are construed so very strictly, that they must be so throughout (*DENMAN, C.J.*).—*DOE d. DOUGLAS v. LOCK* (1835), 2 Ad. & El. 705; 4 Nev. & M. K. B. 807; 4 L. J. K. B. 113; 111 E. R. 271.

Annotations:—*Reid*, *Wickham v. Hawker* (1810), 7 M. & W. 63; *Durham & Sunderland Ry. v. Walker* (1842), 2 Q. B. 910; *Doe d. Croft v. Tidbury* (1854), 2 C. L. R. 347; *Williams v. Hayward* (1859), 5 Jur. N. S. 1417; *Proud v. Bates* (1865), 6 New Rep. 92; *Thollusson v. Liddard*, [1900] 2 Ch. 635. **Mentd.** *Doe d. Egremont v. Stephens* (1844), 6 Q. B. 208; *Doe d. Biddulph v. Hole* (1850), 15 Q. B. 848.

1888. —.]—It is to be observed that a right of way cannot in strictness be made the subject either of exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, & the latter to a reservation (*TINDAL, C.J.*).—*DUKHAM & SUNDERLAND RY. CO. v. WALKER* (1842), 2 Q. B. 910; 3 Ry. & Can. Cas. 36; 2 Gal. & Dav. 326; 114 E. R. 361.

Annotations:—*Reid*, *Midgley v. Richardson* (1845), 14 M. & W. 595; *Bowes v. Havensworth* (1855), 15 C. B. 512; *Hamilton v. Graham* (1871), L. R. 2 Sc. & Div. 166. **Mentd.** *Walls v. Harrison* (1842), 3 Ry. & Can. Cas. 63, n.

1889. Construed against grantor.]—CARDIGAN (EARL) v. ARMITAGE, No. 1062, ante.

1890. What passes by grant—Excepted by like words in exception.]—CARDIGAN (EARL) v. ARMITAGE, No. 1062, ante.

1891. Exception includes all necessary things for obtaining what is excepted.]—CARDIGAN (EARL) v. ARMITAGE, No. 1062, ante.

1892. —.]—By a deed dated in 1630, the grantor conveyed in fee farm, land in the manor

to *pltf.* "subject to the right of R. G.'s wife & daughters to occupy the house & three acres during the life of them or the survivor, & the right to & from the well," & subject to a mortgage, which *pltf.* agreed to pay off. To this deed *pltf.* was an executing party. *Pltf.* brought ejectment against *lt. G.'s* daughters for the three acres:—*Held*: the words "subject to," etc., in the conveyance to *pltf.*, either operated as an exception or by reason of the execution of the deed by *pltf.*, as a regrant of the three acres to her vendor.—*WILSON v. GILMER* (1882), 46 U. C. R. 545.—*CAN.*

s. —.]—In Oct. 1853, A. D. conveyed to his father & two sisters six acres of land for their lives or the life of the survivor. A few days later he conveyed a block of land to M. in fee "saving & excepting" thereout six acres for the life of the grantor's father & sisters or that of the survivor, or until the marriage of the sisters, on the happening of respective events, the six acres to be & remain the property of M., his heirs & assigns under said deed. Three months later M.

of A., in the county of Northumberland, "excepting & reserved out of the grant all mines of coal within the fields & territories of A. aforesaid, together with sufficient wayleave & stayleave to & from the said mines, with liberty of sinking & digging pit & pits," with a covenant by the grantees that they, their heirs & assigns, "should give such accustomed recompense for digging & breaking the ground within A. aforesaid, in which any pits should thereafter happen to be sunk & wrought, as formerly had been usually given & allowed there in like cases":—*Held*: under the reservation of liberty of sinking pits, the right of erecting a steam engine, & other machinery necessary for draining them, were all proper accessories, passed as incident thereto.

Qu.: whether under this reservation of a "sufficient wayleave" the coal owner had now a right to make a railway, for the purpose of carrying the coals from the mines for shipment, with cuttings & embankments, & fenced in so as to exclude the owner of the soil.

As the coals in all the seams are excepted & a right to dig pits for getting those coals reserved, all things that are "depending on that right, & necessary for the obtaining it," are reserved also, according to the rule in *Sheppard's Touchstone*, p. 100 (PARKER, B.).—*DAND v. KINGSCOTE* (1840), 6 M. & W. 174; 2 Rty. & Can. Cas. 27; 9 L. J. Ex. 279; 151 E. R. 370.

Annotations:—*Consd.* *Newcomen v. Coulson* (1877), 5 Ch. D. 133. *Refd.* *Bishop v. North* (1843), 11 M. & W. 418; *Phycsey v. Vicary* (1847), 16 M. & W. 484; *Sidebottom v. Bostock* (1852), 16 Jur. 1013; *Rogers v. Taylor* (1857), 1 H. & N. 706; A.-G. v. *Cambridge Consumers Gas Co.* (1868), L. R. 6 Eq. 282; *Hamilton v. Graham* (1871), L. R. 2 Sc. & Div. 166; *Bidder v. North Staffordshire Ry.* (1878), 4 Q. B. D. 412; *Finch v. G. W. Ry.* (1879), 5 Ex. D. 254; *Welldon v. Butterley Co.*, [1920] 1 Ch. 130.

1893. Must not except thing expressly granted.]—If a man demises a house & shops, excepting the shops, this is a void exception.—*MORNEBY v. CLIFTON* (1567), 3 Dyer, 264 b; 1 And. 52; 73

conveyed the block of land to it. in fee:—*Held*: R. under his deed & that to his grantor had the reversion to the fee in the six acres after the life estate terminated.—*DODS v. McDONALD* (1905), 36 S. C. R. 231.—*CAN.*

b. —.]—Demise of the whole territory or precinct of land commonly called A., containing, etc.; the whole, etc., called B., containing, etc.; the whole, etc., called C.; being in all forty poles of land, save & except two poles of G., situate in the manor of A.:—*Held*: the exception was good.—*ELLIS v. LORD PRIMATE* (1864), 16 L. Ch. R. 181.—*IR.*

c. —.]—A demise was in the following words: "All that part of the lands of G. marked in the map Nos. 10 & 11, & called the L. farm, containing 27 acres of green pasture & improvable ground, & 13 acres of bog, reserving & excepting the 13 acres of bog":—*Held*: the words of grant ended with "L. Farm" the rest being merely words of description, & therefore, the exception was good, as being of a particular thing out of a general.—*MCCLEARY v. COCHRANE* (1869), 18 W. L. R. 262.—*IR.*

d. —.]—By a lease, purporting to demise a close containing 5 acres, at a yearly rent of £10, the lessor purported to reserve 1 acre of the close for himself, for such time as he might require the same, for his own use, allowing to the lessee the sum of £2 out of the therebefore specified rent, as long as the lessor should hold the 1 acre:—*Held*: the clause could not be construed as an exception to the lessor of that acre, & his representatives were not entitled to its possession after his death.—*MORONEY v. MACNAMARA*

(1872), 1 R. 6 C. L. 181.—*IR.*

e. What constitutes a good reservation.]—H., by deed poll, in consideration of natural love & affection & of 5s., conveyed land to her daughter, R., in fee, adding after the *habendum*, "reserving, nevertheless, to my own use, benefit, & behoof, the occupation, rents, issues, & profits of the said above granted premises for & during the term of my natural life":—*Qu.*: whether the reservation was void, or whether only the reversion passed subject to the life estate.—*SIMPSON v. HARTMAN* (1868), 27 U. C. R. 460.—*CAN.*

f. —.]—Action for trespass to lands. Plea justifying under a clause in a lease of 1711, not under the seal of the lessee, "excepting & reserving from said demise all manner of royalties, & particularly the fishing, with a pathway for the fishermen," & averring that deft. exercised the right by the licence of the party in whom the reversion on the lease had become vested:—*Held*: it being admitted that the reservation did not operate as a reservation of the bed & soil of the river or of the pathway, such a right was the subject of grant, & was not the subject of reservation or exception, & that the clause was void as an exception; & not being under seal, could not operate as a grant.—*CONCOR v. PAYNE* (1870), 1 R. 4 C. L. 380.—*IR.*

g. —.]—*Reservation of life estate.]*—H. by deed poll, in consideration of natural love & affection & of 5s. conveyed land to her daughter R., in fee, adding after the *habendum*: "Reserving, nevertheless, to my own use, benefit & behoof, the occupation, rents, issues, & profits of the premises for the term of my natural life":—*Held*:

E. R. 586; *sub nom.* *HAVER v. CLIFTON*, Ben. & D. 181.

Annotations:—*Refd.* *Willson v. Armourer* (1670), T. Raym. 207; *Cudlip v. Rundall* (1691), 11 Mod. Rep. 14; *Idle v. Cooke* (1705), 2 Ld. Raym. 1144; *Cooper v. Stuart* (1889), 14 App. Cas. 286.

1894. —.]—An exception in a lease, which goes to the whole thing demised is void.—*DORRELL v. COLLINS* (1582), Cro. Eliz. 6; 78 E. R. 273.

Annotations:—*Refd.* *Stukeley v. Butler* (1614), Hob. 168. *Mentd.* *Knight v. Cole* (1691), 1 Show. 150.

1895. —.]—An exception in a deed of what has before been expressly granted is void.—*KENSON v. READING* (1591), Cro. Eliz. 244; 78 E. R. 490.

1896. Exception from exception.]—*LEIGH v. SHAW* (1594), Cro. Eliz. 372; 78 E. R. 620; *sub nom.* *LEIGH'S CASE*, Owen, 20.

1897. Exception cannot enlarge grant.]—In general, a grant which contains an exception may be construed as intended to pass all which is not within the exception. But an exception cannot be so construed, as to enlarge the terms of the grant itself.—*SMITHETT v. BLYTHE* (1820), 1 B. & Ad. 509; 9 L. J. O. S. K. B. 39; 109 E. R. 876.

Annotations:—*Refd.* *Hornsey U. C. v. Hennell*, [1902] 2 K. B. 73; *Chare v. Hart* (1918), 88 L. J. K. B. 833.

1898. Must be in person conveying legal estate.]—*DENISON v. HOLLIDAY*, No. 690, *ante*.

1899. Reservation binds assigns of grantor.]—W. by deed in 1821, sold his leasehold interest in an opera house to C. subject to a right of possession by W. his exors., administrators & assigns, of a certain box therein during the continuance of the term. By a deed in 1823, all W.'s interest was assigned to a trustee for sale, for whom *pltf.* was afterwards substituted, for the benefit of W.'s creditors. By a decree in 1829, at the suit of C. it was declared that the agreement of 1821 ought to be specifically performed, & that W. should procure a renewal of the terms. In 1845 the assignees of C., who had become *bkpt.* sold his

the reservation was not void but the deed might be construed as a covenant to stand seised of the reversion to the use of R., the life estate remaining in H.—*HARTMAN v. FLEMING* (1870), 30 U. C. R. 209.—*CAN.*

h. —.]—A., the grantee of a lot of land distinguished as lot No. 10 described by metes & bounds, made a conveyance to B., reserving for himself the east half of the lot during his natural life, then after his decease the said east half of the said lot reserved to revert & return to B., his heirs & assigns. *Habendum*, the lot & parcel of land thereby granted, etc., or meant & intended so to be, & every part thereof, with the appurtenances, unto B., his heirs & assigns for ever. A. afterwards conveyed all his right, title & interest in lot No. 10 to *pltf.*:—*Held*: the exception in the deed to B. was not repugnant to granting part of the deed, & the east half of the lot was reserved to A.—*HENNETT v. MURDOCK* (1880), 20 N. B. R. (P. & B.), 317.—*CAN.*

1898 i. Must be in person conveying legal estate.]—A., by indenture of lease demised several denominations of land to B., reserving out of the demise mines, minerals, & all other royalties. In the indenture was a covenant that it should be lawful for the lessor, his heirs & assigns, his & their servants, labourers, etc., from time to time, to search for mines, etc.:—*Held*: such reserved right in the lessor was one to be exercised by him, his heirs or assigns, by means of his own servants or labourers, & not one which he could delegate to a stranger not an owner of the estate.—*MOORE v. ORR* (1865), 8 I. C. L. R. 347; 11 Ir. Jur. 61.—*IR.*

DEEDS AND OTHER INSTRUMENTS.

Sect. 10.—*The property conveyed: Sub-sect. 6, A. & B.; sub-sect. 7.*

interest in the premises to deft. L. subject to certain covenants, which, as L. alleged, rendered it impossible, in the events which had happened, to continue to W. or his representatives the enjoyment of the box in question. Pltf. claimed to be entitled to the box, or to a sum of money as an equivalent:—*Held*: deft. & all persons claiming under him were bound by the reservation.—*HELLING v. LUMLEY* (1858), 3 De G. & J. 493; 28 L. J. Ch. 249; 33 L. T. O. S. 18; 23 J. P. 356; 5 Jur. N. S. 301; 7 W. R. 152; 44 E. R. 1358, L. JJ.

Annotation:—*Mentd.* Willmott v. Barber (1880), 15 Ch. D. 96.

1900. Exception of unspecified part of grant—Right of grantor to elect part excepted.—*JENKINS v. GREEN*, (No. 1), No. 1707, *ante*.

1901. Depend on intention of parties.—Every case of exception in a conveyance depends on its own circumstances, & the intention of the parties.—*BELL v. WILSON* (1865), 2 Drew. & Sm. 395; 6 New Rep. 81; 34 L. J. Ch. 572; 12 L. T. 529; 11 Jur. N. S. 437; 13 W. R. 708; 62 E. R. 671; *on appeal* (1866), 1 Ch. App. 303, L. JJ.

Annotations:—*Refd.* Cleveland v. Meyrick (1867), 37 L. J. Ch. 125; Mid. Ry. v. Checkley (1867), L. R. 4 Eq. 19; Hext v. Gill (1872), 7 Ch. App. 699; A.-G. for Isle of Man v. Mylchreest (1879), 4 App. Cas. 294; Mid. Ry. v. Haunchwood Brick & Tile Co. (1882), 20 Ch. D. 552; A.-G. v. Welsh Granite Co. (1887), 35 W. R. 617; Glasgow, Lord Provost & Magistrates v. Farie (1888), 13 App. Cas. 657; Mid. Ry. v. Robinson (1889), 15 App. Cas. 19; Greville v. Hemingway (1902), 87 L. T. 443.

1902. Exception operates immediately.—An exception is that by which the grantor excludes some part of that which he has already given, in order that it may not pass by the grant, but may be taken out of it & remain with himself. A valid exception operates immediately, & the subject of it does not pass to the grantee (LORD WATSON).—*COOPER v. STUART* (1889), 14 App. Cas. 286; 58 L. J. P. C. 93; 60 L. T. 875; 5 T. L. R. 387, P. C. *Annotations*:—*Refd.* Savill v. Bethell, [1902] 2 Ch. 523; S. E. Ry. v. Associated Portland Cement Manufacturers (1900), Ltd., [1910] 1 Ch. 12.

1903. Expressum facit cessare tacitum—Maxim inapplicable to general exception or reservation.—

1900 i. Exception of unspecified part of grant—Right of grantor to elect part excepted.—Deft. conveyed to his son J. the east half of a lot, "reserving from the operation of those present unto the parties of the first & second parts, the latter being deft.'s wife, during their joint lives, etc., one acre of the lot heroby conveyed, the same acre to be taken in any part of the lands heroby conveyed, where the parties of the first & second parts see it":—*Held*: the reservation in the deed from deft. to his son was more properly an exception than a reservation, & deft. was entitled to select the acre at any time, & was not bound to do so in the lifetime of his son.—*LAPINTE v. LAFLEUR* (1881), 46 U. C. R. 16.—*CAN.*

k. Exception of roads—Excepts freehold of such roads.—A. donated to B. certain lands to hold for ever, "saving & reserving the present road to B. & also the roads to T."—*Held*: the soil & freehold of the roads were thereby excepted to the grantor.—*TOTTENHAM v. BYRNE* (1861), 12 I. C. L. R. 376; 14 Ir. Jur. 7.—*IR.*

l. Construction of reservation—Must not make grant ineffective.—Pltf. was the owner of a farm of about a mile in breadth & five-sixths of a mile in length. About two-thirds of the farm was heavily wooded, & the rest of it was cleared & cultivated. Deft. became the purchaser of the trees & timber upon the land under an

agreement which provided that the purchaser should have "full liberty to enter upon the lands for the purpose of removing the trees," but reserved to pltf. the full enjoyment of the land "save & in so far as may be necessary for the cutting & removing of the trees." To have removed the timber through the wooded land at the time it was removed, should have involved an expenditure which would have possibly amounted to a sacrifice of the greater portion of the timber:—*Held*: defts. had a right to remove the timber by the most direct & available route, provided they acted in good faith & not unreasonably, & the reservation in favour of the pltf. did not minimise or modify the deft.'s right, under the general grant of the trees, to remove the trees across the cleared land.—*STEPHENS v. GORDON* (1893), 22 S. C. R. 61.—*CAN.*

m. Construed against grantor.—A grant of land made to pltf. co. in 1910 reserved for public use all roads & thoroughfares existing over the land. In 1890 the B. S. A. Co. when occupying S. Rhodesia had made a road traversing the land, & had repaired it on various occasions up to 1910. During all that time the public had used the road, but it had not been proclaimed a public road or become so by prescription. The road was shown on the diagram attached to the grant, though not specified in the grant:—*Held*: the road was reserved for public

use under the grant.—*LIEBIG'S EXTRACT OF MEAT CO., LTD. v. ROGERS* (1913), 3 S. R. 51.—*S. AF.*

n. Expressum facit cessare tacitum—Whether maxim applicable—Absolute grant.—An implied reservation cannot be read into an absolute grant.—*O'MARA v. EDEN* (1892), 40 N. S. R. 172, n.—*CAN.*

o. —————*J.*—*TERNAN v. FLINN* (1897), 40 N. S. R. 167.—*CAN.*

p. —————*J.*—*KERR CO. v. SEELY* (1910), 40 N. B. R. 8.—*CAN.*

q. —————*J.*—*E.*, owning land through which V. street ran part of the way, from north to south, conveyed to pltf. four acres south of that street, "with the exception of continuing V. street across said lot." Afterwards E. conveyed to W. by a statutory deed 65 acres adjoining pltf.'s land on the south & W. conveyed to deft. —*Held*: by the deed to pltf. the continuation of V. street was excepted out of the land conveyed.—*HEBNER v. WILLIAMSON* (1879), 44 U. C. R. 593.—*CAN.*

r. —————*To advance intent of parties.*—Where words taken according to their technical meaning do not create a legal reservation, & are notwithstanding construed to amount to a reservation, it is always done with a view to advance the intent of the parties, but not to defeat or destroy it.—*INCHQUIN v. BURNELL* (1795), 3 Ridg. Parl. Rep. 418, 420.—*IR.*

Annotations:—*Refd.* Proud v. Bates (1865), 13 L. T. 61. *Mentd.* Hayles v. Pease & Partners, [1899] 1 Ch. 567.

—*J.*—*See Sect. 3, sub-sect. 20, ante.*

B. Particular Instances.

In Crown grants.—*See CONSTITUTIONAL LAW*, Vol. XI., p. 572, Nos. 727, 728.

1904. Exception of wood & underwood in lease—Whether soil passes.—*ANON.* (1536), 1 Dyer, 19 a; 73 E. R. 40.

Annotations:—*Refd.* Whistler v. Paslow (1618), Cro. Jac. 487; Cardigan v. Armitage (1823), 2 B. & C. 197; Doe d. Douglas v. Lock (1835), 2 Ad. & El. 705.

1905. ———— Subsequent grant of trees to lessee.—*HARLAKENDEN'S CASE* (1601), Gouldsb. 188; 75 E. R. 1084.

—*J.*—*See AGRICULTURE*, Vol. II., pp. 75, 76, 81, 94–98, Nos. 541, 544, 618, 742–751, 753–755, 766–769, 773–790.

In grants of copyholds.—*See COPYHOLDS*, Vol. XIII., pp. 15, 16, Nos. 72–79.

Of mines & minerals.—*See MINES, MINERALS, & QUARRIES.*

Of easements & profits à prendre.—*See EASEMENTS & PROFITS À PRENDRE.*

Of sporting rights.—*See EASEMENTS & PROFITS À PRENDRE; GAME.*

On assignment of patents.—*See PATENTS & INVENTIONS.*

SUB-SECT. 7.—THE "ALL ESTATE" CLAUSE.

1906. General rule—*Prima facie* presumption on conveyance or settlement.]—*Prima facie* when a person conveys or settles an estate, he means to include in the conveyance every interest which he can part with, & which he does not except.—*JOHNSON v. WEBSTER* (1854), 4 De G. M. & G. 474; 3 Eq. Rep. 99; 24 L. J. Ch. 300; 24 T. O. S. 178; 1 Jur. N. S. 145; 3 W. R. 84; 3 E. R. 592, L. C.

*Annotations:—*Refd. *Re Somerset, Thynne v. St. Maur.* (1886), 55 L. T. 753; *William v. Pinckney* (1897), 67 L. J. Ch. 34; *Price v. John*, [1905] 1 Ch. 744; *Derry v. Sanders* (1919), 88 L. J. K. B. 410. *Mentd.* *Pears v. Weightman* (1856), 2 Jur. N. S. 586; *Re Tasker, Hoare v. Tasker*, [1905] 2 Ch. 587.

1907. What passes under "all estate"—Rent reserved by lease.]—*DAVY v. MATTHEWS* (1597), Moore, K. B. 525; Cro. Eliz. 649; 72 E. R. 735.

1908. — Term en autre droit.]—A grant of all "his right, title & interest in the tithes aforesaid," will pass a lease of the tithes which the grantor had in right of his wife.—*ARNOLD v. BRIDGOD* (1613), Cro. Jac. 318; 79 E. R. 272.

*Annotations:—*Refd. *Hutchinson v. Savage* (1709), 2 Ld. Raym. 1306; *Thrustout d. Levick v. Coppin* (1771), 2 Wm. Bl. 801.

1909. — —.]—An assignment of all & singular the legacies, debts, moneys, estate & effects whatsoever & whosoever, & of what nature or kind soever, of or to which H., in right of his wife or otherwise, was possessed, will not pass a claim of the assignor's wife to dower out of the estates of her former husband.—*BROWN v. MEREDITH* (1837), 2 Keen, 527; 6 L. J. Ch. 361; 48 E. R. 730.

1910. — Contingent remainder.]—Devise of land on contingency to R. R., before the contingency happens, conveys all his right, title, claim, & demand therein by deed, to his younger son, & his heirs, as a provision, & dies. The contingency happening, R.'s heir cannot claim this against his father's act.—*WRIGHT v. WRIGHT* (1750), 1 Ves. Sen. 409; 27 E. R. 1111, L. C.

*Annotations:—*Refd. *Doe d. Brune v. Martyn* (1828), 8 B. & C. 497; *Harris v. Davis* (1844), 1 Coll. 416. *Mentd.* *Stone v. Lidderdale* (1795), 2 Anst. 533; *Lyde v. Mynn* (1833), 1 My. & K. 683; *Parker v. Downing* (1833), Coop. temp. Brough. 148; *Hawker v. Hallowell, Ex p. Sturgis* (1854), 2 Sm. & G. 498; *Crofts v. Middleton* (1856), 8 De G. M. & G. 192.

1911. — Reversion.]—General words, sufficient to pass a reversion, will pass it, unless the party using them indicate a clear intention to the contrary.—*DOE d. PELL v. JEVES* (1830), 1 B. & Ad. 593; 9 L. J. O. S. K. B. 82; 109 E. R. 908.

*Annotations:—**Doe d. Meyrick v. Meyrick* (1832), 2 Tyr. 178; *Doe d. Howell v. Thomas* (1840), 1 Man. & G. 335.

PART III. SECT. 10, SUB-SECT. 7.

a. What passes under "all estate" clause.]—The words "all my right, interest, & estate of, in & to the estate of G. M. & M. M.," in a conveyance, passed all the estate of the grantor in G. M.'s estate.—*O'NEILL v. CAREY* (1858), 8 C. P. 339.—CAN.

b. —.]—When one, having several estates or interests in lands, joins in conveying to a purchaser all his estate & interest in the lands, every estate of interest vested in him, though not in the character in which he became a party to the conveyance, will pass thereby.—*DREW v. NORBURY* (EARL) (1846), 9 L. J. Ch. 171, 524; 3 Jo. & Lat. 267.—IR.

c. — Bonus on insurance policy.]—*O'GRADY v. BRADY* (1854), 3 L. Ch. R. 439; 6 Lr. Jur. 321.—IR.

d. — Money in court—Mortgage—Disentailing deed.]—X. was tenant in tail in remainder, under an indenture of settlement made in 1870, of considerable estate in Galway &

in other parts of Ireland. In 1890 a ry. co. acquired a small portion of the Galway lands under their compulsory powers & the compensation money was lodged & remained in ct. In 1901, X. mortgaged his estates by several instruments in which they were variously described as "all my estates in Galway & whosoever situate in Ireland," "all my estate situate in Galway & elsewhere in Ireland," & "all my lands, hereditaments, & premises in County Galway, Ireland, & other lands, hereditaments, & premises whosoever situate in Ireland." X. was adjudicated a bankrupt in England in 1902, & the estate tail in remainder given to him by the settlement having subsequently become in possession, the official receiver & trustee of his estate duly executed a disentailing assurance of the lands comprised in & settled by the indenture of settlement of 1870, " & all other, if any, the tenements & hereditaments of or to which the said X. was seised or entitled as tenant in tail, whether at law

1912. — Sub-lease.]—L. being seised in fee, demised to B. for twenty-one years. B. demised to M. for twenty-one years wanting twenty-one days, & then granted to L. the indenture of lease to M. L. conveyed the premises, the reversion & reversions, rents issues, & profits, & all his interest in fee to pltf. :—*Held*: the conveyance in fee from L. to pltf. passed the chattel interest created by B., as well as the fee.—*BURTON v. BARCLAY* (1831), 7 Bing. 745; 5 Moo. & P. 785; 9 L. J. O. S. C. P. 231; 131 E. R. 288.

1913. — Not tithes.]—G. conveyed land to trustees together with all profits, commodities, advantages, emoluments, hereditaments, & appurtenances to the premises belonging or in anywise appertaining, & the reversion, etc., & all the estate, right, title, interest, use, trust, possession, freehold, inheritance, reversion, possibility, property, challenge, claim, & demand whatsoever of him G. therein or thereto, or to any part or parcel thereof :—*Held*: tithes did not pass by this conveyance.—*CHAPMAN v. GATCOMBE* (1836), 2 Bing. N. C. 516; 1 Hodg. 401; 2 Scott, 738; 5 L. J. C. P. 93; 132 E. R. 202.

1914. — Not redeemed land tax.]—Guardians of an infant tenant in tail redeemed the land tax on the entailed estate. The tenant in tail died, having bequeathed the land tax to the next tenant in tail. The latter tenant in tail suffered a recovery & settled the estate, but always dealt with the redeemed land tax as a subsisting charge. The settlement contained in its operative part the usual general words—all the estate, etc. :—*Held*: the land tax was not merged by its redemption, by the recovery, by the operation of the settlement, or otherwise, but passed by a bequest of it in the settlor's will.—*BLUNDELL v. STANLEY* (1849), 3 De G. & Sm. 433; 18 L. J. Ch. 300; 13 L. T. O. S. 380; 13 Jur. 998; 61 E. R. 549.

*Annotations:—*Refd. *Neame v. Moorsom* (1866), L. R. 3 Eq. 91. *Mentd.* *Bulkeley v. Hope* (1855), 1 K. & J. 482.

1915. — —.]—*NEAME v. MOORSOM*, No. 1793, ante.

1916. — Leaseholds in mortgage of freeholds.]—The mtgor., by the deed of mtge., charged the property by a description in several particulars, & the deed continued, "all which several closes, pieces, or parcels of land had been then lately thrown together & were situate in, & were then, in the occupation of S. as tenant thereof to the mtgor., or by whatever other name or names, description or descriptions, the lands had been theretofore or were then called or known, with the appurtenances & all the estate & interest of the mtgor. in

or in equity, under the indenture or otherwise. Upon a summons by the Official Receiver in Bankruptcy for payment out of Ct. of the compensation moneys, which was opposed by the mortgagee :—*Held*: (1) the compensation moneys were not included in the mortgage; (2) they were included in the disentailing assurance.—*Ex p. BALLINROBE & CLAREMORRIS LIGHT RY. CO. & KENNY*, [1913] 1 L. R. 519.—IR.

e. — Deed of assignment—Assignment of mortgage carries the land with it.]—Where a deed of assignment to creditors expressly mentioned debts, bonds & securities for money, a bond debt which a mtgee. was given to secure passed to the lessors, & carried with it, as accessory thereto, the land contained in the mtge.—*Doe d. BURNHAM v. WATTS* (1817), 3 Kerr, 346.—CAN.

f. — Assignment—Past rents.]—W. having an equitable estate in chattels real, assigned to M. all his

Sect. 10.—The property conveyed: Sub-sect. 7. Sect. 11: Sub-sect. 1.]

the same with the repayment of the money lent. The parts particularised were freehold, but part of the other property in the occupation of S. as tenant of the mtgor. was leasehold:—*Held*: the charge was not confined to the parcels particularised, but comprised all the estate & interest, whatever it might be, of the mtgor. in the property then in the occupation of S. as his tenant.—*YOUNG v. WALLINGFORD* (1883), 52 L. J. Ch. 590; 48 L. T. 756; 31 W. R. 838.

1917. — Rentcharge.—By a voluntary settlement of 1868 a husband & wife & each of them did grant release dispose of & confirm a moiety of the wife's hereditaments & all the estate right title interest property claim & demand of either of them in, to, & out of the same to trustees & their heirs on certain trusts. The husband was entitled to a rentcharge issuing out of the hereditaments, but it was not mentioned in the settlement. The settlement contained no covenants for title:—*Held*: the settlement operated by way of release & not by way of grant of the rentcharge, & that as the husband & wife, the owners of the unsettled moiety of the hereditaments, had concurred, that moiety, by virtue of the Law of Property Amendment Act, 1859 (c. 35), s. 10, remained subject to the entire charge.—*PRICE v. JOHN*, [1905] 1 Ch. 744; 74 L. J. Ch. 469; 92 L. T. 768; 53 W. R. 456.

1918. Construction controlled by intent of whole deed—Conveyance of moiety cut down to one-fifth.—An estate directed to be sold was limited to A. for life, & as was then supposed a moiety thereof was, as real estate, limited to B. in remainder. A. conveyed, & B. confirmed B.'s moiety & all their estate, etc., therein by way of mtge., & they further assured it by fine. It turned out that B. had one-fifth only in remainder as personality:—*Held*: A.'s interest in one-fifth only was affected by the mtge.—*GRIEVESON v. KIRKOPP* (1842), 5 Beav. 283; 49 E. R. 587.

1919. — Conveyance intended to pass freeholds—Will not pass leaseholds.—M., being lessee of certain premises for a term of years to G., under a lease containing a covenant by G. that M. should at any time during the term be at liberty to purchase the freehold, & having made arrangements for borrowing a sum of money for the purpose of making such purchase, agreed with A., in consideration of A.'s having paid off certain mtges. upon the premises, to assign the freehold to A. by way of mtge., subject to a first mtge. to the lender of the purchase-money. A deed was executed by M., which recited, among other things, that G.

had conveyed the freehold to M., leaving a blank for the date of the indenture of conveyance, & recited also that M. had made a mtge. to the lenders of the purchase-money, a blank being left for the date of the deed of mtge. It then witnessed that M. conveyed the premises subject to such last-mentioned mtge., & all the estate, right, title, interest, property, claim & demand whatsoever of M. in the premises, to A., his heirs & assigns for ever. The freehold was not then, nor was it eventually, conveyed by G. to M.:—*Held*: the deed did not pass M.'s leasehold interest; looking at the intention of the parties, the deed must be construed as intended to pass the freehold, when purchased; & such purchase never having been made, the deed was, with respect to those premises, wholly inoperative.—*GOODWIN v. NOBLE* (1857), 8 E. & B. 587; 27 L. J. Q. B. 204; 4 Jur. N. S. 208; 120 E. R. 219.

Annotations:—Mentd. Re Skeen, Ex p. Sykes (1858), 32 L. T. O. S. 19; *Re Caston, Ex p. De Buisson* (1861), 10 L. T. 792; *Bradshaw v. James* (1869), 17 W. R. 1010; *Williams v. Taylor* (1869), 21 L. T. 612; *White v. Hunt* (1870), 23 L. T. 559; *Titterton v. Cooper* (1882), 46 L. T. 870.

1920. — — — — —.—A., being possessed of an undivided moiety of a messuage in fee, & having a lease of the other moiety, granted to C., by way of mtge. in fee, all his estate & interest in the messuage in the most general words:—*Held*: the undivided moiety in fee which A. had in the messuage alone passed by this deed, & not his leasehold interest in the other moiety.—*FRANCIS v. MINTON* (1867), L. R. 2 (C. P.) 543; 36 L. J. C. P. 201; 16 L. T. 352; 15 W. R. 788.

Annotation:—Refd. Bulley v. Bulley (1874), 44 L. J. Ch. 79.

1921. — Intent not to pass reversion.—Although it is a rule of law that a reversion will pass by general words, unless a different intention is distinctly shown in other parts of the instrument, yet such an intention may be gathered by implication from the form of the deed.

Where a deed conveying a particular estate is expressed in such terms as appear to be reasonable only on the supposition that the general words of conveyance were not intended to pass the reversion, it is a sufficient indication of intention by the parties.—*MULLINEUX v. ELLISON* (1863), 8 L. T. 236.

1922. — Share of reversion omitted in recitals & operative clause—Covered by "all estate" clause.—A deed was executed, by which it was intended to pass the whole of certain reversionary interests in an estate, but by mistake one share was omitted:—*Held*: the intention was so clear that the whole estate must be considered to have passed.—*KNAPPING v. TOMLINSON, KNAPPING v. BANNERSTER* (1870), 18 W. R. 684.

interest, right, title, etc. in it; & all debts, claims, demands, & accounts which he had in respect of it:—*Held*: sufficient to include past rents received by or for the use of W.'s trustee, & retained or misapplied by him.—*ARCHER v. LAVENDER*, [1875] 9 I. R. Eq. 220.—*IR.*

g. — Whether reversion passes—Absence of recital.—A. B., by indenture, in consideration of a sum of money & of the yearly rents & covenants therein reserved, demised to C. D. in these words: "hath demised, granted, set, & to farm let, & by those presents doth demise, grant, & to farm let unto the C. D., all that & these, etc., now in the possession of J. C., habendum for three lives:—*Held*: that this instrument did not operate as a grant of a reversion, as it could not be inferred that the grantor's estate was a reversion, there not being any apparent privity between J. C. & him; nothing

being recited in the instrument but a bare possession in J. C., & nothing beyond that possession having been shown in evidence.—*DOE d. KEARNS v. SHERRLOCK* (1824), 2 Fox & S. Ir. 79.—*IR.*

h. — Whether interest under deed not recited.—In 1822 a lease of lands was made for twenty-one years. The lands were afterwards mtged., & a renewal was granted to a mtgee. in 1829. In 1830, by deed, reciting the lease of 1822, & the mtge., but not the renewal, the mtgee. conveyed the lands & all his estate, title, interest, etc., both at law & in equity therein, & also the mtge. debt & interest, to hold during the residue of the term granted by the lease of 1822. The deed contained covenants against acts by the mtgee., for good title & further assurance:—*Held*: the legal estate under the renewal of 1829 passed by the deed of 1830.—*REYNOLDS v. REYNOLDS*

(1848), 12 I. Eq. R. 172.—*IR.*

k. What passes under "all estate" in settlement—Not lands already subject of another settlement.—*NUNN v. DONOVAN* (1862), 13 I. Ch. R. 184; 14 Ir. Jur. 313.—*IR.*

l. Conveyance by executor having beneficial interest—Interpreted according to intention of parties.—An exor., who had a beneficial interest in the testator's estate, joined with other beneficiaries in the sale & conveyance of a part of the estate to *bona fide* purchasers for value. The exor. did not purport to convey in his capacity as exor., but the deed stated that all the estate, & title of the vendors were conveyed:—*Held*: the deed conveyed the whole title vested in the exor., & it was not proper to infer, from the conduct of the parties & from indications in the deed that the intention was only to convey the beneficial interest, since that inference was contrary to the

1923. — **Recitals showing contrary intention.**—*Re MOON, Ex p. DAWES*, No. 1744, *ante*.

1924. — ——.]—In a conveyance of land, the general clause purporting to convey all the estate, etc. of the grantor may be restricted in its construction by the recitals & general scope of the instrument.—*WILLIAMS v. PINCKNEY* (1897), 67 L. J. Ch. 34; 77 L. T. 700, C.A.

1925. Conveyance by executor or trustee having beneficial interest—Will only pass what is intended to be conveyed.—*KNIGHT v. COLE* (1890), Carth. 118; 3 Lev. 273; 1 Show. 150; 90 E. R. 673; *sub nom. COLE v. KNIGHT*, Holt. K. B. 620; 3 Mod. Rep. 277.

Annotations.—*Reid. Thorpe v. Thorpe* (1896), 1 Ld. Raym. 235; *Jenner v. Jenner* (1866), L. R. 1 Eq. 361.

1926. — ——.]—*HUTCHINSON v. SAVAGE* (1709), 2 Ld. Raym. 1306; 92 E. R. 356.

1927. — ——.]—The premises intended to be conveyed by a deed of mtge. were described as deft.'s undivided moiety, etc. The deed afterwards professed to convey all deft.'s estate, etc., in the premises:—*Held*: this conveyed the moiety only, to which deft. was entitled in his own right, & not one-third part of the same premises in which he was interested as a co-trustee with the lessors of pltf.—*DOE d. RAIKES v. ANDERSON* (1816), 1 Stark. 155, N. P.

1928. — ——.]—*FAUSSET v. CARPENTER*, No. 1071, *ante*.

1929. — ——.]—The general rule that where a party conveys all his estate in a property to a purchaser, every estate vested in him will pass by the conveyance, although not vested in him in the character in which he is made a party, may be rebutted by the circumstances.

A trustee in whom the legal estate was vested under a mtge. created by the testator, joined with his co-trustee in a conveyance in fee for the purposes of the will:—*Held*: having regard to the intention of the parties & the circumstances of the case, the legal estate did not pass.—*Re COOKS & BLETCHER'S CONTRACT* (1895), 13 R. 264.

1930. Clause implied by Conveyancing Act, 1881 (c. 41), s. 63—Will pass equitable estate—Treated as subsisting though merged in law.—H. was entitled to certain houses for a term of ninety-nine years less one day by way of mtge. from W. W. was entitled to the property for the original term subject to the mtge., & H. was entitled to the reversion in fee expectant on the determination of the original term. Under these circumstances W. conveyed the property to H. for the

terms of the conveyance.—*BIRAJ NOPANI v. PURA SUNDARY DASSEE* (1914), L. R. 41 Ind. App. 189.—**IND.**

m. Grantor's interest wrongly described.—If a party convey land & all his estate therein as heir-at-law of another person deceased, though he claim as devisee & not as heir-at-law, still the land passes.—*DOE d. CLARK v. MCINNIS* (1849), 6 T. C. R. 28.—**CAN.**

n. Rights of owner in fee may pass—Equity of redemption—Recital of mortgage.—S. having mortgaged certain land in fee, afterwards leased it for 21 years, making no mention of such mtge. in the lease. He then conveyed to pltf. in trust, subject to the mtge. P., the assignee of the mtge., proceeded to foreclose, & under a decree in chancery, the land was sold expressly subject to the lease to J., who received a conveyance from S. & P. & pltf., each using apt words (bargain, sell, & release) to convey a legal estate in fee. On the same day, J. mortgaged to pltf. to secure a balance of the purchase money. This mtge. had been discharged before action by certificate duly registered, & pltf. sued

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unexpired residue of the original term, & H. covenanted to indemnify W. against the rents & covenants in the lease & the principal & interest secured by the mtge. H. afterwards conveyed by way of sale to W. in fee, the conveyance being expressly subject to & with benefit of the lease, & W. then conveyed to pltf. in fee subject to & with benefit of the lease. H. subsequently purported to convey by way of mtge. in fee to deft., who had no notice of pltf.'s title:—*Held*: whether the original term had merged in the reversion or not, yet, inasmuch as H. & W. had dealt with one another on the footing that the term was to be deemed in existence, it would be inequitable to allow it to be treated as at an end. H. had therefore, when he purported to convey the fee to deft., an equitable estate to the extent of the leasehold interest, which, under s. 63 of above Act passed to deft., & pltf. were bound to give effect to it.

The question whether two equitable estates are merged or not is one of intention. *Qu.*: whether this rule applied where a merger of legal estate has actually taken place.—*THELLUSSON v. LIDDARD*, [1900] 2 Ch. 625; 69 L. J. Ch. 673; 82 L. T. 753; 49 W. R. 10.

Annotation.—*Mentd. Capital & Counties Bank v. Rhodes* (1902), 71 L. J. Ch. 573.

SECT. 11.—THE HABENDUM.

SUB-SECT. 1.—NATURE AND EFFECT OF.

1931. Not essential part of deed.—The *habendum* is not an essential part of a deed. If the premises in a deed give an express estate in law, the *habendum* shall not be allowed to defeat it; the office of an *habendum* being to explain, (& therefore, occasionally, either to enlarge or limit) but not to defeat an estate created by the premises.

Accordingly, where a deed in the premises created an estate in fee; & the *habendum* was "to hold after the death of A," which would be creating an estate *in futuro*, & would, therefore, avoid the deed:—*Held*: the *habendum* should not prevail to defeat the deed.—*GOODTITLE d. DONWELL v. GIBBS* (1826), 5 B. & C. 709; 8 Dow. & Ry. K. B. 502; 4 L. J. O. S. K. B. 284; 108 E. R. 264.

Annotation.—*Consd. Boddington v. Robinson* (1875), L. R. 10 Exch. 270.

deft., who was a mtgee. of the term by assignment, for rent accrued during the existence of the mtge.:—*Held*: though S., when he leased, had only an equity of redemption, yet as this fact did not appear in the lease, he had a legal reversion by estoppel as against the tenant, & such reversion passed to pltf. by the first conveyance from S. though in it the mtge. was recited.—*CAMERON v. TODD* (1861), 2 E. & A. 431; 22 U. C. R. 390.—**CAN.**

PART III. SECT. 11, SUB-SECT. 1.

1931 i. Not essential part of deed.—The *habendum* is not essential to a deed.—*DUNLOP v. DUNLOP* (1884), 10 A. R. 670.—**CAN.**

1932 i. Habendum may control premises.—In 1810 the Crown granted to the rector, churchwardens & vestry of Christ Church, & their successors, a lot of land "for the use & benefit of the church forever, & to & for none other use interest or purpose whatever." The church was organised on the formation of the Province under authority from the Church of England in England to certain persons in N. B.

to establish churches in N. B. in connection with the Church of England in England, & under its ecclesiastical authority:—*Held*: the grant was to Christ Church as it existed at the time of the grant, & while it remained in adherence to the faith & discipline of the Church of England as then established.—*BLISS v. CHRIST CHURCH FREDERICTON (RECTOR, CHURCHWARDENS & VESTRY)* (1887), N. B. Dig. 315.—**CAN.**

1932 ii. ——.]—*ARMSTRONG v. HARRISON* (1898), 29 O. R. 174.—**CAN.**

o. Marks commencement of tenant's interest.—In lease.—When lands, in the possession of several persons under existing leases, were demised for years, *habendum* "from the expiration of the present leases made by the lessor to the aforesaid each & several parties," the "first payment" of the rent "to be made on Sept. 29 next ensuing the possession thereof":—*Held*: the lease was not to commence in possession until all the existing leases had expired.—*STUART v. NEYLAN* (1841), 5 L. R. 118, n.—**IR.**

Sect. 11.—The habendum: Sub-sects. 1, 2, 3 & 4.]

1932. Habendum may control premises.]—DOWSE'S CASE (1584), Cro. Eliz. 25; 78 E. R. 291.

1933. — By limiting estate.]—R. v. SION (ADDRESS), No. 1952, *post*.

1934. — —.]—THROCKMERTON v. TRACY, No. 634, *ante*.

1935. — —.]—A lease, *habendum* from the Lady-day then next last past, shall, in respect of time, be computed from that day, though it does not commence in interest till the day of its date.—MAYN v. BEAK (1596), Cro. Eliz. 515; 78 E. R. 764.

1936. — —.]—A., tenant for life, the remainder in fee to B., made a lease for years to J. S., & afterwards granted the lands to C., *habendum* from Midsummer following for life; the lessee for years attorned; & after the expiration of the term C. entered, & made a lease at will to D., to whom A. levied a fine *come ceo*, etc.:—*Held*: the grant to C. was void, for the law will make construction upon the whole grant, & an estate of freehold cannot commence *in futuro*.

The office of the premises, is to express the grantor, grantee, & the subject of the grant; & that of the *habendum*, is to limit the estate, so that the general implication of the estate, which will pass by construction of law by the premises, is always controlled & qualified by the *habendum*.—BUCKLER'S CASE, BUCKLER v. HARRIS (1597), 2 Co. Rep. 55 a; 76 E. R. 537; *sub nom.* BUCKLER v. HARDY, Cro. Eliz. 585; 2 And. 28; Moore, K. B. 423.

*Annotations:—*Refd. Butler v. Fincher (1614), 2 Bulst. 302; Greenwood v. Tyler (1620), Cro. Jac. 563; Swyft v. Eyres (1639), Cro. Car. 546; Biddington v. Robinson (1875), L. R. 10 Exch. 270; Savill v. Bethell (1902), 71 L. J. Ch. 652. *Mentd.* Blunden v. Baugh (1632), Cro. Car. 302; Symonds v. Cudmore (1692), Holt, K. B. 666; Hunt v. Burne (1702), 1 Com. 124; Smith d. Dornor v. Parkhurst (1738), Andr. 315; Doe d. Brune v. Martyn (1828), 8 B. & C. 497.

1937. — —.]—But not to divide estate.]—ANON. (1502), Moore, K. B. 43; 72 E. R. 429.

1938. — —.]—But not to avoid estate.]—A lease is made to A., B. & C. for their lives, "proviso & it is covenanted & granted that the second shall not occupy during the life of the first, & the third shall not occupy during the life of the second." This is but a collateral covenant, which shall not alter the nature of the estate given by the premises.—SCOVEL v. CABELL (1588), Cro. Eliz. 107; 78 E. R. 305.

*Annotations:—*Mentd. Goodall's Case (1597), 5 Co. Rep. 95 b; Lee v. Elkins (1701), 12 Mod. Rep. 585.

1939. — —.]—Or extend or vary—But not to defeat estate.]—KENDAL v. MICKFIELD (1740), Barn. Ch. 46; 27 E. R. 549; *sub nom.* ANON., 2 Eq. Cas. Abr. 615.

1940. — —.]——GOODTITLE d. DODWELL v. GIBBS, No. 1931, *ante*.

1941. — —.]—WEBSTER v. ASHTON-UNDER-LYNE OVERSEERS, ORME'S CASE (1872), L. R. 8 C. P. 281; 2 Hop. & Colt. 60; 42 L. J. C. P. 38; 37 J. P. 55; 21 W. R. 171.

*Annotations:—*Refd. Savill v. Bethell (1902), 71 L. J. Ch. 652. *Mentd.* Webster v. Ashton-under-Lyne Overseers, Hadfield's Case (1873), L. R. 8 C. P. 306; Boon v. Howard (1874), L. R. 9 C. P. 277.

1942. — —.]—By altering, abridging or frustrating estate.]—STUKELEY v. BUTLER, No. 1116, *ante*.

1943. Habendum cannot abridge estate.]—On June 20, 1848, B., by a bill of sale, bargained, sold, assigned, & transferred to A. "a certain ship or vessel now in course & progress of building" by him, "to have & to hold the said ship or vessel, etc., goods & chattels, etc., to A., his exors., etc., to their absolute use & benefit & behoof for ever,

when the said ship or vessel shall be complete & finished, in as full, ample, & perfect a manner as if the said ship or vessel were ready for sea, & ready to be delivered to the said A. at the time of executing these presents":—*Held*: the property in the ship passed to A. by the bill of sale of June 20, 1848, & that his right was in no degree limited by the *habendum*.—REID v. FAIRBANKS (1853), 13 C. B. 692; 21 L. T. O. S. 166; 1 C. L. R. 787; 138 E. R. 1371; *sub nom.* READ v. FAIRBANKS, 22 L. J. C. P. 206; 17 Jur. 918.

*Annotations:—*Refd. Chinery v. Viall (1860), 5 H. & N. 288; Peruvian Guano Co. v. Dreyfus (1887), [1892] A. C. 170, n. *Mentd.* Wood v. Bell (1856), 2 Jur. N. S. 664; Bell v. Bank of London (1858), 28 L. J. Ex. 116; Jones v. Williams (1859), 4 H. & N. 706.

1944. Marks duration of tenant's interest—In lease.]—SHAW v. KAY (1847), 1 Exch. 412; 17 L. J. Ex. 17; 154 E. R. 175.

*Annotation:—*Refd. Bird v. Baker (1858), 1 E. & E. 12.

 SUB-SECT. 2.—WHERE GRANTEE DIFFERS IN PREMISES AND HABENDUM.

1945. Grant to husband—Habendum to wife—Habendum void.]—ANON. (1573), 3 Leon. 32; 74 E. R. 522.

1946. Grant to two—Habendum to them & two others—Persons named only in the habendum do not take.]—KIRKMAN & REIGNOLD'S CASE (1588), 2 Leon. 1; 74 E. R. 307.

1947. Grantee named—Habendum to him & another—Stranger may take an estate in remainder.]—The lord of the manor of T., held of the King by knight's service in fee, & of which manor J. S. was a copyholder in fee of a mead called G., by indenture made between himself of the one part, & J. S. & G. S. his son & heir, of the other, did bargain, sell, grant, enfeoff, release & confirm, unto the said J. S. the said mead called G. to have & to hold the said mead unto the said J. S. & G. S., their heirs & assigns, to the only use & behoof of the said J. S. & G. S. their heirs & assigns for ever; & covenanted for further assurance to J. S. & G. S. & their heirs, to the use of them & their heirs; & livery of seisin was made. J. S. died, G. S. being within age:—*Held*: G. S. shall not be in ward to the King & G. S. not being named in the premises cannot take by the *habendum*.—SAMMES'S CASE (1609), 13 Co. Rep. 51; 77 E. R. 1461.

*Annotations:—*Refd. Kenworthy v. Ward (1853), 11 Harc. 196; Webster v. Ashton-under-Lyne Overseers, Orme's Case (1872), L. R. 8 C. P. 281.

1948. Grant to A.—Habendum to A. & his wife & daughter—Successive sicut scribuntur et nominantur in ordine—Remainder to daughter good.]—GRUBHAM'S CASE (1613), 4 Leon. 246; 74 E. R. 850.

1949. — Habendum to him & his wife for their lives successive—Conveys remainder to wife.]—A grant to A. "*habendum* to him & his wife for their lives successive," conveys a remainder to the wife.—WHEADON v. SUGG (1615), Cro. Jac. 372; 79 E. R. 318.

*Annotation:—*Mentd. Bucksome v. Hoskin (1704), 2 Ld. Raym. 1057.

1950. — Habendum to A., B., C. & D. for their lives & the life of the survivor of them successively—A. alone takes—Remainder void for uncertainty.]—WINDSMORE v. HOBART, No. 418, *ante*.

1951. Grant to B., C. & D.—C. & D. unmentioned in premises—Habendum to them ut supradictum est et eorum diutius viventium successive—C. & D. take by way of remainder.]—An indenture made, "between A. & B." granting lands to "B. & C.

his wife, & D. their daughter, *habendum* to them *ut supradictum est et eorum diutius viventi successive* for term of their lives" is good, although neither C. nor D. are mentioned in the premises of the deed; & the wife & daughter shall take by way of remainder, one after the other; for "*supradictum est*" is the same as if they had been named.—**GREENWOOD v. TYBER** (1620), Cro. Jac. 563; Hob. 314; 79 E. R. 482.

Annotations:—*Refd.* Geary v. Bearcroft (1666), Cart. 57; Machil v. Clark (1702), 2 Salk. 619.

SUB-SECT. 3.—EFFECT OF OMISSIONS IN PREMISES.

1952. General rule.—*R. v. SION (ABBESS)* (1460), cited 1 Plowd. 152; 75 E. R. 233.

Annotation:—*Mentd.* Willon v. Berkeley (1561), 1 Plowd. 223.

1953. Omission of grantee—Named in habendum—Grant valid.—*BULLER v. DODDINGTON* (1579), Toth. 128; Cary, 86; 21 E. R. 144.

1954. ———— *BUSTARD v. COULTER* (1602), Cro. Eliz. 902, 917; Yelv. 8; Moore, K. B. 665; 78 E. R. 1124, 1138.

1955. ———— *EELES v. LAMBERT* (1648), Aleyn, 38; Sty. 38, 54, 73; 2 Vern. 101, n.; 82 E. R. 904.

Annotations:—*Mentd.* Davis v. Rayner (1671), 2 Keb. 758; Simmons v. Bolland (1817), 3 Mer. 547.

1956. ———— *A* lease for a year being made between A. & B.; the release, stating B. to be a trustee for C., granted the premises unto C. in his possession being by virtue of an indenture of lease, bearing date the day before the release, & to his heirs *habendum* to B. & his heirs to such uses as C. should appoint:—*Held*: the release sufficient to convey the premises to B.—*SPYVE v. TOPHAM* (1802), 3 East, 115; 102 E. R. 541.

Annotations:—*Refd.* Dart v. Clayton (1864), 4 New Rep. 221; Burchell v. Clark (1876), 2 C. P. D. 88. *Mentd.* Doe d. Timms v. Steele (1843), 4 Q. B. 663.

1957. Omission of parcels—Mentioned in habendum—Grant void.—*R. v. SION (ABBESS)*, No. 1952, ante.

1958. Grant of manor—Exception of part of grantor for life—Habendum except as excepted to A. in tail—Exception does not pass.—*WILSON v. ARMORER* (1670), 1 Lev. 287; 1 Vent. 106; T. Raym. 297; 2 Keb. 719; 83 E. R. 410.

1959. Grant of messuage in premises—With land in habendum—Land does not pass.—*MELD v. COOPER* (1582), Toth. 121; 21 E. R. 142.

SUB-SECT. 4.—LIMITATIONS IN PREMISES AND HABENDUM.

1960. Limitation in habendum must not be contrary to rule of law—Freehold in futuro.—*A* termor grants all his term & interest to B. *habendum* to him after his death; the whole

interest passes immediately, & the *habendum* is void.—*LILLEY v. WHITNEY* (1568), 3 Dyer, 272 a; 73 E. R. 605.

Annotations:—*Refd.* Corbets Case (1599), 2 And. 134; Holder v. Dickson (1673), Freem. K. B. 95.

1961. ———— *A* feoffment to A. *habendum* after the death of the feoffor in tail with livery *sec. for. chartæ* is void.—*HOGG v. CROSS* (1591), Cro. Eliz. 254; 78 E. R. 510.

Annotations:—*Apprvd.* Jerman v. Orchard (1694), Skin. 528. *Refd.* Buckler's Case, Buckler v. Harris (1597), 2 Co. Rep. 55 a; Symson v. Sothorn (1615), Cro. Jac. 376; Boddington v. Robinson (1875), L. R. 10 Exch. 270.

1962. ———— *BUCKLER'S CASE, BUCKLER v. HARRIS*, No. 1936, ante.

1963. ———— *STUKELEY v. BUTLER*, No. 1116, ante.

1964. ———— *Grant of a term for years to a man, habendum after the death of the grantor, the term passes presently, & the habendum is void.*—*GERMIN v. ORCHARD* (1694), 1 Freem. K. B. 500; 12 Mod. Rep. 11; 1 Salk. 346; 88 E. R. 1131; *sub nom.* JERMYN v. ORCHARD, Show. Parl. Cas. 199; Skin. 528, H. L.

Annotations:—*Consd.* Goodtitle d. Dodwell v. Gibbs (1826), 5 B. & C. 709. *Refd.* Boddington v. Robinson (1875), L. R. 10 Exch. 270.

1965. ———— *Indenture of bargain & sale to one & his heirs in the premises. Habendum to the bargainee in tail after the death of the bargainor. The indenture shall enure upon the premises, & shall pass the estate to the vendee directly by the premises.*—*CARTER v. MADGWICK* (1692), 3 Lev. 339; 83 E. R. 719.

Annotations:—*Consd.* Goodtitle doe d. Dodwell v. Gibbs (1826), 5 B. & C. 709. *Refd.* Boddington v. Robinson (1875), L. R. 10 Exch. 270.

1966. ———— *Habendum from the day of the date, of an estate for three lives, is a freehold to commence in futuro, so is void. He who enters under a void lease & pays rent is not a disseisor, but tenant at will.*—*DENN d. WARREN v. FEARN-SIDE* (1747), 1 Wils. 176; 95 E. R. 558.

1967. ———— *GOODTITLE d. DODWELL v. GIBBS*, No. 1931, ante.

1968. Habendum explaining premises—Lease to three—Habendum to first for life—Remainder to second & third for life in succession.—*ANON.* (1557), 2 Dyer, 160 b; 73 E. R. 349.

1969. Lease to two—Habendum to them for lives & life of survivor.—*Lease to two, habendum to them for their lives, & the life of the longest liver, successively one after the other & not jointly, is no joint tenancy, but they must take in succession.*—*ANON.* (1577), 3 Dyer, 361 a; 73 E. R. 809.

Annotations:—*Refd.* Mellow v. May (1600), Moore, K. B. 636; Greenwood v. Tyber (1620), Cro. Jac. 563.

1970. Grant to A. & his heirs—Habendum to A. & heirs of his body.—*ALTHAM'S CASE* (1610), 8 Co. Rep. 150 b; 77 E. R. 701.

Annotations:—*Consd.* Brice v. Smith (1737), Willes, 1. *Refd.* Trenchard v. Hoskins (1624), Win. 91; Beck's Case (1630), Litt. 344; Austin v. Lippencott (1673), 1 Mod.

PART III. SECT. 11, SUB-SECT. 3.

p. Omission of appurtenances—Mentioned in habendum.—*M.*, possessed of two contiguous plots of ground, assigned one of them to T. "together with the right to use the walls on the north side," i.e. on the adjoining plot, "for building purposes"; T. afterwards assigned the plot so purchased by him to deft. by deed, the granting part of which was silent as to "rights, members, & appurtenances," *habendum* "with the rights, members, & appurtenances thereto belonging"; & subsequently, M. assigned the adjoining plot of ground to plff. —*Held*: the right to use them for building purposes passed with

the plot of ground to deft.—*RENWICK v. DALY* (1877), 1 R. 11 C. L. 126.—*IR.*

PART III. SECT. 11, SUB-SECT. 4.

q. Nature of habendum.—*The habendum may explain the granting part; that is the office of the habendum.*—*KENNEDY v. HAYES* (1840), 2 L. L. R. 186.—*IR.*

r. Habendum explaining premises—Transfer of indenture simply—Habendum transferring interest.—*Where the granting part of a deed of assignment of mtge. transfers the indenture simply, & the habendum, the interest in the land described in the indenture, the*

estate passes.—*DOE d. WOOD v. FOX* (1846), 3 U. C. R. 134.—*CAN.*

s. — Estate in fee—Habendum for years.—*A.*, by indenture granted, demised, & to farm let to M., his heirs & assigns, certain land, *habendum*, "unto M., his heirs & assigns, from the day of the date hereof, for & during the term of 21 years";—*Held*: without livery of seisin the fee simple granted in the premises could not take effect, & the *habendum* for 21 years would stand.—*MCDONALD v. MCGILLIS* (1867), 26 U. C. R. 455.—*CAN.*

t. — Estate for lives—Habendum for years.—*A* demise of land for three lives named, " & afterwards with renewals of lives to subsist for & during

Sect. 11.—The habendum: Sub-sects. 4 & 5. Part IV. Sect. 1: Sub-sects. 1 & 2, A.]

Rep. 99; Green v. Horne (1693), 1 Salk. 197; Goodridge v. Goodridge (1742), 7 Mod. Rep. 453; Walpole v. Cholmondeley (1797), 7 Term Rep. 138; Doe d. Ellis v. Ellis (1808), 9 East, 382; Smith v. Jersey (1821), 3 Bl. 290; Doe d. Gord v. Needs (1838), 2 Gale, 245. **Mentd.** Hughes & Keene's Case (1811), Godb. 183; Lampets Case (1812), 10 Co. Rep. 46 b; Wiseman v. Cotton (1863), 1 Keb. 505; Williams v. Fry (1872), 3 Keb. 19; Miller v. Travers (1832), 8 Bing. 244.

1971. — Grant to husband & wife & their heirs—Habendum to them & the heirs of their bodies.]—A grant to husband & wife, & their heirs, habendum to them & the heirs of their bodies, with remainder to them for life, conveys an estate-tail with a fee-expectant thereon.—TURNMAN v. COOPER (1619), Cro. Jac. 476; 79 E. R. 406; sub nom. THURMAN v. COOPER, Poph. 138; 2 Roll. Rep. 19.

Annotation:—Reid. Brice v. Smith (1737), Willes, 1.

1972. — Demise to A. & his heirs—Habendum to him & his heirs for three lives.]—PILSWORTH v. PYET (1671), T. Jo. 4; 84 E. R. 1118.

Annotation:—Reid. Doe d. Timmins v. Steel (1843), 7 Jur. 555.

1973. — Demise to A., her heirs & assigns—Habendum to A. & her assigns—During natural life of B.]—Tenant in fee conveyed lands "to H., her heirs & assigns, to hold to H. & her assigns during the life of G." G. was H.'s heir at law:—Held:** after H.'s death, G. was entitled to hold for his life, as special occupant, & that the land did not pass to H.'s exors. by the words in the habendum.—DOE d. TIMMIS v. STEELE (1843), 4 Q. B. 663; 3 Gal. & Dav. 622; 12 L. J. Q. B. 272; 1 L. T. O. S. 168; 7 Jur. 555; 114 E. R. 1048.**

Annotation:—Reid. Phillips v. Ball (1859), 6 C. B. N. S. 811.

1974. Habendum repugnant to premises—Void.]—ANON. (1428), Jenk. 96; 145 E. R. 68.

1975. Grant to one—Habendum to two.]—ANON. (1572), Ben. & D. 79; 123 E. R. 289.

1976. — Habendum to lessee for his life—Term commencing after previous term for three lives.]—UNDERHAY v. UNDERHAY (1592), Cro. Eliz. 269; 78 E. R. 524.

Annotation:—Reid. Stukeley v. Butler (1615), Hob. 168.

1977. — Demise to B.—Habendum to grantor & his wife for their lives—& after their decease to B.]—A., being possessed of a lease for 1,000 years, grants "all his term, estate & interest therein to B. his daughter, habendum to A. & his wife for their lives, & after their decease to B." The first grant to B. is good, & the habendum to A. & his wife, with remainder to B. is void.—GOSHAWKE v. CHIGGELL (1629), Cro. Car. 154; W. Jo. 205; 79 E. R. 734.

Annotation:—Reid. Jerman v. Orchard (1694), Skin. 528.

1978. — Demise to A. & her heirs—Habendum to A. & her heirs—During lives.]—By an indenture of lease certain premises were demised to M. E. & her heirs, habendum to her & her heirs for & during the natural lives of M. E.'s son, J. E., her daughter, M. E., & A. E.'s granddaughter, & the life of the survivor of them. A. E. had a daughter, but he had not any granddaughter at the time of making the indenture, nor previously thereto, though subsequently he had several granddaughters:—Held:** the lease was good for the lives of J. E. & M. E. only.—DOE d. PEMBERTON v. EDWARDS (1836), 1 M. & W. 553; 2 Gale, 137; Tyr. & Gr. 1006; 5 L. J. Ex. 258; 150 E. R. 555.**

1979. — Demise by tenant for life to A., his executors, etc.—Habendum from future date—For term of grantor's life.]—R. was tenant for life of a house & premises, of which (subject to his life) he had made two leases, a lease expiring on Nov. 13, 1864, & a lease to J. expiring on Nov. 13, 1874. On Nov. 10, 1864, R. executed a deed, by which, in consideration of a yearly rent of £50, he granted & leased the property to J., his exors., administrators, & assigns, habendum from Nov. 13, for the

term of 150 years, & no longer, to be computed from Mar. 25 or Sept. 29, which would first or next happen after the death of the survivor or longest liver of the *cestuis que vie*:—**Held:** after the death of the survivor, this constituted a chattel interest.—**Re O'BRIEN (1891), 27 L. R. 1r. 372.—IR.**

a. — Lease of separate portions at separate rents—Habendum joint.]—When in an ejectment on the title by the exors. of a co-lessee in a lease for years, it appeared that the granting part of the lease gave separate portions at separate rents to the respective lessees, but the habendum & covenants in the lease were joint:—Held:** the lease was a joint lease.—KENNEDY v. HAYES (1840), 2 L. L. R. 186.—IR.**

1974 i. Habendum repugnant to premises—Void.]—A lease of real estate for 21 years with a covenant for a like term or terms was mortgaged by the lessee. The mtgce. after reciting the terms of the lease proceeded to convey to the mtgce. the indenture & the benefit of all covenants & agreements therein, the leased property by description, etc. **Habendum: "To have & to hold under the mtgce., their successors & assigns for the residue yet to come & unexpired of the term of years created by the lease less one day thereof & all renewals, etc."—**Held:** the premises of the mtgce. above referred to contained an express assignment of the whole time, & the habendum, if intended to reserve a portion to the mtgce., was repugnant to the said premises & therefore void.—JAMESON v. LONDON & CANADIAN LOAN & AGENCY CO. (1897), 27 S. C. R. 435.—CAN.**

b. — Demise to B.—Habendum to grantor.]—In a lease by G. to D. &

others the habendum ran "to hold unto G., his exors., administrators, & assigns," etc.:—**Held:** this, so far as G. was concerned, being repugnant to the demise & to the whole tenor & intention of the deed, might be rejected.—GRATTAN v. GILES, 2 N. Z. Jur. 213.—N.Z.

c. — To A. & heirs—Habendum to A. & heirs—During widowhood.]—By deed of bargain & sale, A. conveyed to H. her heirs & assigns certain freehold premises to hold the same to H. her heirs & assigns, "so long as she remains the widow of M., but should she marry or decease, the above-described land will become the property of the two sons of H. for ever." Covenants for title were added to the said H. her heirs & assigns:—Held:** the habendum constituted a limitation & not a condition, & such limitation was void, as being repugnant to the grant in the premises, & the grantee took a fee simple.—DOE d. MEYERS v. MARSH (1851), 9 U. C. R. 242.—CAN.**

d. — Then in trust to B.]—Under a conveyance to A., her heirs & assigns, habendum to A., her heirs & assigns, & in case of her decease leaving issue, then in trust to O., her husband, his heirs or assigns, to & for the benefit of the children, their heirs or assigns, to be sold for their benefit, if O., his heirs or assigns, should think fit; & if A. should not survive O., leaving no issue, then to O., his heirs & assigns for ever:—Held:** the habendum being inconsistent with the premises, the former must govern & A. took a fee.—OWSTON v. WILLIAMS (1858), 16 U. C. R. 405.—CAN.**

e. Words of limitation omitted—Whether can be read into habendum.]—

Where freehold land was expressed to be granted "unto the grantee . . . unto & to the use of the grantee for ever," & where the deed contained an interpretation clause in the description of the parties to the deed, by which the word "grantee" was, unless a contrary intention appeared, to be read as "grantee & his heirs & assigns":—**Held:** the words of limitation could not, consistently with the context, be read into the habendum, & the legal estate in the fee simple did not pass.—**Re FORD & FERROUSON'S CONTRACT, [1906] 1 I. R. 607.—IR.**

f. May qualify estate—Even though void.]—The habendum of a deed, although void, may be looked at, together with the other parts of the deed, to qualify the estate granted by the premises.—HAGARTY v. NALLY (1862), 13 I. C. L. R. 532.—IR.

g. —.]—M., possessed of a chattel interest in lands, by deed operating as a common law conveyance, assigned them to A., B., C. & D., to be divided & enjoyed by them thus: A.'s one-fourth to consist of W., B.'s fourth of X., C.'s fourth of Y., & D.'s fourth of Z.; to have & to hold the lands unto A., B., C. & D., as follows—that is to say, to A. his one-fourth for his life, & from & after his demise, if he should leave lawful issue him surviving, to such of them as he should appoint; but if he should die without issue, his fourth to be divided & descend to the survivor & survivors of B., C. & D., which should be then living. A. survived B. & C., & died in the lifetime of D., without having had issue:—Held:** the habendum was not inconsistent with the premises.—KERR v. K. (1854), 4 I. Ch. R. 493; 7 Ir. Jur. 76.—IR.**

term of R. for the term of his natural life":—*Held*: this deed was not void on the ground that it purported to create a future estate of freehold, as there was in the premises of the instrument an express grant of the life estate *in presenti* which was not controlled by the *habendum*.—**BODDINGTON v. ROBINSON** (1875), L. R. 10 Exch. 270; 44 L. J. Ex. 223; 33 L. T. 364; 23 W. R. 925.
Annotation.—**Mentd.** Savill v. Bethell, [1902] 2 Ch. 523.

1980. Demise to A., B. & A. & heirs of A.—Habendum to them for ninety-nine years—Taking effect on delivery only.—**BALDWIN'S CASE**, No. 636, *ante*.

SUB-SECT. 5.—VARIANCE BETWEEN HABENDUM AND REDDENDUM.

1981. As to amount of rent—Reddendum pre-

vails.—If in a lease special days of payment are limited by the *reddendum*, the rent must be computed according to that, & not the *habendum*.—**TOMPKINS v. PINCENT** (1702), 1 Salk. 141; 91 E. R. 131; *sub nom.* **TOMKINS v. PINSENT**, 2 Ld. Raym. 819.

Annotation.—**Mentd.** Doe d. Harries v. Morse (1834), 4 Tyr. 185.

1982. As to duration of term—Habendum prevails.—Where the *habendum* of a lease differs from the *reddendum* as to the duration of the term, the statement in the *habendum* must prevail.—**BURCHELL v. CLARK** (1876), 1 O. P. D. 602; 45 L. J. Q. B. 671; 35 L. T. 372; 40 J. P. 760; 25 W. R. 8; *reversd.* on other grounds, 2 C. P. D. 88, C. A.

Annotations.—**Mentd.** Ingleby v. Slack (1890), 6 T. L. R. 284; Matthews v. Smallwood, [1910] 1 Ch. 777.

Part IV.—Covenants and Provisoes.

SECT. 1.—COVENANTS.

SUB-SECT. 1.—IN GENERAL.

1983. Definition.—**HOLLIS v. CARR**, No. 2027, *post*.

1984. —.—A covenant is nothing more than an agreement of the parties under seal (**LORD ELLENBOROUGH, C.J.**).—**RANDALL v. LYNCH** (1810), 12 East, 179; 104 E. R. 71.

Annotations.—**Mentd.** Rodgers v. Forresters (1810), 2 Camp. 483; Edwards v. Vere (1833), 5 B. & Ad. 282; Wright v. Goddard (1838), 8 Ad. & Kl. 144; Brown v. Johnson (1842), 10 M. & W. 331; Ivens v. Elwes (1854), 3 Eq. Rep. 163; Parker v. Winlo (1857), 27 L. J. Q. B. 49; Ford v. Cotesworth (1868), L. R. 4 Q. B. 127; Norden S.S. Co. v. Dempsey (1876), 1 C. P. D. 654; Thus v. Byers (1876), 1 Q. B. D. 244; Porteus v. Watney (1878), 3 Q. B. D. 534; Davies v. McVeagh (1879), 4 Ex. D. 265; Dahl v. Nelson, Donkin (1880), 6 App. Cas. 38; Postlethwaite v. Freeland (1880), 5 App. Cas. 599; Gullischen v. Stewart (1883), 11 Q. B. D. 186; Budgett v. Blinnington, [1891] 1 Q. B. 35; Neptune Steam Navigation Co. v. Slater & Procter, The Delano (1894), 71 L. T. 544; Alexander v. Akt. Pampskibet Hansa, [1920] A. C. 88.

1985. —.—Wherever you have words importing agreement by all parties, it is on the part of each of those parties a covenant, if it be under seal, provided the party who is sought to be charged by the covenant is, by the terms of the instrument according to the agreement of the parties, to do something or not to do something (**KINDERLEY, V.-C.**).—**RAMSDEN v. SMITH** (1854), 2 Drew. 298; 2 Eq. Rep. 660; 23 L. J. Ch. 757; 23 L. T. O. S. 166; 18 Jur. 566; 2 W. R. 435; 61 E. R. 734.

Annotations.—**Mentd.** Willoughby v. Middleton (1862), 2 John. & H. 344; Campbell v. Bainbridge (1868), L. R. 6 Eq. 269; Lee v. Lee (1876), 4 Ch. D. 175; *Re* Campbell's Policies (1877), 6 Ch. D. 686; Dawes v. Tredwell (1881), 18 Ch. D. 354; *Re* D'Estampes' Settlement, D'Estampes v. Crowe (1884), 53 L. J. Ch. 1117; *Re* Macpherson, Macpherson v. Macpherson (1886), 55 L. J. Ch. 922; Hancock v. Hancock (1888), 38 Ch. D. 78; *Re* Rickman, Stokes v. Rickman (1899), 80 L. T. 518; *Re* Smith, Robson v. Tidy, [1900] W. N. 75.

1986. —.—**BROOKES v. DRYSDALE**, No. 2006, *post*.

1987. — Covenants real & personal.—Warranty is a covenant real annexed to a freehold. If annexed to a chattel, it is but a personal cove-

nant.—**BOULS v. HORTON** (1672), 1 Freem. K. B. 50; 89 E. R. 44.

1988. Covenants may be read to mean contract.—**HAYNE v. CUMMINGS**, No. 2053, *post*.

How construed—According to intention.—*See* Part III., Sect. 3, sub-sect. 3, *ante*.

1989. Negative covenant—Whether affirming preceding affirmative covenant—Or additional to preceding affirmative covenant.—**LAUGHWELL v. PALMER** (1662), 1 Sid. 87; 82 E. R. 986.

SUB-SECT. 2.—WHAT CONSTITUTES A COVENANT.

A. Form of Words.

Covenant defined.—*See* Sub-sect. 1, *ante*.

1990. General rule.—(1) By an indenture of lease, the lessee covenanted that he would "from time to time during the term at his own cost (being allowed all necessary materials for this purpose (to be previously approved in writing by the lessors), & carting such materials free of cost a distance not exceeding five miles from the farm) when & so often as need shall require, well & substantially repair & maintain the farm, etc.," in repair. This covenant appeared among the lessee's covenants, there being lessors' covenants elsewhere in the deed. The deed contained certain powers of determining the tenancy with a view to selling or letting the land:—*Held*: the clause within the outer brackets when read together with the rest of the lease was not a covenant by the lessors to supply the materials for repair, but only a qualification of the lessee's covenant to repair.

(2) I think the only principle which these cases establish is that covenant is a matter of intention & that any words will make a covenant, whether participial or not, if it can be clearly seen that such was the intention of the parties. A participial clause, therefore, such as that in this case, may be only a qualification of the previous covenants of the lessee, or it may be a covenant by the lessor to

PART IV. SECT. 1, SUB-SECT. 1.

h. Nature of.—A covenant must be express & distinct, & not gathered as arising consequently or morally by reason of something else in the deed.—**LIDDELL v. MUNRO** (1847), 4 U. C. R. 474.—**CAN.**

PART IV. SECT. 1, SUB-SECT. 2.—A.

k. No particular form essential.—In

a lease was contained the following proviso: "Provided always that nothing herein contained shall be deemed, or taken, or construed to be deemed, or taken, in any way, to compel the said G., his exors., administrators, or assigns, to give up the buildings at the expiration thereof, which are all wooden & liable to decay, in as sound & good a state as they now are; but such buildings are not to be wilfully or negligently wasted

or destroyed; necessary repairs, however, for the preservation of the said buildings, to be done & performed by the said G. at his own proper cost & charge."—*Held*: the words recited constituted a covenant.—**PERRY v. BANK OF UPPER CANADA** (1866), 16 C. P. 404.—**CAN.**

l. —.—It is well settled that no particular words are necessary

Sect. 1.—Covenants: Sub-sect. 2, A.]

perform what is mentioned in the clause. If it be such a covenant, it may be also a qualification in the sense that the lessor's performance of his covenant may be a condition precedent to the lessee's obligation to perform his. In former days it seems to have been considered that a clause could not be both a covenant & a qualification, but I think that is not the law now (PICKFORD, L.J.).—*WESTACOTT v. HAHN*, [1918] 1 K. B. 495; 87 L. J. K. B. 555; 118 L. T. 615; 34 T. L. R. 257; 62 Sol. Jo. 348, C. A.

1991. No particular form essential—Provided clear intention to agree shown.]—If it be agreed between A. & B., that B. shall pay A. a sum of money for his lands, etc., on a particular day, these words amount to a covenant by A. to convey the lands; for "agreed" is the word of both.—*PORDAGE v. COLE* (1669), 1 Wms. Saund. 319; 1 Sid. 423; T. Raym. 183; 1 Lev. 274; 2 Keb. 542; 85 E. R. 449.

Annotations:—*Apld.* *Emmens v. Elderton* (1853), 4 H. L. Cas. 624. *Refd.* *Lock v. Wright* (1723), 1 Stra. 509; *Carpenter v. Crosswell* (1827), 4 Bing. 409; *Churchward v. R.* (1865), L. R. 1 Q. B. 173. *Mentd.* *Thorpe v. Thorpe* (1701), 1 Ld. Raym. 682; *Callonel v. Briggs* (1703), 1 Saik. 112; *Terry v. Duntze* (1795), 2 Hy. Bl. 389; *Lloyd v. Lloyd* (1837), Donnelly, 187; *Abbott v. Hicks* (1839), 8 L. J. C. P. 314; *Mattock v. Kinglake* (1839), 10 Ad. & Kl. 50; *Wilks v. Smith* (1842), 10 M. & W. 355; *Giles v. Giles* (1846), 9 Q. B. 164; *Dicker v. Jackson* (1848), 6 C. B. 103; *Silthorpe v. Brunel* (1849), 3 Exch. 826; *Wright v. Colls* (1849), 8 C. B. 150; *Lindsay v. Direct London & Portsmouth Ry.* (1850), 1 L. M. & P. 529; *Thomas Haven Dock Co. v. Brymer* (1850), 5 Exch. 696; *Ellen v. Topp* (1851), 6 Exch. 424; *Graves v. Legg* (1854), 23 L. J. Ex. 228; *Groy v. Friar* (1854), 4 H. L. Cas. 565; *Anderson v. Balgout* (1856), 26 L. T. O. S. 237; *Newson v. Smythies* (1858), 3 H. & N. 840; *Hoare v. Ronnie* (1859), 29 L. J. Ex. 73; *Marsden v. Moore* (1859), 4 H. & N. 500; *Christie v. Borely* (1860), 1 L. T. 328; *Seeger v. Duthie* (1860), 30 L. J. C. P. 65; *National Assee. Assocn. v. Stoy* (1863), 2 New Rep. 391; *Parsons v. Evans* (1864), 12 W. R. 743; *Roberts v. Brett* (1865), 11 H. L. Cas. 337; *Cullen v. O'Meara* (1867), 15 W. R. 1174; *Paynter v. James* (1867), L. R. 2 C. P. 348; *Oxford v. Provand* (1868), L. R. 2 P. C. 135; *Williams v. Earle* (1868), 9 B. & S. 740; *Button v. Thompson* (1869), L. R. 4 C. P. 330; *Bradford v. Williams* (1872), L. R. 7 Exch. 259; *Simpson v. Crippin* (1872), L. R. 8 Q. B. 14; *Robinson v. Mollett* (1875), L. R. 7 H. L. 802; *Westwick v. Theodor* (1875), 39 J. P. 646; *Bettini v. Gye* (1876), 1 Q. B. D. 183; *Honek v. Muller* (1881), 7 Q. B. D. 92; *Mersey Steel & Iron Co. v. Naylor, Benzon* (1884), 9 App. Cas. 434; *Thymney Ry. v. Brecon & Merthyr Tydfil Ry.* (1900), 83 L. T. 111; *Ebbw Vale Steel, Iron & Coal Co. v. Blairston & Tinplate Co.* (1901), 6 Com. Cas. 33; *Workman, Clark v. Lloyd Bradleho*, [1908] 1 K. B. 968; *General Billposting Co. v. Atkinson*, [1909] A. C. 118; *Leiston Gas Co. v. Leiston-cum-Sizewell U. C.*, [1916] 2 K. B. 428; *Stein, Forbes v. County Tailoring Co.* (1916), 86 L. J. K. B. 448; *Kidner v. Stimpson* (1918), 34 T. L. R. 434; *Westacott v. Hahn*, [1918] 1 K. B. 495; *Colley v. Overseas Exporters*, [1921] 3 K. B. 302.

1992. ———.]—*HILL v. CARR* (1670), 1 Cas. in Ch. 294; 22 E. R. 807.

Annotation:—*Mentd.* *Coventry v. Coventry* (1721), Gilb. Ch. 160.

1993. ——— & words not merely qualifying or conditional.]—Any words in a deed which show an agreement to do a thing make a covenant; but it must be clear that they are meant to operate as an agreement, & not merely as words of condition or qualification (DENMAN, C.J.).—*WOLVERIDGE v. STEWARD* (1833), 1 Cr. & M. 611; 3 Moo. & S. 561; 3 Tyr. 637; 3 L. J. Ex. 360; 149 E. R. 557, Ex. Ch.; *revg.* S. C. *sub nom.* *STEWARD v. WOLVERIDGE* (1832), 9 Bing. 60.

Annotations:—*Apld.* *Westacott & Hahn*, [1917] 1 K. B. 605. *Refd.* *Smith v. Noale* (1837), 2 C. B. N. S. 67. *Mentd.* *Howley v. Adams* (1839), 4 My. & Cr. 534; *Humble v. Langston* (1841), 7 M. & W. 517; *Smith v. Lovell* (1850), 10 C. B. 6; *Magnay v. Edwards* (1853), 17 Jur. 839; *Smith v. Post* (1853), 9 Exch. 161; *Crouch v. Tregonning*

(1872), L. R. 7 Exch. 88; *Moule v. Garrett* (1872), L. R. 7 Exch. 101; *Roberts v. Crowe* (1872), L. R. 7 C. P. 629; *Charrington v. Wooder*, [1914] A. C. 71; *Kelantan Government v. Duff Development Co.*, [1923] A. C. 395.

Compare No. 1990, *ante*.

1994. ———.]—Where, in an indenture between A. & B., B. acknowledges that he owes so much money to A., such acknowledgment may be declared upon as a covenant to pay that sum, if an intention to enter into an engagement to pay, appear upon the face of the deed. *Secus* where the acknowledgment appears to have been made solely for a collateral purpose.

To charge a party with a covenant it is not necessary that there should be express words of covenant or agreement. It is enough if the intention of the parties to create a covenant be apparent (TINDAL, C.J.).—*COURTNEY v. TAYLOR* (1843), 6 Man. & G. 851; 7 Scott, N. R. 749; 12 L. J. C. P. 330; 1 L. T. O. S. 257; 134 E. R. 1135.

Annotations:—*Consd.* *Stone v. Van Heythuysen* (1854), Kay, 721. *Folld.* *Marryat v. Marryat* (1860), 28 Beav. 224. *Consd.* *Jackson v. N. E. Ry.* (1877), 7 Ch. D. 573. *Refd.* *Saunders v. Milsome* (1866), L. R. 2 Eq. 573; *Isaacson v. Harwood, Brook v. Harwood* (1868), 3 Ch. App. 225; *Holland v. Holland* (1869), 4 Ch. App. 449. *Mentd.* *Browe v. Cox* (1855), 24 L. T. O. S. 326.

1995. ———.]—No technical words are necessary to constitute a covenant. Whatever words you find which clearly show the parties oblige themselves to do an act, those amount to a covenant in point of law (PARKE, B.).—*RIGBY v. GREAT WESTERN Ry. Co.* (1845), 14 M. & W. 811; 4 Ry. & Can. Cas. 190; 15 L. J. Ex. 60.

Annotation:—*Refd.* *Milos v. Tobin* (1867), 17 L. T. 432.

1996. ———.]—No precise form of words is necessary to constitute a covenant. It is enough, if the intention of the parties mutually to contract, is apparent from the general scope of an instrument under seal, more especially, where it commences with the words "it is hereby agreed by & between the said parties in manner following."—*WOOD v. COPPER MINERS' Co.* (1849), 7 C. B. 906; 18 L. J. C. P. 293; 137 E. R. 358.

Annotations:—*Refd.* *Harrison v. G. N. Ry.* (1852), 11 C. B. 815; *Bealey v. Stuart* (1862), 7 H. & N. 753; *Barnes v. City of London Real Property Co.*, [1918] 2 Ch. 18. *Mentd.* *Wood v. Copper Miners in England* (1851), 23 L. J. C. P. 209.

1997. ———.]—No particular word or form of words is necessary to create a covenant, but any words are sufficient for the purpose which show an intention to be bound by the deed to do or omit that which is the subject of the covenant (MAULE, J.).—*RASHLEIGH v. SOUTH EASTERN Ry. Co.* (1851), 10 C. B. 612; 16 L. T. O. S. 282; 138 E. R. 242; *subsequent proceedings* (1852), 16 Jur. 567, n., Ex. Ch.

Annotations:—*Consd.* *Knight v. Gravesend & Milton Waterworks Co.* (1857), 2 H. & N. 6; *Smith v. Harwich Corpn.* (1857), 2 C. B. N. S. 651; *Westacott v. Hahn*, [1918] 1 K. B. 495. *Refd.* *McIntyre v. Belcher* (1863), 32 L. J. C. P. 254; *Westhoughton U. D. C. v. Wigan Coal & Iron Co.*, [1919] 1 Ch. 159. *Mentd.* *G. N. Ry. v. Harrison* (1852), 16 Jur. 565.

1998. ———.]—It is not necessary that a covenant or agreement should be couched in express terms. There may be a covenant or agreement contained by necessary implication, in terms which do not directly amount either to a covenant or agreement" (WIGHTMAN, J.).—*EMMENS v. ELDERTON* (1853), 4 H. L. Cas. 624; 13 C. B. 495; 22 L. T. O. S. 1; 18 Jur. 21; 10 E. R. 606, H. L.; *affg.* S. C. *sub nom.* *ELDERTON v. EMMENS* (1848), 6 C. B. 160, Ex. Ch.

Annotations:—*Refd.* *Payne v. New South Wales Coal & Intercolonial Steam Navigation Co.* (1854), 10 Exch. 283;

to create a covenant. The deed said deft. shall hold subject to the yearly rent & to all & singular the covenants

& agreements on the lessee's part in said indenture of lease contained:—*Held:* these words created an express

covenant to pay the rent.—*LUTTRELL v. M'CREEERY* (1850), 2 I. C. L. R. 289.—*IR.*

c. "Warrant & defend."—The words "warrant & defend" are words creating a covenant of warranty.—

Sect. 1.—Covenants: Sub-sect. 2, A. & B.]

premises were held contained this clause: "Provided always & these presents are upon this express condition, that all & every underlease, deed of assignment, etc., which shall be made & executed during the term, shall be left with the solr. of the ground landlord within two months of its date, for the purpose of registration, & a fee of one guinea paid for such registration," & a power of re-entry in case of "breach or non-performance of any of the covenants or other stipulations hereinbefore contained or referred to." The purchaser refused to complete, on the ground that this was not a common & usual covenant; & the jury so found:—*Held*: whether the proviso in the head lease was a covenant in the strict sense or not, it was at all events a covenant within the contemplation of the agreement, & therefore the purchaser was not bound to complete.

I am of opinion, upon the authorities cited, & upon the reason of the thing, that, though the words "covenant" & "agree" are not used, there is enough to make this proviso or stipulation a covenant in law. "Any words in a deed which show an agreement to do a thing make a covenant: as, if it be agreed by articles between A. & B. that stock shall be in the hands of B. until a jointure be made, B. *solvendo provide* the interest to A., covenant lies against B. for the interest:" *Com. Dig. Covenant* (A.1.). So, in Sheppard's Touchstone, p. 162, it is laid down that "there needs not formal & orderly words, as, covenant, promise, & the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words": & the following instance is *puf*: "If these words be inserted in a deed, amongst other covenants, 'that the lessee shall repair, provided always that the lessor shall allow timber,' or 'that the lessee shall scour ditches, provided always that the lessor do carry away the earth,' these are good covenants on both sides." There, neither the word "covenant" nor the word "agreed" is used. It seems to me that, although there may be some slight apparent contradiction in some of the authorities, these may well be reconciled by looking at the whole of the instrument in order to ascertain the real intention of the parties (*GROVE, J.*).—*BROOKES v. DRYSDALE* (1877), 3 C. P. D. 52; 37 L. T. 467; 26 W. R. 331. *Annotation*:—*Reid*. Westcott v. Hahn, [1917] 1 K. B. 605.

2007. — *Sufficiency of "grant."*—*ROE d. WILKINSON v. TRANMARR*, No. 988, *ante*.

2008. — [No particular technical words are requisite towards making a covenant (*LORD MANSFIELD, C.J.*).—*LANT v. NORRIS* (1757), 1 Burr. 287; 97 E. R. 317.

Annotations:—*Reid*. Monypenny v. Monypenny (1859), 33 L. T. O. S. 33. *Mentd.* Stephens v. Junior Army & Navy Stores, [1914] 2 Ch. 516.

2009. — [—*SAMPSON v. EASTERBY*, No. 2032, *post*.

2010. *Must amount to binding agreement.*—By an agreement between *pltf.* & *defts.* for the sale of some land, after a recital that *pltf.* had been intending to construct a street over some portion of the land, *defts.* agreed that the street should be carried over the land to be conveyed, by means of

a bridge to be constructed to the satisfaction of certain *comrs.* & that *defts.* should & would pay their proportion of the making, etc.:—*Held*: this did not amount to a covenant by *defts.* to make a bridge over the land in question, as the clause, whereby *defts.* contracted to pay their proportion of the expense of making the street, was inconsistent with the notion of their making it themselves.—*CHADWICK v. CHESTER & BIRKENHEAD RY. Co.* (1851), 18 L. T. O. S. 93.

2011. — *Not merely contemplation of agreement.*—The *ct.* must be satisfied that the language does not merely show that the parties contemplated that the thing might be done, but it must amount to a binding agreement upon them that the thing shall be done (*PARKE, B.*).—*JAMES v. COCHRANE* (1852), 7 Exch. 170; 21 L. J. Ex. 229; 155 E. R. 903; *on appeal* (1853), 8 Exch. 556, Ex. Ch. *Annotations*:—*Mentd.* Wheatley v. Westminster Brymbo Coal Co. (1869), L. R. 9 Eq. 538; Kelantan Government v. Duff Development Co., [1923] A. C. 395.

2012. "I will be ready at all times."—*WALKER v. WALKER* (1636), 1 Roll. Abr. 519. *Annotations*:—*Mentd.* Hollis v. Carr (1676), *Freem. Ch.* 3; Williams v. Burrell (1845), 1 C. B. 402.

2013. *Covenant to be "accountable."*—Covenant lies on a writing, by which the *deft.* covenants to be accountable for £100.—*BRICE v. CARRE & EMERSON* (1661), 1 Lev. 47; 1 Keb. 155; 83 E. R. 290.

2014. *Force of words yielding & paying.*—*PORTER v. SWETNAM* (1654), *Sty.* 406; 82 E. R. 816.

Annotations:—*Mentd.* Hellar v. Casbrooke (1665), 1 Keb. 923; Floyd v. Langfield (1676), *Freem. K. B.* 218; Garth v. Taylor (1679), *Freem. K. B.* 261; Taylor d. Atkins v. Horde (1755), 1 Keny. 143.

2015. — [—*HELLIER v. CASBARD* (1665), 1 Sid. 240, 266; 82 E. R. 1081, 1096; *sub nom.* *HELLIER v. CASEBERT*, 1 Lev. 127; 1 Keb. 839, 923.

Annotations:—*Consd.* Rubery v. Stevens (1832), 4 B. & Ad. 211. *Reid*. Pitcher v. Tovey (1691), 4 Mod. Rep. 71. *Mentd.* Steward v. Wolveridge (1832), 9 Bing. 60.

2016. — [—*HOLLIS v. CARR*, No. 2027, *post*.

2017. — [—A. being seised in fee of a mill & of certain lands, granted a lease of the latter for years, the lessee yielding & paying to the lessor, his heirs & assigns, certain rents, & doing certain suits & services; & also doing suit to the mill of the lessor, his heirs and assigns, by grinding all such corn there as should grow upon the demised premises. The lessor afterwards devised the mill & the reversion of the demised premises to the same person:—*Held*: the reservation of the suit to the mill was in the nature of a rent, & the implied covenant to render it resulting from the *reddendum*, was a covenant that ran with the land as long as the ownership of the mill & the demised premises belonged to the same person, & consequently the assignee of the lessor might take advantage of it.—*VIVYAN v. ARTHUR* (1823), 1 B. & C. 140; 2 Dow. & Ry. K. B. 760; 107 E. R. 152; *sub nom.* *VIVYAN v. ARTHUR*, 1 L. J. O. S. K. B. 138.

Annotations:—*Consd.* Keppell v. Bailey (1834), 2 My. & K. 517. *Reid*. Doe d. Calvert v. Reid (1830), 10 B. & C. 849; Standen v. Christmas (1847), 16 L. J. Q. B. 265; Norval v. Pascoe (1864), 4 New Rep. 390; Rogers v. Hosegood, [1900] 2 Ch. 388; Dewar v. Goodman, [1909] A. C. 72; Dyson v. Forster, Dyson v. Seed, Quinn, Morgan, [1909] A. C. 98; Luckett v. Enfield, [1909] 1 Ch. 541.

GURRAIN v. LANGRIS (1882), 21 N. B. R. (P. & B.), 549.—*CAN.*

p. "To be used only as a site for a detached dwelling house."—In the original deed of *deft.*'s predecessor in title the following words followed the description of the lot: "to be used only as a site for a detached brick or stone dwelling house." There was no express covenant to the same effect

though there was one not to erect any building for manufacturing purposes:—*Held*: the provision quoted was a covenant.—*PEARSON v. ADAMS* (1912), 27 O. L. R. 87.—*CAN.*

q. "Saving & reserving."—In the granting part of a lease, the following clause was inserted immediately after "all that & those," & also saving & reserving to the lessor liberty

to resume the whole or any part of that portion of the hereby demised premises called the Nine Acres, lying, etc., allowing to the lessee, his heirs, etc., the rent of 30s. an acre per annum, for so much as shall be resumed of the same, for & during the remaining term that shall exist of the said demised premises"—*Held*: this clause was a covenant.—*DUBLIN (ARCHBP.) v. EATON* (1841), 3 L. L. R. 168.—*IR.*

2018. Force of word "rendering."—GILES v. HOOPER (1690), Carth. 135; 90 E. R. 683.

Annotation.—**Mentd.** Fosting v. Taylor (1862), 3 B. & S. 218.

2019. Force of words "covenant" & "agree."—The word covenant is not more powerful than the word agree (LORD ST. LEONARDS, L.J.).—MONYPENNY v. MONYPENNY (1861), 9 H. L. Cas. 114; 31 L. J. Ch. 269; 11 E. R. 671, H. L.; *affg.* (1859), 3 De G. & J. 572, L. C.

Annotations.—**Refd.** Piggott v. Stratton (1859), 1 De G. F. & J. 33. **Mentd.** Ford v. Tynte (1865), 34 L. J. Ch. 455; Nicholls v. Bulwer (1870), L. R. 6 C. P. 281; Minchin v. Minchin (1871), 19 W. R. 993.

2020. —.]—BROOKES v. DRYSDALE, No. 2006, *ante*.

2021. Agreeing & declaring without covenanting—**Self contradictory.**—ELLISON v. BIGNOLD (1821), 2 Jac. & W. 503; 37 E. R. 720.

Annotation.—**Consd.** Rose & Frank Co. v. Crompton, [1923] 2 K. B. 261.

B. Recitals amounting to Covenants.

Recitals generally.—See Part III., Sect. 8, *ante*.
Variance between recitals & operative part.—See Part III., Sect. 7, sub-sect. 1, *ante*.

Covenants arising by construction.—See CONTRACT.

Form of words necessary to constitute covenant.—See Sect. 1, sub-sect. 2, *ante*.

Qualification of covenants by recitals.—See Sub-sect. 9, C., *post*.

2022. General rule.—Where words of recital or reference manifested a clear intention that the parties should do certain acts, the cts. have from these inferred a covenant to do such acts & sustained actions of covenant for non-performance, as if the instrument had contained express covenants to perform them (LORD DENMAN, C.J.).—ASPEN v. AUSTIN (1844), 5 Q. B. 671; 1 Dav. & Mer. 515; 13 L. J. Q. B. 155; 8 Jur. 355; 114 E. R. 1402.

Annotations.—**Consd.** Emmens v. Elderton (1853), 4 H. L. Cas. 624; Whittle v. Frankland (1862), 31 L. J. M. C. 81; Churchward v. R. (1865), L. R. 1 Q. B. 173; Phillips v. G. W. Ry. (1872), 41 L. J. Ch. 614; Re Shell Transport & Trading Co. & Consolidated Petroleum Co. (1904), 20 T. L. R. 517; Devonald v. Rosser, [1906] 2 K. B. 728. **Refd.** Dunn v. Sayles (1844), 5 Q. B. 685; Richardson v. Palmer (1845), 5 L. T. O. S. 177; Pilkington v. Scott (1846), 15 M. & W. 657; Burton v. G. N. Ry. (1854), 9 Exch. 507; Worthington v. Sudlow (1862), 26 J. P. 453; McIntyre v. Belcher (1863), 32 L. J. C. P. 254; Boston Deep Sea Fishing & Ice Co. v. Ansell (1888), 59 L. T. 345. **Mentd.** R. v. Welch & Wills (1853), 17 Jur. 1007; Whitmore v. Owen (1854), 2 W. R. 432; Lewin v. Brown (1866), 14 W. R. 640.

2023. —.]—FARRALL v. HILDITCH, No. 2033, *post*.

2024. —.]—LAY v. MOTTRAM, No. 2034, *post*.

2025. Recital of covenant.—HILTON v. SMITH (1690), 1 Lut. 493; 125 E. R. 259.

2026. Recital showing intention of party to be bound—Agreement to pay share of profit.—BARFOOT v. FRESWELL & PICARD (1875), 3 Keb. 465; 84 E. R. 826.

Annotation.—**Refd.** Farrall v. Hilditch (1859), 5 C. B. N. S. 840.

2027. — Agreement to settle property in

marriage.]—Articles of agreement reciting an intended marriage, covenanting to settle a jointure in consideration of a marriage portion, & concluding thus: " & it is hereby agreed that a fine shall be levied to secure the payment of the said portion," amount to a covenant to levy the fine; & the ct. of chancery may decree the execution of it *in specie*.

Wherever there is an agreement under hand & seal, covenant lies. Now there are many cases where words will make a covenant, because of the agreement, when the general words of "covenant, grant, etc." are wanting; as "yielding & paying" will make a covenant (FINCH, C.).—HOLLIS v. CARR (1676), 2 Mod. Rep. 86; Cas. temp. Finch 261; Freem. Ch. 3; 86 E. R. 956.

Annotations.—**Consd.** Saltoun v. Houston (1824), 1 Blng. 433. **Expld. & Distd.** Young v. Smith (1865), 35 Beav. 87. **Apld.** Buckland v. Buckland, [1900] 2 Ch. 534. **Refd.** Itashleigh v. S. E. Ry. (1851), 10 C. B. 612.

2028. —.]—An ante-nuptial settlement made between the intended husband, the intended wife (an infant), & trustees, recited an agreement that property belonging to the wife & then in the hands of the trustees should be settled. By the *testatum* the wife, in pursuance of the agreement, declared that the trustees should hold the property on certain trusts. There was no declaration or covenant by the husband. On attaining twenty-one the wife repudiated the settlement:—**Held**: there was an agreement between the husband & the trustees, & the recital of that agreement was operative as between the parties to it, although unaccompanied by any obligation binding on the infant wife.—BUCKLAND v. BUCKLAND, [1900] 2 Ch. 534; 69 L. J. Ch. 648; 82 L. T. 759; 48 W. R. 637; 16 T. L. R. 487; 44 Sol. Jo. 593.

Annotation.—**Mentd.** Re Crook's Settlement, Re Glasier's Settlement, Crook v. Preston, [1923] 2 Ch. 339.

2029. — Agreement to pay marriage portion.]—GRAVES v. WHITE (1680), 2 Eq. Cas. Abr. 652; Freem. Ch. 57; 22 E. R. 548, L. C.

2030. — Agreement as to value of lands settled as marriage portion.]—GLEGG v. GLEGG (1728), 4 Bro. Parl. Cas. 614; 2 Eq. Cas. Abr. 27, pl. 32; 2 E. R. 418, H. L.

2031. — Agreement by husband & wife to live apart.]—By a separation deed, after reciting that the husband & wife had agreed to live apart, the husband assigned certain leaseholds to trustees in trust to pay the rents to the wife for life, & then to sell & hold the proceeds, in the events which happened, in trust for himself, & he covenanted to make up the wife's income to £300 a year. The deed contained a proviso for determination in the event of the wife seeking to resume cohabitation, but it contained no covenant by the wife to live apart. The husband paid nothing under the covenant, & in 1868 he was adjudicated a bkpt. The trustees proved for arrears due down the date of the bkpcy., but there were further arrears due to them since that date. On the death of the wife the husband's assignee in bkpcy. claimed

PART IV. SECT. 1, SUB-SECT. 2.—B.

2025 i. Recital of covenant.—The recital of an agreement in a bond signed by a railway co.:—**Held**: amounted to a covenant on their part to observe the terms of the agreement.—WHITBY v. GRAND TRUNK RY. CO. (1901), 21 C. L. T. 226; 1 O. L. R. 480.—**CAN.**

2026 i. Recital showing intention of party to be bound.—An indenture between pltf. & deft. recited that deft. was the owner & occupier of certain timber limits, & had agreed to sell to pltf. all the square timber growing

there of a specified length, & witnessed that pltf. "had a right to cut, make, & draw off the said timber until the 15th April next, & not longer";—**Held**: taken altogether the instrument contained a covenant by deft. that he owned the limits, & had power to sell & give the pltf. a right to remove the timber.—LINK v. HUNTER (1868), 27 U. C. R. 187.—**CAN.**

2027 i. — Agreement to pay marriage portion.]—A father joined in a settlement executed on the marriage of his daughter which contained a recital that he was desirous to give her,

as a marriage portion, such sum or child's share as he might be entitled to dispose of:—**Held**: the recital amounted to an absolute covenant.—DUCKETT v. GORDON (1860), 11 L. Ch. R. 181.—**IR.**

2027 ii. —.]—A settlement, executed previously to the marriage of A. (B.'s daughter) recited that B. agreed to give & appoint to A. a portion of £2,000.—**Held**: the deed contained no personal covenant by B. to pay the £2,000.—BORROWES v. BORROWES (1872), 6 L. R. Eq. 368.—**IR.**

Sect. 1.—Covenants: Sub-sect. 2, B.; sub-sect. 3.]

the leaseholds:—*Held*: a covenant by the wife to live apart ought to be implied from the recital. Consequently there was valuable consideration for the husband's covenant & the trustees were entitled to retain the leaseholds until the arrears were satisfied.—*Re WESTON, DAVIES v. TAGART*, [1900] 2 Ch. 164; 69 L. J. Ch. 555; 82 L. T. 591; 48 W. R. 467.

Annotation:—*Mentd. Re Jewell's Settltmt., Watts v. Public Trustee*, [1919] 2 Ch. 161.

2032. — Agreement to pull down & erect a mill.—Where a lease of an undivided third part of certain mines contained a recital of an agreement made by the lessee with the lessor, & the owners of the other two-thirds, for pulling down an old smelting mill, & building another of larger dimensions, & the lease contained a covenant to keep such new mill in repair, & so leave it at the expiration of the term, but did not contain a covenant to build it:—*Held*: such a covenant was to be implied, & the lessor of the one-third might sue upon it in respect of his interest.

It appears evidently to have been the intention of the parties that the building should be erected; & as no precise form of words is necessary to make a covenant, we think the recital of the agreement that the building should be erected, followed by the express covenants to maintain & leave it, do amount to a covenant in law to erect the building (*LORD TENTERDEN, C.J.*).—*SAMPSON v. EASTERBY* (1829), 9 B. & C. 505; 4 Man. & Ry. K. B. 422; 5 L. J. O. S. K. B. 291; 109 E. R. 188; *affd. sub nom. EASTERBY v. SAMPSON* (1830), 6 Bing. 644, Ex. Ch.

Annotations:—*Consd. Stephens v. Junior Army & Navy Stores*, [1914] 2 Ch. 516. *Refd. Dunn v. Sayles* (1844), 5 Q. B. 685. *Mentd. Keppell v. Bailey* (1834), 2 My. & K. 517; *Asplin v. Austin* (1844), 5 Q. B. 671; *Dowar v. Goodman*, [1909] A. C. 72; *Ricketts v. Jenfield*, [1909] 1 Ch. 544.

2033. — Agreement not to enforce debt—Till security realised.—An indenture made between pltf. & deft. recited that the former was seised or entitled to certain hereditaments & premises, subject to a mtge. & further charge, that he was indebted to deft. in the sum of £100 for goods sold & delivered, that deft. had commenced an action against him to recover the same, & that pltf. being desirous of staying the action & of securing to deft. the payment of his debt, had proposed & agreed to convey the hereditaments & premises to him, subject to the incumbrances, upon certain trusts for securing the same. It then recited as follows—"and it has also been agreed between pltf. & deft. that he, deft., shall be at liberty to sign judgment in the action commenced against pltf. as aforesaid, but that no execution shall issue thereon, until this present security be realised." The indenture then proceeded to convey the premises to deft. upon certain trusts:—*Held*: the latter recital amounted to a covenant by deft. not to issue execution until the realisation of the security.—*FARRALL v. HILDITCH* (1859), 5 C. B. N. S. 840; 28 L. J. C. P. 221; 5 Jur. N. S. 902; 7 W. R. 409; 141 E. R. 377.

Annotations:—*Consd. Iay v. Mottram* (1865), 19 C. B. N. S. 479. *Refd. Sherborn v. Tollemache* (1863), 13 C. B. N. S. 742; *Reeves v. Watts* (1866), 7 B. & S. 523; *Jackson v. N. E. Ry.* (1877), 7 Ch. D. 573; *Jackson v. N. E. Ry.* (1878), 26 W. R. 518.

2034. — Agreement to pay composition.—A recital in a deed may amount to a covenant, where it appears to be the intention of the parties that it should do so.

A composition deed under Bkpcy. Act, 1861 (c. 134), s. 192, professing to be made between the debtor, a surety, & all the creditors recited, amongst

other things, that the debtor had agreed to pay his creditors 5s. in the pound upon their debts by two instalments of 2s. 6d. in the pound each, the first in cash, the second by the joint & several promissory notes of the debtor & the surety, at four months' date; & that the statutory majority of creditors had consented to accept such composition. It then witnessed that, in consideration of the premises, the several creditors released the debtor, in the largest possible terms, from all debts, claims, & demands, "save & except their rights, claims, & demands under & by virtue of this deed, & of the said promissory notes for the second instalment of the said composition"; with a proviso saving their remedies against third persons; & the surety covenanted not to accept any security, preference, or benefit, until the full amount of the composition should have been paid:—*Held*: the deed amounted to an absolute release, & might be pleaded in bar as such.—*LAY v. MOTTRAM* (1865), 19 C. B. N. S. 479; 12 Jur. N. S. 6; 144 E. R. 874.

Annotations:—*Refd. Brooks v. Jennings* (1866), L. R. 1 C. P. 476; *Gresty v. Gibson* (1866), L. R. 1 Exch. 112; *Reeves v. Watts* (1866), 7 B. & S. 523.

2035. ——A recital in a deed of composition under Bkpcy. Act, 1861 (c. 134), s. 192, that the debtor has agreed to pay a composition of a given amount to all his creditors, amounts to a covenant.—*BROOKS v. JENNINGS* (1866), L. R. 1 C. P. 476; *Har. & Ruth.* 414; 14 L. T. 19; 12 Jur. N. S. 341; 14 W. R. 440.

Annotations:—*Mentd. Kitchin v. Hawkins* (1866), L. R. 2 C. P. 22; *Tetley v. Wanless* (1866), 15 L. T. 255; *Isaacs v. Green* (1867), L. R. 2 Exch. 352; *McLaren v. Baxter* (1867), L. R. 2 C. P. 559.

2036. Whether covenant to pay debts implied from recital of—Agreement to take over business.—*SALTOUN v. HOUSTOUN*, No. 2005, *ante*.

2037. — Agreement to pay off mortgages & debts of another.—A declaration stated, that by indenture between deft. & J. reciting that deft. for certain considerations had agreed to pay off certain mtges. & debts of J., deft. covenanted to & with J. to save, & indemnify J., his heirs, etc., from the payment of the said debts & from all actions, etc., in respect of them. Breach that £500 of an annuity for payment of which J. had bound himself, his heirs, etc., became in arrear & remained so after J.'s death, & that deft. did not pay the same nor protect or indemnify J., his exors. & administrators by reason whereof the annuity bond became forfeited & the grantee recovered against pltf., administratrix of J., & had judgment of assets *quando*:—*Held*: looking to the whole of the deed declared upon, there appeared a covenant by deft., not only to indemnify, but to pay the debt.—*CARR v. ROBERTS* (1833), 5 B. & Ad. 78; 2 Nev. & M. K. B. 42; 2 L. J. K. B. 183; 110 E. R. 721.

Annotations:—*Mentd. A.-G. v. Hope* (1834), 4 Tyr. 878; *Ashdown v. Ingamells* (1880), 5 Ex. D. 280; *Wiggall v. School for Indigent Blind* (1882), 8 Q. B. D. 357; *Re Perkins, Poyser v. Beyfus*, [1898] 2 Ch. 182; *Re Law Guarantee Trust & Accident Soc., Liverpool Mortgage Insee. Co.'s Case*, [1914] 2 Ch. 617.

2038. — Agreement to pay balance to be found there.—A deed was executed by C. & D., reciting that C. was indebted to D. in various sums, but that the precise balance was not yet ascertained, & that C. was willing to pay to D. the balance that might be due to him, "such balance to be ascertained & paid in manner hereinafter mentioned." It then provided for submitting the accounts to arbitrators named in the deed. The arbitrators died before they made their award:—*Held*: this constituted an absolute promise to pay the amount due; & therefore, notwithstanding

ing that clause, these recitals, coupled with extrinsic parol evidence as to the amount, were sufficient to take the case out of the operation of the Stat. Limitations.—*CHESLYN v. DALBY*, *DALBY v. CHESLYN* (1840), 4 Y. & C. Ex. 238; 10 L. J. Ex. Eq. 21; 160 E. R. 993.

Annotations.—*Mentd.* *Spong v. Wright* (1842), 9 M. & W. 629; *Williams v. Griffith* (1849), 3 Exch. 335; *Hales v. Stevenson* (1863), 8 L. T. 798; *Re Astley & Tyldesley Coal & Salt Co. & Tyldesley Coal Co.* (1899), 68 L. J. Q. B. 232.

2039. — **Acknowledgment that sum is due.**—*BRICE v. CARRE & EMERSON*, No. 2013, *ante*.

2040. — **—**—*COURTNEY v. TAYLOR*, No. 1994, *ante*.

2041. — **—**—*A deed of assignment for the benefit of creditors contained a recital on the part of the debtor of the existence of the debt, a simple contract one, & a covenant by the creditors not to sue for a certain period:—Held: the debt was not thereby converted into a specialty.*—*IVENS v. ELWES* (1854), 3 Drew. 25; 3 Eq. Rep. 163; 24 L. J. Ch. 249; 24 L. T. O. S. 187; 1 Jur. N. S. 6; 3 W. R. 119; 61 E. R. 810.

Annotations.—*Reid.* *Brevo v. Cox* (1855), 3 W. R. 276. *Mentd.* *Barnes v. City of London Real Property Co., etc.* (1918), 87 L. J. Ch. 601.

2042. — **—**—*A., being indebted to B., made & executed an indenture between himself & C., to which B. was no party, & thereby, after reciting that A. stated that he was indebted to B. in a certain specified sum, A. conveyed & assigned all his real & personal property to C. upon trust to sell, & out of the proceeds to pay the debt, & to pay the surplus to A. The deed contained a covenant for further assurance:—Held: the debt to B. was not converted into a specialty.*

The thing to be inquired into is, looking to the whole construction of the deed, what was its object & purport & that of the recitals. There is nothing equivalent to a covenant with B. as party to the deed (*PAGE WOOD, V.-C.*).—*STONE v. VAN HEYTHUYSEN* (1854), Kay, 721; 69 E. R. 307.

2043. — **—**—*Where a deed contained a recital acknowledging a debt & went on to assign property as a security for the debt:—Held: no covenant to pay would be implied, the object of the acknowledgment being simply intended to fix the amount of the debt.*—*MARRYAT v. MARRYAT* (1860), 28 Beav. 224; 29 L. J. Ch. 605; 2 L. T. 531; 6 Jur. N. S. 572; 54 E. R. 352.

Annotations.—*Consd.* *Jackson v. N. E. Ry.* (1877), 7 Ch. D. 573. *Reid.* *Saunders v. Milsons* (1866), L. R. 2 Eq. 573; *Holland v. Holland* (1869), 4 Ch. App. 449.

2044. — **—**—*A. being indebted to B. on simple contract, gave a promissory note for the amount, & executed a deed by which after reciting the debt & the note, he, as further security, charged certain property with the payment of it, & agreed to execute such a mtge. of the property, with all powers, covenants, & clauses incidental thereto, as B., should require:—Held: the deed converted the debt into a specialty debt.*—*SAUNDERS v. MILSOME* (1866), L. R. 2 Eq. 573; 14 L. T. 788; 15 W. R. 2.

Annotation.—*Reid.* *Jackson v. N. E. Ry.* (1877), 7 Ch. D. 573.

2045. — **—**—*ISAACSON v. HARWOOD, BROOK v. HARWOOD*, No. 2000, *ante*.

2046. — **—**—*By the acknowledgment of a debt in a deed under seal, a covenant to pay will not be implied where the acknowledgment is merely collateral to the purpose for which the deed was executed.*—*JACKSON v. NORTH EASTERN RY. Co.* (1877), 7 Ch. D. 573; 47 L. J. Ch. 303; 37 L. T. 664; 26 W. R. 518.

2047. — **Recital that debt had been paid—Debt not paid in fact.**—*By deed under seal between plffs. & deft. after reciting an agreement*

by plffs. to transfer to deft. their interest in certain inventions & letters patent for the sum of £1,000, it was witnessed that in pursuance of such agreement, & in consideration of £1,000 upon the execution, etc., paid by deft. to plffs., the receipt of which plffs. thereby acknowledged & therefrom discharged deft., plffs. thereby granted & assigned the said inventions & letters patent to deft. In an action on the deed by plffs. subsequently to recover the £1,000 from deft.:—Held: the deed contained no covenant to pay the £1,000, & in the face of the acknowledgment therein contained, that deft. had paid the money, it was impossible to imply such a covenant on his part.—*MORGAN'S PATENT ANCHOR CO., LTD. v. MORGAN* (1876), 35 L. T. 811.

Annotation.—*Reid.* *Burchell v. Thompson*, [1920] 2 K. B. 80.

2048. **Recital that wife's fortune would amount to certain sum—No covenant on part of father implied—Though party to deed.**—*A recital in a marriage settlement, to which the father of the intended wife was a party, that the lady's fortune would amount to £10,000 is not equivalent to a covenant by the father to that effect.*—*BOLD v. HUTCHINSON* (1855), 5 De G. M. & G. 558; 25 L. J. Ch. 598; 26 L. T. O. S. 229; 2 Jur. N. S. 97; 4 W. R. 3; 43 E. R. 986, L. C.

Annotations.—*Mentd.* *Jamison v. Stein* (1855), 25 L. T. O. S. 300; *Shadwell v. Shadwell* (1860), 9 C. B. N. S. 159.

2049. **Where express covenant relating to same subject-matter—In witnessing part.**—*DAWES v. TREDWELL*, No. 1743, *ante*.

SUB-SECT. 3.—NECESSITY FOR AND EFFECT OF BEING UNDER SEAL.

Sealing of deeds generally, *see* Part I., Sect. 5, sub-sect. 1, C., *ante*.

2050. **Necessity for.**—*ALDWORTH v. HUTCHINSON* (1888), 1 Lut. 329; 125 E. R. 173.

Annotations.—*Reid.* *Moore v. Jones* (1728), 2 Ld. Raym. 1536. *Mentd.* *Johnson v. Smith* (1760), 2 Burr. 950; *Palmouth v. Thomas* (1832), 3 Tyr. 26.

2051. — **—**—*Where it is stated that deft. covenanted, it must be inferred that it was by deed, & although the instrument declared upon were not sufficiently shown to be a deed, yet the defect is aided by pleading over.*

It is not necessary to say always, that the writing was sealed & delivered, nor even to say it was a deed; the saying it was *scriptum obligatorium* has been held to be well enough (*LORD HARDWICKE, C.J.*).—*DODD v. ATKINSON* (1736), *1 see temp.* Hard. 342; 95 E. R. 221.

Annotation.—*Mentd.* *Dunn v. Di Nuovo* (1811), 3 Man. & G. 105.

2052. — **—**—*RUSSELL v. WATTS*, No. 2001, *ante*.

2053. — **Covenant to be performed referred to in later document.**—*Agreement in writing between H. & G. that as soon as G. had repaired certain premises H. would demise them to him for a term, the lease to contain a covenant by G. to keep in repair & a proviso for re-entry by H., on non-performance of covenants. Until the lease G. to perform the covenants agreed to be inserted in it, & H. to have the same remedies as under it. G. to do certain repairs before June 24, & H. to have right of re-entry if G. should make default, "in the performance of the covenants & conditions on his part herein contained." G. entered & paid rent, but did not do any repairs by June 24th. On ejectment by H.:—Held: the words "covenants & conditions" should be referred to the agreement, though not under seal.*

It is said the word covenant cannot apply to this agreement because in legal language a covenant

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is a promise under seal which this agreement is not. But in the English language the word "covenant" is applicable to any solemn agreement whether under seal or not (WILLES, J.).—*HAYNE v. CUMMINGS* (1864), 16 C. B. N. S. 421; 4 New Rep. 61; 10 L. T. 341; 10 Jur. N. S. 773; 143 E. R. 1191.

Annotation:—*Mentd. S.S. Magnhild v. McIntyre*, [1920] 3 K. R. 321.

2054. Effect of—Creates specialty debt.]—An agreement under hand & seal, by deed, is a covenant, & consequently a specialty (*per* CUR.).—*BENSON v. BENSON* (1710), 1 P. Wms. 130; 24 E. R. 324.

Annotations:—*Refd. Re Hawksworth, Lovell v. Sherwin* (1853), 2 W. R. 34; *Holland v. Holland* (1869), 4 Ch. App. 449, n.

2055. ———.]—E. covenanted that he would, by will, settle £3,000 to be charged upon & issuing out of all such real & personal property as he should at his death be seised or possessed of:—*Held*: this constituted a specialty debt.—*EYRE v. MONRO* (1857), 3 K. & J. 305; 26 L. J. Ch. 757; 30 L. T. O. S. 61; 3 Jur. N. S. 584; 5 W. R. 870; 69 E. R. 1124.

Annotations:—*Mentd. Patch v. Shore* (1862), 11 W. R. 142; *Keays v. Gilmore* (1874), 22 W. R. 465.

2056. ———.]—*SAUNDERS v. MILSOME*, No. 2044, *ante*.

2057. ———.]—A father on the marriage of his son covenanted to give & bequeath by will to the son, or if he should die in the father's lifetime, leaving his wife surviving, then to the wife, the sum of £2,500, to be held on the trusts of the settlement. The father died insolvent:—*Held* the covenant was not to be construed as affecting only assets applicable to payment of legacies, but created a specialty debt against his estate.—*GRAHAM v. WICKHAM* (1863), 1 De G. J. & Sm. 474; 2 New Rep. 410; 32 L. J. Ch. 639; 8 L. T. 679; 9 Jur. N. S. 702; 11 W. R. 1009; 46 E. R. 188, L. J.J.

2058. ———.]—By an agreement under seal, E. covenanted with B., his exors. & administrators, that he would at any time thereafter, at the request of B., his exors., administrators, or assigns, execute a demise of certain freeholds for the term of twenty-one years, at the yearly rent of £180, which lease should contain a covenant to keep the premises in good & substantial repair, & all other usual covenants; & B. thereby, for himself, his exors., or administrators, covenanted with E., whenever thereto requested by E., to accept such lease, & execute a counterpart thereof. Under this agreement B. entered & paid rent until his death & after his death his widow & legal personal representative entered & paid rent. No lease was ever executed, & no such request, as above-mentioned, was ever made by either party. Since B.'s death rent had accrued due, & a sum was required for repairs:—*Held*: the liability under the deed was from the first, & still was, a specialty, hence, a claim by E. for the sums due for arrears of rent & dilapidations under the covenants agreed to be entered into by B. were debts by specialty against his estate.—*KIDD v. BOONE* (1871), L. R. 12 Eq. 89; 40 L. J. Ch. 531; 24 L. T. 356.

Annotation:—*Refd. Talbot v. Shrewsbury* (1873), 42 L. J. Ch. 877.

SUB-SECT. 4.—PARTIES.

Rights & liabilities of non-executing party to deeds.]—*See* Part III., Sect. 5, sub-sect. 7, B., *ante*.

Position of parties & non-parties to deeds.]—*See* Part I., Sect. 6, *ante*.

Corporations.]—*See* CORPORATIONS, Vol. XIII., p. 375, No. 1057.

Joint & several covenants.]—*See* CONTRACT, Vol. XII., pp. 24–30.

Rights of personal representatives on covenants.]—*See* EXECUTORS & ADMINISTRATORS.

Rights of assignees of covenantor—Covenants running with the land.]—*See* LANDLORD & TENANT; SALE OF LAND.

Covenants in leases.]—*See* LANDLORD & TENANT. **Covenants with mortgagee & mortgagor.]—***See* MORTGAGE.

Tenants in common.]—*See* LANDLORD & TENANT.

SUB-SECT. 5.—VALIDITY OF COVENANTS.

See, generally, CONTRACT.

Where deed void or voidable—Whether covenant void.]—*See* CONTRACT, Vol. XII.

Bills of sale.]—*See* BILLS OF SALE, Vol. VII., p. 126, No. 718.

Legal & illegal covenant in same deed—Whether all void.]—*See* CONTRACT, Vol. XII.

Bonds.]—*See* BONDS, Vol. VII., pp. 166, 167, Nos. 37–42.

Covenants relating to land.]—*See* LANDLORD & TENANT; SALE OF LAND.

SUB-SECT. 6.—PERFORMANCE OR BREACH.

Bonds.]—*See* BONDS, Vol. VII., pp. 197–213, Nos. 366–550.

Contract.]—*See* CONTRACT, Vol. XII., pp. 303–436.

Covenants in relation to land.]—*See* LANDLORD & TENANT; SALE OF LAND.

Covenants in restraint of trade.]—*See* TRADE & TRADE UNIONS.

SUB-SECT. 7.—COVENANTS ARISING BY CONSTRUCTION—IMPLIED COVENANTS.

See, generally, CONTRACT.

For quiet enjoyment & title.]—*See* LANDLORD & TENANT; SALE OF LAND.

By & against trustees.]—*See* TRUSTS & TRUSTEES. **In mortgages.]—***See* MORTGAGES.

In grants or conveyances of easements.]—*See* EASEMENTS & PROFITS A PRENDRE.

SUB-SECT. 8.—COVENANTS IN LAW.

A. In General.

2059. Distinguished from implied covenants.]—A covenant in law differs from an implied covenant in its proper sense. The former is an agreement which the law infers from the use of certain words of grant having a known legal operation, as *dedi* in a feoffment, or *demisi* in a lease, whereas the latter is a covenant which is collected by constructive inference from the terms used in the deed.—*WILLIAMS v. BURRELL* (1845), 1 C. B. 402; 14 L. J. C. P. 98; 4 L. T. O. S. 415; 9 Jur. 282; 135 E. R. 596.

Annotations:—*Refd. Baynes v. Lloyd*, [1895] 1 Q. B. 820. *Mentd. Look v. Furze* (1866), 35 L. J. C. P. 141; *Child v. Stenning* (1879), 11 Ch. D. 82.

2060. Not extended to make covenantor do more

than he can.]—BRAGG v. WISEMAN (1614), 1 Brownl. 22; 123 E. R. 640.

Annotations:—*Reid*, Adams v. Gibney (1830), 6 Bing. 636; Penfold v. Abbott (1862), 32 L. J. Q. B. 67.

“Demise” — “Grant” — “Let.”]—See LANDLORD & TENANT.

“Grant” — “Ded.”]—See SALE OF LAND.

In grants & conveyances of easements.]—See EASEMENTS & PROFITS A PRENDRE.

In mortgages.]—See MORTGAGE.

In conveyances to trustees.]—See TRUSTS & TRUSTEES.

B. In Conveyances of Land.

See, now, Real Property Act, 1845 (c. 106); SALE OF LAND; MORTGAGE.

C. In Leases.

See LANDLORD & TENANT.

SUB-SECT. 9.—ABSOLUTE AND QUALIFIED COVENANTS.

A. In General.

Dependent & independent covenants & conditions.]—See CONTRACT, Vol. XII., pp. 413 *et seq.*

2061. Mode of qualification.—By subsequent covenant—General covenant in indenture.]—BROWN v. BROWN (1661), 1 Lev. 57; 83 E. R. 205.

2062. Whether covenant qualified or absolute.—Covenant for title.]—COOKE v. FOUNDS (1661), 1 Lev. 40; 83 E. R. 287.

Annotation:—*Mentd.* May v. Platt, [1900] 1 Ch. 616.

2063. ——— Subsequent qualified covenant.]—Covenants in an indenture of sale that the covenantors were seised of a good estate in fee simple, & good right, etc., to convey:—*Held*: they were qualified & restricted by a subsequent covenant for quiet enjoyment.—MILNER v. HORTON (1824), M'Cle. 647; 148 E. R. 271.

Annotations:—N.F. Smith v. Compton (1832), 5 B. & Ad. 189. *Reid*, Line v. Stephenson (1838), 6 Scott, 447.

2064. ——— Covenant to repair.]—An indenture of lease containing a covenant by the lessees to repair the premises at all times, is often as need or occasion should require, & at farthest within three months after notice, is one entire covenant, the former part of which is qualified by the latter.—HORSEFALL v. TESTAR (1817), 7 Taunt. 385; 1 Moore, C. P. 89; 129 E. R. 151.

Annotations:—*Reid*, Wood v. Day (1817), 1 Moore, C. P. 389; Baylis v. Le Gros (1858), 4 C. B. N. S. 537.

2065. ———.]—WESTACOTT v. HAHN, No. 1990, *ante*.

2066. ——— Covenant to pay rent—“Save as in hereinafter is mentioned.”]—In covenant for non-payment of rent, pltf. declared generally, treating the covenant to pay rent as unqualified. On *non est factum* pleaded, pltf. produced in evidence a deed containing the covenant in question; but with these words added, “save as in hereinafter is mentioned.” In a subsequent part of the deed there was a proviso that the rent should be reduced on the lessee paying the lessor a certain sum:—

Held: this was a qualified covenant.—VAVASOUR v. ORMROD (1827), 6 B. & C. 430; 9 Dow. & Ry. K. B. 597; 5 L. J. O. S. K. B. 172; 108 E. R. 509.

Annotations:—*Reid*, Munro Brice v. War Risks Assn. & Anchor Marine Mutual Underwriting Assn. (1918), 118 L. T. 708. *Mentd.* Tucker v. Webster (1842), 10 M. & W. 371.

2067. ——— Covenant to pay money—Several liability.]—Pltf. & L., being about to dissolve partnership, pltf. in consideration of £225 4s. 6d., assigned the debts owing to the partnership to L., who, with J. & deft., in consideration thereof, severally & respectively covenanted with pltf. that they or some or one of them should & would pay the £225 4s. 6d. by instalments:—*Held*: this was not a collateral engagement by deft. to pay if L. did not, but an absolute covenant to pay at all events.—GUY v. NEWSON (1833), 2 Cr. & M. 140; 4 Tyr. 31; 3 L. J. Ex. 18; 149 E. R. 706.

Annotation:—*Mentd.* Amott v. Holden (1852), 18 Q. B. 593.

2068. ——— Adequacy of fund to meet payment.]—By a certain deed between pltf. & deft. co., it was covenanted that the sum of £15,000 in cash should be paid to pltf., for patents sold by him to the co., as soon as conveniently could be done after the execution of the articles, out of the money raised by the first calls on the shares in the co. Breach, that although the co., within a convenient time after the execution of the articles, could & might by calls on the shares have raised the sum, & a reasonable & convenient time had elapsed, the co. had only paid pltf. £1,000, & had not paid the residue. Plea that no calls had been received sufficiently to satisfy the £15,000 or any part thereof:—*Held*: there was no breach of covenant in not making calls, & the covenant was a simple covenant to pay, although it pointed out a fund from which payment was to be made, it was not a condition precedent that such a fund should furnish the means of payment.—PILBROW v. PILBROW'S ATMOSPHERIC RY. CO. (1848), 5 C. B. 440; 5 Ry. & Can. Cas. 89; 17 L. J. C. P. 166; 10 L. T. O. S. 345; 136 E. R. 950.

Annotations:—*Consd.* Sunderland Marine Insec. v. Kearney (1851), 16 Q. B. 925. *Fold*, Scott v. Ebury (1867), L. R. 2 C. P. 255. *Reid*, Gage v. Newmarket Ry. (1852), 7 Ry. & Can. Cas. 168. *Mentd.* Woodbridge Union Grdnrs. v. Colneis & Carlford Corp. (1849), 18 L. J. Q. B. 126; Melhado v. Porto Alegre Ry. (1874), L. R. 9 C. P. 503; *Re* Nassau Phosphate Co. (1876), 2 Ch. D. 610.

2069. ———.]—SCOTT v. EBURY (LORD) (1867), L. R. 2 C. P. 255; 36 L. J. C. P. 161; 15 L. T. 506; 15 W. R. 517.

Annotations:—*Mentd.* Coutts v. Irish Exhibition in London (1890), 63 L. T. 489; Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth, [1891] 1 Ch. 337.

2070. ———.]—By a deed, which recited, that deft. was exor. of the will of J., deceased; & that pltf. & his brothers were entitled each to a legacy of £3,000; & that the assets were insufficient to satisfy the legacies; that pltf. had lately entered into a trading partnership, & had thereupon undertaken to pay two sums of money on Mar. 15, & on Dec. 15, & that pltf. & his mother had requested deft. to advance pltf. those sums, out of the estate, before those days; deft. covenanted, that he would on or before those days, pay to pltf., “by & out of the assets of J.,

PART IV. SECT. 1, SUB-SECT. 9.—A.

2067 i. Whether covenant qualified or absolute.—Covenant to pay money—Several liability.]—A mtge. to a co. contained a covenant jointly & severally to pay the amount secured; & then provided that the covenant should not affect the personal liability of the covenantors beyond the amount unpaid by them on their shares in said co.:—*Held*: the restriction on the covenant was void.—ORIENTAL

BANK F. GOUJON (1865), 2 W. W. & A'B. 10.—AUS.

r. ——— Alterations to ground floor.—Covenant to adequately support upper storey.]—Under a contract with a tenant, the landlord covenanted to effect alterations to the premises, provided that the alterations should be so effected that the upper storey of the building would be adequately supported:—*Held*: the covenant that the works should be so executed that

the upper storey should be adequately supported, was absolute.—BEARD, WATSON, LTD. v. DIXON TRUST, LTD. (1914), 14 S. R. N. S. W. 133; 31 N. E. W. W. N. 62.—AUS.

s. ——— Covenant to convey.]—When a deed of assignment, after reciting deed deft. was seised & possessed of certain premises, & witnessed that deft. did grant, etc., unto pltf., the premises, to hold same to him, his heirs, exors., etc., for ever;

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deceased," the sums required; & pltf., in consideration thereof, agreed, that he would, on Nov. 1, execute a release & indemnity to deft., in respect of all matters connected with the will of J., & that, in case pltf.'s share of & in the assets of J., should not amount to the sum to be advanced, pltf. would pay deft. the difference, & indemnify him against all loss, etc., & against all actions by other legatees, by reason of the payment to him; & pltf.'s mother, upon the same consideration, agreed to release to deft., the payment of part of an annuity due to her under the will:—*Held*: notwithstanding the words "by & out of the assets," etc., the covenant of deft. was absolute, & not contingent upon the existence of assets at the days appointed for the payment of the monies.—*BAIN v. KIRK* (1849), 13 Q. B. 540; 18 L. J. Q. B. 83; 12 L. T. O. S. 374; 13 Jur. 559; 116 E. R. 1369. *Annotation*:—*Mentd.* *North v. Wakefield* (1849), 13 Q. B. 536.

2071. — Subsequent covenant providing for alternative event.]—A covenant in a farming lease provided that the tenant should, during the demise, consume & convert into manure, & spread on the premises, all the turnips & green crops of all kinds grown thereon; but, that, in case he should take, or sell off any part thereof, which he was at liberty to do, then that he should, for every ton of vetches or of any green crop which should be taken or sold off from the premises, bring back & spread thereon, one ton of good stable manure, within three months after the selling, or taking off such green crops, etc. In an action upon this covenant, pltf. set out the first part only, & assigned for breach, that deft. carried away fourteen acres of turnips, without converting the same into manure, & spreading the same on the demised premises:—*Held*: the covenant was an alternative one.—*RICHARDS v. BLUCK* (1848), 6 C. B. 437; 6 Dow. & L. 325; 18 L. J. C. P. 15; 12 L. T. O. S. 126; 12 Jur. 963; 136 E. R. 1319. *Annotations*:—*Mentd.* *Danby v. Lamb* (1861), 11 C. B. N. S. 423; *Waylett v. Windham* (1864), 3 New Rep. 441.

2072. — — — — —.]—By indenture, pltf., granted to deft., for a term of years, the exclusive licence to use a patent, upon payment of certain sums by way of royalty. The indenture contained a covenant for payment of the royalty, & also the following: " & it is hereby agreed, that if it shall happen in any year during the continuance of the term that royalties or sums of money hereinbefore covenanted to be paid shall not amount to £2,000, then & in every such case, & as often as same shall so happen, deft., shall within fourteen days after the expiration of any year in which it shall so happen, pay to pltf., such a sum of money as with the royalty hereby reserved will amount to £2,000 for that year; or, if deft., shall, at any time, make default in payment of such sum of money aforesaid, within the time appointed for payment, then it shall be lawful for pltf., by writing signed by him, & indorsed on the indenture or duplicate thereof, to declare that the indenture, & the powers & licence thereby granted shall cease & determine:—*Held*: this was not an absolute covenant, on the part of deft., to pay £2,000 a year during the term, but an alternative, enabling pltf., to put an end to the licence on non-payment

of that sum by deft.—*TIELENS v. HOOPER* (1850), 5 Exch. 830; 20 L. J. Ex. 78; 155 E. R. 363; *sub nom.* *TIELENS v. HOOPER*, 16 L. T. O. S. 237.

2073. — — — — —.]—Declaration that by an indenture, dated in May, it was agreed that pltf. would act as engineer-in-chief of a proposed railway, etc.; that pltf. should be paid £25,000 by instalments, & in manner following, viz. £1,000 on or before the execution of the indenture, & £500 on the last day of the then present month of May, & £500 on the last day of each succeeding month, until pltf. should have been paid in money £18,000, pltf., to take £7,000 in shares; that deft. covenanted to be personally responsible, & would guarantee to pltf. the due payment of the monthly instalments. Breach, that pltf., had not been paid for five of the monthly instalments due. Plea, that by the indenture it was covenanted that in case, from any reason whatever, the construction of the railway should not be proceeded with, all the plans, etc., should become the property of the directors of the co., & in case the whole of the £25,000 should not then have been paid, it should be referred to the sole & final arb'n., of S., who should have full power to decide & determine whether any of what further sum of money in farther part of the £25,000, should be paid to pltf., that after the making of the indenture, & before any one of the five instalments became due, the construction of the railway was not proceeded with, & that the other parties to the indenture have always been ready & willing to refer:—*Held*: the covenant referred to in the plea qualified the covenant declared upon, & the plea was a good answer to the declaration.—*HEMANS v. PICCIOTTO* (1857), 1 C. B. N. S. 646; 26 L. J. C. P. 163; 5 W. R. 322; 140 E. R. 266.

2074. — Purchase of land for specific purpose — Covenant to inclose land with wall—Failure of purpose.]—In Feb. 1872, deft. corpn. purchased of W. a piece of land for the purpose of building thereon a blind school or asylum; & it was conveyed to them, their successors & assigns, in fee by a deed containing a proviso that the piece of land should be inclosed & kept inclosed by the corpn., their successors & assigns, on all the sides abutting on the land belonging to W., with a brick wall or iron railing seven feet at the least. W. died in Sept. 1878, & no wall or railing having been erected by defts. in his lifetime, pltf.s., as his exors. & trustees, required them to erect the same, which they failed to do, but gave notice to pltf.s. that they did not require the land for building a school or asylum thereon. Thereupon pltf.s. gave notice to defts. to inclose the land within a reasonable time with a wall or railing in accordance with their covenant; & upon defts. neglecting so to do pltf.s. brought an action against them for damages sustained by W.'s estate, & through defts.' breach of covenant:—*Held*: the covenant by defts. to inclose the piece of land in question with a brick wall or iron railing seven feet high at the least, was an absolute covenant, & was not conditional upon the building by defts. of a school or asylum upon the land.—*WIGSELL v. SCHOOL FOR THE INDIGENT BLIND CORPN.* (1880), 43 L. T. 218.

Annotation:—*Mentd.* *Joyner v. Weeks*, [1891] 2 Q. B. 31.

2075. What are repugnant qualifications—"For & notwithstanding any act done by the covenantor "

& also contained a covenant that deft. then had in himself good right, full power, & lawful authority to make that conveyance of his estate & interest under the said deed to the pltf., his heirs, exors., etc.—*Held*: not an absolute covenant that A. had power to convey a freehold estate, but only

that he had power to convey such an estate as he took under deed.—*DELMER v. M'CABE* (1863), 14 I. C. L. R. 377; 15 Ir. Jur. 236.—*IR.*

t. What are repugnant qualifications—Covenant in mortgage to pay—Proviso against personal liability.]—A

mtge. contained the following covenant & proviso: The mtgors. do hereby for themselves jointly & each of them for himself separately, their & his heirs exors. & assigns covenant with the corpn. that the mtgors. their exors. administrators & assigns shall & will on such demand as aforesaid well &

—**Inconsistent with contract & subject-matter.**—The words “for & notwithstanding any act done by the covenantor,” which in general restrict the covenant to his own acts, may be rejected, where, from the context, & the subject-matter, it appears that such a restriction was not intended.—**BELCHER v. SIKES** (1828), 8 B. & C. 185; 6 L. J. O. S. K. B. 314; 108 E. R. 1012.

Annotations:—**Mentd.** *Potter v. I. R. Comrs.* (1854), 10 Exch. 147; *Christie v. I. R. Comrs.* (1866), 36 L. J. Ex. 11.

2076. — **Personal covenants—Proviso wholly repugnant—Not limitation of liability.**—A proviso which is in terms wholly repugnant to a covenant creating a personal liability is void; but a proviso only limiting the personal liability without destroying it is valid.—**WILLIAMS v. HATHAWAY** (1877), 6 Ch. D. 544.

Annotations:—**Consd.** *Watling v. Lewis*, [1911] 1 Ch. 411. **Refd.** *Forbes v. Git*, [1922] 1 A. C. 256.

Covenants running with the land.—See **LANDLORD & TENANT**.

B. Extent of Qualification.

(a) Covenants having same Objects.

See, generally, SALE OF LAND.

2077. Qualification applicable to all covenants—Later restrictive words controlling earlier general words—Covenants for title.—**BROUGHTON v. CONWAY** (1564), Moore, K. B. 58; 2 Dyer, 240 a; 72 E. R. 439.

Annotations:—**Consd.** *Nind v. Marshall* (1819), 1 Brod. & Bing. 319. **Refd.** *Crayford v. Crayford* (1628), Cro. Car. 106; *Gale v. Reed* (1806), 8 East, 80; *Iggulden v. May* (1806), 7 East, 237; *Foord v. Wilson* (1818), 8 Taunt. 543.

2078. — — — — — **GERVIS v. PEADE** (1598), Cro. Eliz. 615; 78 E. R. 857.

2079. — — — — — **FEILDER v. STUDLEY** (1673), Cas. temp. Finch 90; 23 E. R. 48.

Annotations:—**Consd.** *Browning v. Wright* (1799), 2 Bos. & P. 13; *Hesse v. Stevenson* (1803), 3 Bos. & P. 565.

2080. — — — — — **A lessee for a term of eleven years, if C. should so long live, by indenture, reciting a demise to him for eleven years, & that he had agreed to sell the residue unexpired thereof, granted & assigned the same, & covenanted that, notwithstanding any act, deed, matter, or thing whatever done by him at any time theretofore, the lease was, at the time of the assignment, a good, valid, & effectual lease, & that the term of eleven years was in full effect, & in no wise forfeited, surrendered, assigned, determined, or otherwise become void, or voidable or prejudicially affected, otherwise than by effluxion of time; & also that, notwithstanding any such act, matter, etc., he had full power to assign, etc., & also for quiet enjoyment without disturbance by him or any persons claiming under him or by his acts. Before the assignment, the lease had become determined by the death of C., which was known to the**

assignor:—Held: the words “notwithstanding any act, etc.,” done by the assignor, qualified the covenants throughout.—**STANNARD v. FORBES** (1837), 6 Ad. & El. 572; 1 Nev. & P. K. B. 633; Will. Woll. & Dav. 321; 6 L. J. K. B. 185; 112 E. R. 219.

2081. — — — — — **Covenant for value of land.**—**RICH v. RICH** (1584), 1 And. 134; Cro. Eliz. 43; 123 E. R. 393.

2082. — **Earlier restrictive words controlling later general words—Covenants for title.**—**NERVIN v. MUNNS** (1682), 3 Lev. 46; 83 E. R. 569.

2083. — — — — — **A. after granting certain premises in fee to B. & after warranting the same against himself & his heirs, covenanted, that notwithstanding any act by him done to the contrary he was seised of the premises in fee, & that he had full power, etc., to convey the same; he then covenanted for himself, his heirs, exors., & administrators, to make a cart-way, & that B. should quietly enjoy without interruption from himself, or any person claiming under him; & lastly, that he, his heirs, & assigns, & all persons claiming under him, should make further assurance:—Held:** the intervening general words, “full power, etc. to convey,” were either part of the preceding special covenant; or, if not, they were qualified by all the other special covenants against the acts of himself & his heirs.—**BROWNING v. WRIGHT** (1799), 2 Bos. & P. 13; 126 E. R. 1128.

Annotations:—**Consd.** *Barton v. Fitzgerald* (1812), 15 East, 530. **Apld.** *Sicklemore v. Thistleton* (1817), 6 M. & S. 9. **Follid.** *Foord v. Wilson* (1818), 8 Taunt. 543. **Consd.** *Milner v. Horton* (1824), M'Cle. 647; *Saward v. Anstey* (1825), 10 Moore, C. P. 55. **Distd.** *Teulon v. Curtis* (1832), You. 610. **Apld.** *Stannard v. Forbes* (1837), 5 Ad. & El. 572. **Consd.** *Thackeray v. Wood* (1861), 5 B. & S. 325. **Refd.** *Howell v. Richards* (1809), 11 East, 633; *Nind v. Marshall* (1819), 1 Brod. & Bing. 319; *Smith v. Compton* (1832), 3 B. & Ad. 189; *Young v. Rainecock* (1849), 7 C. B. 310. **Mentd.** *Hesse v. Stevenson* (1803), 3 Bos. & P. 565; *Budd v. Fairman* (1831), 8 Bing. 48; *Farrall v. Hilditch* (1859), 28 L. J. C. P. 221; *David v. Sabin*, [1893] 1 Ch. 523.

2084. — — — — — **The assignor of a lease, covenanted that he had not at any time done or suffered any act or thing whereby the premises intended to be assigned could be impeached or affected in title or estate; & that for & notwithstanding any such act, etc., the lease was a good, valid, & subsisting lease, & not forfeited, surrendered or become void; & that he had in himself good right full power, & authority to grant, assign, transfer, & set over the same, to the assignee in manner aforesaid; then followed a covenant for further assurance by the assignor & all persons claiming under him:—Held:** the general words that the assignor had full power to grant, assign, & set over, were restrained by the preceding part of the covenant.—**FOORD v. WILSON**

truly pay unto the corp. the principal sum with interest for same as aforesaid, provided always that the covenant last aforesaid shall not be construed to affect or extend the personal liability of the mtors. beyond the amount unpaid by them respectively as members of the co. in their respective shares in same:—**Held:** the proviso as a restriction of the covenant was repugnant to it & therefore void.—**ORIENTAL BANK v. GOUGHON** (1865), 2 W. W. & A'B. 10.—**AUS.**

PART IV. SECT. 1, SUB-SECT. 9.—B. (a).

a. Qualification applicable to all covenants—Later restrictive words not controlling earlier general words—Covenant to repair.—**Deft. demised to pltf. a wharf, covenanting generally, to put**

the wharf into good & sufficient repair on or before a given day. The condition of the wharf was discussed between the parties & a memorandum was drawn up by deft. & signed by both: “Work to be completed to put wharf into good repair; two stringers, & one stringer to be put into place; all that part of wharf not plankd to be plankd with new plank & all the broken plank or holes to be repaired with sound plank.” Pltf. signed this memorandum before examining the wharf, & on the deft.’s representation that it was all right. These repairs were executed, but about a month afterwards the wharf fell in, by reason of the defective state of the caps on which the stringers rested:—Held: the memorandum did not control or modify the covenant.—**SNARR v. BEARD** (1871), 21 C. P. 473.—**CAN.**

2077 i. — **Later restrictive words controlling earlier general words—Covenants for title.**—Where a settlor, in the settlement executed on the marriage of his son, enters into absolute covenants for title with the father of the lady; & in the same deed enters into qualified covenants for title to the same lands with the trustees of the settlement the latter covenants restrain the generality of the former, although entered into with different persons.—**MARTYN v. MACNAMARA** (1843), 2 Con. & Law. 541.—**IR.**

2077 ii. — — — — — **Where two covenants—for quiet enjoyment & freedom from incumbrances—are so connected grammatically, the general words of the former are limited & controlled by the restrictive expressions in the latter.—THOMPSON v. THOMPSON** (1871), 6 L. R. Eq. 322.—**IR.**

BARTON v. FITZGERALD (1812), 15 East, 530; 104 E. R. 944.

Annotations.—**Refd.** Foord v. Wilson (1818), 8 Taunt. 543; Nind v. Marshall (1819), 1 Brod. & Bing. 319; Line v. Stephenson (1838), 4 Bing. N. C. 678; Magnihild S.S. v. McIntyre, [1920] 3 K. B. 321.

2094. ————]—**NIND v. MARSHALL**, No. 2085, ante.

2095. ————]—A covenant which is unqualified in itself & unconnected with one that is qualified, is not controlled or restrained by the latter but is a general covenant.

By indenture, reciting a power vested in A. B. to dispose of certain premises & that C. D. had contracted to purchase them, A. B. appointed & conveyed them to the use of C. D., his heirs, etc., & covenanted that the power in A. B. was then in force & not executed; & also that he, A. B., then had in himself, good right, title power & authority to limit & appoint & to grant, bargain, sell, etc., the premises to the said uses; & further that the premises should be held & enjoyed to the said uses without the let or interruption of A. B. or any claiming under or in trust for him; & also for further assurance by A. B. & all so claiming:—**Held**: the second covenant was absolute, for good title against all persons & not to be qualified by reference to the other covenants.—**SMITH v. COMPTON** (1831), 3 B. & Ad. 189; 1 L. J. K. B. 43; 110 E. R. 71; *subsequent proceedings*, 3 B. & Ad. 407.

Annotations.—**Refd.** Line v. Stephenson (1838), 4 Bing. N. C. 678; Young v. Itaincock (1849), 7 C. B. 310. **Mentd.** Broom v. Hall (1859), 7 C. B. N. S. 503; Gray v. Lewis, Parker v. Lewis (1873), 8 Ch. App. 1035; G. W. Ry. v. Fisher, [1905] 1 Ch. 316.

2096. ————]—The declaration in an action by the exors. of a covenantee, after setting out the covenant for quiet enjoyment, assigned a breach of that covenant & then set out a recovery in ejectment & an eviction by due process of law:—**Held**: the generality of the terms of the covenant for quiet enjoyment was not restricted by the introductory words of the covenant for title.—**YOUNG v. RAINCOCK** (1849), 7 C. B. 310; 18 L. J. C. P. 193; 13 L. T. O. S. 401; 13 Jur. 539; 137 E. R. 124.

Annotations.—**Mentd.** Stroughill v. Buck (1850), 11 Q. B. 781; Wilcs v. Woodward (1850), 5 Exch. 557; Norman v. Mitchell (1854), 5 De G. M. & G. 648.

2097. ———— **Bond for value of land.**—**GRAYFORD v. GRAYFORD** (1628), Cro. Car. 106; 79 E. R. 695.

Annotation.—**Refd.** Nervin v. Munns (1682), 3 Lev. 46.

2098. ————]—**HUGHES v. BENNET** (1630), Cro. Car. 495; 79 E. R. 1028.

2099. ———— **Covenant to leave premises repaired & to repair during tenancy.**—**ANON.** (1622), 2 Roll. Rep. 250; 81 E. R. 780.

2100. ———— **& to repair on notice given.**—If a lessee covenant to leave premises in repair at the expiration of the term, & also that the lessors might direct the lessee to complete the repair, by giving six months' notice in writing:—**Held**: these are two distinct & separate covenants, the former of which is not qualified by the latter.—**WOOD v. DAY** (1817), 7 Taunt. 646; 1 Moore, C. P. 389; 129 E. R. 257.

Annotations.—**Foll.** Doe d. Morecraft v. Meux (1825), 7 Dow. & Ry. K. B. 98. **Consd.** Baylis v. Le Gros (1858), 4 C. B. N. S. 537.

2101. ———— **Covenant to repair generally & to repair on notice given.**—Covenants to repair generally, & to repair within three months after notice in writing are independent covenants.—**DOE d. MORECRAFT v. MEUX** (1825), 4 B. & C. 606; 7 Dow. & Ry. K. B. 98; 4 L. J. O. S. K. B. 4; 107 E. R. 1185.

Annotations.—**Foll.** Baylis v. Le Gros (1858), 4 C. B. N. S. J.—VOL. XVII.

537. **Mentd.** Doe d. De Rutzen v. Lewis (1836), 5 Ad. & El. 277; Jones v. Carter (1846), 15 M. & W. 718; Gregory v. Wilson (1852), 9 Harc. 683; Croft v. Lumley (1858), 6 H. L. Cas. 672; Dendy v. Nicholl (1859), 4 C. B. N. S. 374; Few v. Perkins (1867), L. R. 2 Exch. 92; Evans v. Wyatt (1880), 43 L. T. 176.

2102. ————]—A general covenant to repair, & further to repair, within three months after notice from the lessor, are separate & independent covenants; & a right of re-entry attaches for a breach of the former, though no notice be given under the latter.—**BAYLIS v. LE GROS** (1858), 4 C. B. N. S. 537; 31 L. T. O. S. 182; 22 J. P. 482; 4 Jur. N. S. 513; 140 E. R. 1201.

Annotation.—**Refd.** Liddy v. Kennedy (1871), L. R. 5 H. L. 134.

2103. ———— **Covenant to pay money received**—As "reasonably required."—**R. v. POINTS** (1620), Litt. 101; 124 E. R. 158.

2104. ———— **Covenant of title to assign patent**—**Covenant that assignor has not forfeited title.**—Covenant by the assignor of certain shares in a patent-right that he has good right, full power, & lawful authority to assign & convey the shares, & that he has not by any means directly or indirectly forfeited any right or authority he ever had or might have had over the same:—**Held**: the generality of the former words of the covenant is not restrained by the latter.—**HESSE v. STEVENSON** (1803), 3 Bos. & P. 565; Dav. Pat. Cas. 244; 2 Smith, K. B. 39; 127 E. R. 305.

Annotations.—**Consd.** Saward v. Anstey (1825), 2 Bing. 519. **Refd.** Line v. Stephenson (1838), 4 Bing. N. C. 678. **Mentd.** Nias v. Adamson (1819), 3 B. & Ald. 225; Bloxam v. Elsee (1825), 1 C. & P. 558; Smith v. Compton (1832), 3 B. & Ad. 189; *Re* Roberts, [1900] 1 Q. B. 122.

2105. ———— **Covenant to pay annuities charged on land & to indemnify vendor.**—In a declaration on a covenant by the vendee to pay certain annuities charged on the land, & to indemnify the vendor against any action, suit, etc., in respect thereof—breach for non-payment of the annuities—without alleging that the vendor was thereby damaged:—**Held**: good on demurrer, the former covenant not being restrained or qualified by the latter.—**SAWARD v. ANSTEY** (1825), 2 Bing. 519; 10 Moore, C. P. 55; 3 L. J. O. S. C. P. 62; 130 E. R. 406; *affd. sub nom.* ANSTEY v. SAWARD, 4 L. J. O. S. K. B. 1.

Annotations.—**Refd.** Crook v. Latley (1847), 9 L. T. O. S. 102; Piggott v. Stratton (1859), 29 L. J. Ch. 1; *Re* Perkins, Poyser v. Boyliss, [1898] 2 Ch. 182.

2106. ———— **Covenant by assignee to perform covenants & to indemnify assignor.**—Upon the assignment of a lease from pltf., the lessee, to deft., the latter covenanted with the former, that he, deft., his exors., etc., should, so long as he or they should be in possession, pay the lessor the rent reserved; & should observe the covenants in the lease on the part of the lessee or assignee to be observed, & should at all times thereafter indemnify pltf. against the rent & covenants continued in the lease:—**Held**: the words restricting the first covenant to the period of deft.'s possession did not extend to the covenant to indemnify.—**CROSSFIELD v. MORRISON** (1849), 7 C. B. 286; 6 Dow. & L. 608; 18 L. J. C. P. 135; 13 L. T. O. S. 161; 13 Jur. 565; 137 E. R. 114.

Annotation.—**Mentd.** Rutland v. Bagshaw (1850), 14 Q. B. 869.

2107. ———— **Covenant to keep public-house in proper manner.**—By a lease of a beerhouse the lessee covenanted that he would at all times during his term keep & conduct the house in a regular & proper manner in every respect, & would not knowingly or willingly do or suffer any act whereby the licence might become indorsed, forfeited, or the renewal thereof refused, & would not commit any offence against the licensing laws

Sect. 1.—Covenants: Sub-sect. 9, B. (b) & C.; sub-sects. 10, 11 & 12.]

for the time being in force. The lessee sublet the house, & the sub-lessee was convicted of permitting drunkenness on the premises, & the renewal of the licence was in consequence refused. In an action by the lessor against the lessee to recover damages for breach of covenant:—*Held*: the first part of the covenant was an absolute covenant to keep & conduct the house in a regular & proper manner, & was not qualified by the subsequent part.—*PALETHORPE v. HOME BREWERY CO., LTD.*, [1906] 2 K. B. 5; 75 L. J. K. B. 555; 94 L. T. 871; 54 W. R. 489; 22 T. L. R. 505; 50 Sol. Jo. 463, C. A.

C. Qualification by Recital.

Recitals generally.—See Part III., Sect. 8, *ante*.

Recitals amounting to covenants.—See Part IV., Sect. 1, sub-sect. 2, B., *ante*.

2108. General rule.—*DAWES v. TREDWELL*, No. 1743, *ante*.

2109. Covenant to pay annuity—Recital of source of payment.—By a deed of separation, after reciting an agreement by the husband to allow the wife £250 out of his salary as a searcher, the husband covenants generally to pay her £250 *per annum* during her life:—*Held*: the covenant was controlled by the recital, & dismissal from the office justified non-payment of the annuity.—*HESSE v. ALBERT* (1828), 3 Man. & Ry. K. B. 406. *Annotation*:—*Folld. Crouch v. Crouch*, [1912] 1 K. B. 378.

2110. Recital disclosing defect in title—Covenant for quiet enjoyment.—A covenant for quiet enjoyment given by vendor to purchaser does not extend to protect the purchaser from a defect of title which the recitals of the deed, in which the covenant is contained, were sufficient to disclose.—*HUNT v. WHITE* (1868), 37 L. J. Ch. 326; 19 L. T. 141; 16 W. R. 478.

Annotation:—*Overd. Page v. Mid. Ry.*, [1894] 1 Ch. 11.

2111. ——A covenant for title in the ordinary form extends to defects of title appearing on the face of the conveyance.—*PAGE v. MIDLAND RY. CO.*, [1894] 1 Ch. 11; 63 L. J. Ch. 126; 70 L. T. 14; 42 W. R. 116; 38 Sol. Jo. 41; 7 R. 24, C. A.

Annotations:—*Consd. G. W. Rty. v. Fisher*, [1905] 1 Ch. 316. *Refd. May v. Platt*, [1909] 1 Ch. 616. *Mentd. Marten v. Whale*, [1917] 1 K. B. 544.

SUB-SECT. 10.—SEVERAL, JOINT, AND JOINT AND SEVERAL COVENANTS.

See *CONTRACT*, Vol. XII., pp. 24-33, Nos. 28-104; *BONDS*, Vol. VII., p. 192, Nos. 320 *et seq.*

BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS, Vol. VI., p. 49, Nos. 365 *et seq.*; **BILLS OF SALE**, Vol. VII., pp. 3 *et seq.*

PART IV. SECT. 1, SUB-SECT. 9.—C.

c. Covenant by grantee not to sell.—Recital that sale to "grantees their heirs & assigns for railway purposes."—*Pltf. sold land to E. & S., the deed containing a recital that pltf. had agreed to sell the land to E. & S., their heirs & assigns, for railway purposes. The covenant was that E. & S., for themselves, their heirs & assigns, covenanted with pltf. that they, their heirs or assigns, would, in the event of their disposing of or conveying said land, immediately pay to pltf. the further sum of \$500. E. & S. sold & conveyed the land to a co. In an action to recover \$500 for the breach of covenant not to sell:—Held*: the

covenant was controlled by the recital.—*QUART v. EAGER* (1909), 18 O. L. R. 181; 12 O. W. R. 735.—*CAN.*

PART IV. SECT. 1, SUB-SECT. 12.

2113 I. Whether covenantor can elect to break covenant.—*Deft. agreed to serve pltf., with special stipulations as to not serving customers on his own behalf, & in case of breach he would forfeit \$50:—Held*: this did not enable *deft.*, on payment of the \$50, to do the prohibited acts.—*TORONTO DAIRY CO. v. GOWANS* (1879), 26 Gr. 290.—*CAN.*

2113 II. ——The general rule of equity is, that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet

SUB-SECT. 11.—DEPENDENT AND INDEPENDENT COVENANTS.

See *CONTRACT*, Vol. XII., pp. 413-426, Nos. 3331-3421.

SUB-SECT. 12.—COVENANTS WITH A PENALTY.

See, generally, *INJUNCTION*; *SPECIFIC PERFORMANCE*.

Whether sum liquidated damages or penalty.—See *DAMAGES*, pp. 136-153, Nos. 433-546, *ante*.

2112. Covenant to pay sum of money—Penalty for smaller sum—Covenantor may sue for larger sum.—*INGLEDEW v. CRIPPS* (1702), 2 Ld. Raym. 814; 92 E. R. 43; *sub nom. INCLEDON v. CRIPS*, 2 Salk 658; *sub nom. GRIPS v. INGLEDEW*, Holt, K. B. 200; 7 Mod. Rep. 87.

Annotations:—*Refd. Ex p. Tindal* (1832), 8 Bing. 402. *Mentd. Buckley v. Kenyon* (1808), 10 East, 139; *Mills v. Funnell* (1824), 2 R. & C. 899; *Simmons v. Wood* (1843), 5 Q. B. 170.

2113. Whether covenantor can elect to break covenant.—A purchaser has no right to say that he will put an end to the agreement, forfeiting his deposit (LORD ELDON, C.).—*CRUTCHLEY v. JERNINGHAM* (1817), 2 Mer. 502; 35 E. R. 1032, L. C. *Annotation*:—*Refd. Greenwood v. Turner* (1891), 39 W. R. 315.

2114. ——It is said, that not having settled the estate as it was recited he should do, he had elected to abide by the former alternative; & that such actual election was proof of his intention to elect. Now, that point will depend on the question, how this instrument is to be construed, & whether it is to be considered an agreement to settle the property, or a bond to pay so much money in case he should not so settle it. The ct. must, in all cases look to the primary intention of the parties, as it may be gathered from the instrument (GRAHAM, B.).—*ROPER v. BARTHOLOMEW* (1823), 12 Price, 797; 147 E. R. 880.

2115. ——The doctrine of this ct. is that, wherever there is a distinct agreement that a thing shall be done, whether it be the conveyance of an estate, the relinquishment of a right, the payment of an annual sum, or the payment of a sum indefinite in amount, there, notwithstanding the agreement, appears in the form of a bond with a penalty, the ct. will consider that the recital in the condition of the bond is evidence of the agreement, & will not limit the relief it gives to the amount of the penalty (SHADWELL, V.-C.).—*JEUDWINE v. AGATE* (1829), 3 Sim. 129; 57 E. R. 948.

2116. ——J. S. agreed by deed to sell to M. part of a piece of land laid out for building. The agreement contained a stipulation that if either

the very thing itself must be done. So if a man covenant to abstain from doing a certain act, & agree, that if he do it, he will pay a sum of money; it would seem that he will be compelled to abstain from doing that act, & just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract.—*FRENCH v. MACABEE* (1842), 2 Dr. & War. 269.—*IR.*

2113 III. ——When a penalty is imposed for an act which a party has covenanted not to do, relief will not be granted in equity against an action for the penalty, if the party persists in the breach.—*GERRARD v. O'REILLY* (1843), 2 Con. & Law. 165; 3 Dr. & War. 414.—*IR.*

Semble : an agreement to pay liquidated damages for doing a certain act does not preclude the remedy by injunction, unless the construction of the contract be that the party is to be at liberty to do the act on payment of a certain sum.—*COLES v. SIMS* (1854), 5 De G. M. & G. 1 ; 2 Eq. Rep. 951 ; 23 L. J. Ch. 258 ; 22 L. T. O. S. 277 ; 18 Jur. 883 ; 2 W. R. 151 ; 43 E. R. 768, L. J.

2117. —[—]—Where the doing of any particular act is secured by a penalty, a ct. of equity is, in general, anxious to treat the penalty as being merely a mode of securing the due performance of the act contracted to be done, & not as a sum of money really intended to be paid. On the other hand, it is certainly open to parties who are entering into contracts to stipulate that, on failure to perform what has been agreed to be done, a fixed sum shall be paid by way of compensation (LORD CRANWORTH, C.).—*RANGER v. GREAT WESTERN RY. Co.* (1854), 5 H. L. Cas. 72; 24 L. T. O. S. 22; 18 Jur. 795; 10 E. R. 824, H. L.; & *previous proceedings* (1843), 3 Ry. & Can. Cas. 298.

2118. Whether penalty recoverable in addition to injunction or specific performance.]—Upon an appln. for an injunction to restrain the breach of an agreement, the ct. ordered the motion to stand over, with liberty for plff. to take proceedings at law. Pltf. thereupon brought his action, & recovered a sum of £500, by way of liquidated damages, & then renewed his appln. for an injunction. The ct., under these circumstances, refused to interfere.—**SANTER v. FERGUSON** (1849), 1 Mac. & G. 286; 1 H. & Tw. 383; 19 L. J. Ch. 170; 14 L. T. O. S. 217; 14 Jur. 255; 41 E. R. 1275. L. C.

2119. —.]—Pltf. agreed to hire as his assistant in the practice as a surgeon & apothecary & deft. agreed to serve him for one month & so on from month to month until either party should give to the other a calendar month's notice of his intention to determine the agreement at a certain

Annotations:—**Conrad.** *Young v. Chalkley* (1867), 16 L. T. 286. **Reid.** *Gent v. Harrison* (1893), 69 L. T. 307. **Mentl.** *Bilke v. L. C. & D. Ry.* (1864), 3 H. & C. 95; *Stiles v. Ecclestone* (1903), 88 L. T. 294.

In an action upon the agreement, with a prayer for injunction, judgment by default, the damages were assessed at \$20:—*Held*: whether the sum assessed by the jury was in the nature of a penalty or liquidated damages, the ct. would not grant an injunction.—*YOUNG v. CHALKLEY* (1807), 16 L. T. 286: 15 W. R. 743.

2121. —[—]—An assurance co. appointed an agent, & by the terms of the agreement between them it was provided that in the event of the agent ceasing to act for the co. he should not give information as to the co.'s connections, or interfere directly or indirectly with their business, or represent any other co. doing similar business, within a radius of fifty miles from the headquarters of his agency for one year from the date of his ceasing to act, & that in case of breach he should pay the co. £100 as ascertained & liquidated damages:—*Held:* the co. could not, upon the agent's breach of agreement, claim an injunction as well as the £100 liquidated damage, but must elect between the two remedies.—GENERAL ACCIDENT ASSURANCE CORPN. v. NOEL, [1902] 1 K. B. 377; 71 L. J. K. B. 236; 86 L. T. 555; 50 W. R. 381; 18 T. L. R. 164.

2122. —[J. A. petitioner in a divorce suit withdrew his petition on the co-respondent covenanting not to go within a certain area, & paying a sum of £3,000 to trustees to be held in trust for pltf. in case of a breach of the covenant. The co-respondent committed a breach of the covenant, & in an action to restrain the breach, & for payment of the stipulated sum, contended that the covenant was void on the ground of public policy : —*Held* : the defence failed, & pltf. was entitled to an injunction & the £3,000.—**UPTON v. HENDERSON** (1912), 106 L. T. 839; 28 T. L. R. 398; 50 Sol. Jo. 481.

2123. Enforcement of—By Injunction.—If a man agree not to do an act, & enter into a bond with a penalty to be forfeited on his doing it, the

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penalty is never to be considered as the price for doing such act, but the ct. will relieve by injunction, until the actual damage sustained shall be ascertained by an issue.—**HARDY v. MARTIN** (1783), 1 Cox, Eq. Cas. 26; 1 Bro. C. C. 419, n.; 29 E. R. 1046.

*Annotations:—***Refd.** **Astley v. Weldon** (1801), 2 Bos. & P. 346; **Wallis v. Smith** (1882), 21 Ch. D. 243.

2124. ———.]—**BIRD v. LAKE** (1863), 1 Hem. & M. 111; 8 L. T. 632; 71 E. R. 49; *subsequent proceedings*, 1 Hem. & M. 338.

*Annotations:—***Mentd.** **Smith v. Hancock**, [1894] 2 Ch. 377; **Cory v. Harrison** (No. 2) (1904), 48 Sol. Jo. 350.

2125. ———.]—I quite agree that, notwithstanding penalties being affixed to a contract, the ct. can grant an injunction, & that those words are not sufficient as a general rule to prevent the ct. doing so (**CHITTY**, L.J.).—**ROBINSON & CO., LTD. v. HEUER**, [1898] 2 Ch. 451; 67 L. J. Ch. 644; 79 L. T. 281; 47 W. R. 34; 42 Sol. Jo. 756.

*Annotations:—***Mentd.** **Chapman v. Westerby** (1913), 58 Sol. Jo. 50; **Altwood v. Lamont**, [1920] 2 K. B. 146.

2126. ———.]—**Lease.**—Injunction granted to restrain a breach of covenant, secured by forfeiture of the lease & a penalty.—**BARRET v. BLAGRAVE** (1800), 5 Ves. 555; 31 E. R. 735; *subsequent proceedings*, 6 Ves. 104.

*Annotations:—***Mentd.** **Shackle v. Baker** (1808), 14 Ves. 468; **Dietrichsen v. Cabburn** (1846), 1 Coop. temp. Cott. 72; **Rochdale Canal Co. v. King** (1851), 2 Sim. N. S. 78; **Lumley v. Wagner** (1852), 1 De G. M. & G. 604.

2127. ———.]—**Sale of Land.**—**COLES v. SIMS**, No. 2116, *ante*.

2128. ———.]—**Restraint of trade or professional practice.**—A surgeon at W., upon taking an assistant, required him to give his bond, in a penalty, not to practice at W. Afterwards he discharged the assistant, who thereupon commenced practice at W. The surgeon then filed a bill to restrain him, to which deft. demurred. The ct. overruled the demurrer, holding that, notwithstanding the pecuniary penalty, pltf. was entitled to a remedy in equity.—**FOX v. SCARD** (1863), 33 Beav. 327; 55 E. R. 394.

2129. ———.]—A bond which recited an agreement to give a bond not to practice within a certain locality, was conditioned on the payment of £1,000 as & for liquidated damages, if the obligor should so practice.—**Held**: the ct. has power to grant an injunction to restrain the obligor from so practising.—**HOWARD v. WOODWARD** (1864), 5 New Rep. 8; 34 L. J. Ch. 47; 11 L. T. 414; 29 J. P. 3; 10 Jur. N. S. 1123; 13 W. R. 132.

*Annotations:—***Consd.** **General Accident Assce. Corp'n. v. Noel**, [1902] 1 K. B. 377. **Refd.** **London & Yorkshire Bank v. Pritt** (1887), 56 L. J. Ch. 987; **Dewes v. Fitch**, [1920] 2 Ch. 159.

2130. ———.]—Pltf., a surgeon, engaged deft. to assist him in his practice, the engagement being terminable at the will of either party. Subsequently deft. executed, at the request of pltf., a bond, which was conditioned to be void if deft. should not practice within certain limits, but which contained no express agreement on the part of pltf. to continue deft.'s employment. Deft. remained in pltf.'s employment for about three months afterwards, & was then dismissed. He subsequently commenced practising within the prescribed limits, & a suit was instituted to restrain him from so doing.—**Held**: pltf. was entitled to an injunction.—**GRAVELY v. BARNARD**

(1874), L. R. 18 Eq. 518; 43 L. J. Ch. 659; 30 L. T. 863; 39 J. P. 20; 22 W. R. 891.

*Annotations:—***Consd.** **London & Yorkshire Bank v. Pritt** (1887), 56 L. J. Ch. 987. **Mentd.** **Davies v. Davies** (1887), 36 Ch. D. 359; **Hood & Moore's Stores v. Jones** (1899), 85 L. T. 169; **Re Weston, Davies v. Tagart**, [1900] 2 Ch. 164.

2131. ———.]—A covenant not to carry on, or be concerned in carrying on, either directly or indirectly, the business of a saddler, or sell any goods in any way connected with that trade within a distance of ten miles from C. under a penalty of £100, to be paid by way of liquidated damages for every such offence is broken by selling goods as a journeyman in the employment of a person carrying on the particular trade in C.; & the breach will be restrained by injunction.—**JONES v. HEAVENS** (1877), 4 Ch. D. 636; 25 W. R. 460.

2132. ———.]—**By specific performance—Marriage settlement.**—**NANDIKE v. WILKES** (1716), Gilb. Ch. 114; 25 E. R. 80.

2133. ———.]—Under a marriage settlement tenant for life, with remainder to his first & other sons by his wife F., in tail, with remainder to himself in fee, had power to grant leases for 99 years in possession at the most improved rent under an indenture of lease to be executed with certain formalities. 28 years after the marriage, the wife still living, & there being no issue of the marriage, the husband gave a bond conditioned for the granting a lease for 99 years, at a rent of £20 *per annum*, upon the expiration of a subsisting lease. As soon as the subsisting lease determined, the obligee of the bond entered into possession, & for some years paid a rent of £20.—**Held**: the representatives of the obligee were entitled to a decree for specific performance of the agreement contained in the bond.—**BUTLER v. POWIS** (1845), 2 Coll. 156; 5 L. T. O. S. 303; 9 Jur. 859; 63 E. R. 679.

*Annotation:—***Mentd.** **Moore v. Clench** (1875), 34 L. T. 13.

2134. ———.]—**Lease.**—A lessee covenants not to dig up a particular part of the demised premises for raising sand, gravel, etc., under the penalty of £100 per acre. He breaks this covenant, & thereupon the lessor files a bill for an injunction; on affidavit of the waste committed, the injunction is granted till answer & further order: after the answer put in, a motion is made to dissolve the injunction, & upon showing cause, deft. consented to appear & plead to an action of debt or trover, & to take short notice of trial; & thereupon the injunction is dissolved. But on an appeal, this order was discharged, & an injunction granted to continue till the hearing of the cause.—**LONDON (CITY) v. PUGH** (1727), 4 Bro. Parl. Cas. 395; 2 E. R. 268, H. L.

2135. ———.]—Deft. contracted to grant pltf. an under-lease of property held by him under the C. company, & he covenanted that if the C. company refused to grant a licence for that purpose, he would pay pltf. £1,000 by way of liquidated damages.—**Held**: deft. could not escape a specific performance by refusing to apply for a licence & by paying to pltf. the £1,000.—**LONG v. BOWRING** (1864), 33 Beav. 585; 10 L. T. 683; 28 J. P. 726; 10 Jur. N. S. 668; 12 W. R. 972; 55 E. R. 496.

2136. ———.]—**Purchase of land.**—A proviso in articles for the purchase of an estate that if either should break the agreement he should pay the other £100; deft., on being offered two years' purchase more, accepted it, notwithstanding his agreement. Specific performance decreed.—

HOWARD v. HOPKYNs (1742), 2 Atk. 371; 26 E. R. 624, L. C.

Annotations:—*Mentl.* Wall v. Stubbs (1815), 1 Madd. 80; Roper v. Bartholomew (1823), 12 Price, 797.

See, further, BONDS, Vol. VII., p. 252, Nos. 948-954.

Where penalty is increase of rent.—*See* AGRICULTURE, Vol. II., pp. 19, 24, 99, Nos. 107-113, 142-145, 794; & LANDLORD & TENANT.

In contracts by local authorities.—*See* LOCAL GOVERNMENT.

SUB-SECT. 13.—COVENANTS OPERATING BY WAY OF ASSIGNMENT OR RELEASE.

Assignment of after-acquired property.—*See* BILLS OF SALE, Vol. VII., pp. 118-124, Nos. 686-706; MORTGAGES; SETTLEMENTS.

Covenant not to sue—Whether operating as in release.—*See* BONDS, Vol. VII., p. 232, Nos. 744-756; BANKRUPTCY, Vol. V., pp. 1086, 1159, 1160, 1169, 1191, Nos. 8891-8893, 9391-9397, 9406-9407, 9464, 9618-9620; CONTRACT, Vol. XII., p. 510, Nos. 4200-4206.

SUB-SECT. 14.—ENFORCEMENT OF COVENANTS.

See BONDS, Vol. VII., p. 252, Nos. 947 *et seq.*; DAMAGES; INJUNCTION; SPECIFIC PERFORMANCE. *Statute of Limitations.*—*See* LIMITATION OF ACTIONS.

Particular covenants.—*See* TITLES *passim*.

SUB-SECT. 15.—DISCHARGE OF COVENANTS.

See, generally, CONTRACT, Vol. XII., pp. 437 *et seq.*

2137. *By death of covenantor—Where covenantee heir.*—A covenant, though good in its creation, may be extinguished afterwards by the death of the covenantor, to whom the covenantee was heir. —MUDGE v. MUDGE (1719), 1 Com. 332; 92 E. R. 1098.

Discharge of contract made by deed.—*See* CONTRACT, Vol. XII., pp. 351-353, Nos. 2915-2937.

SUB-SECT. 16.—PARTICULAR COVENANTS.

Covenant to do one of two things—Option in Covenantor.—*See* CONTRACT, Vol. XII., pp. 305, 306, 318, 319, Nos. 2515-2531, 2362, 2363.

Joint & several covenants.—*See* CONTRACT, Vol. XII., pp. 24-33, Nos. 28-104.

Dependent & independent covenants.—*See* CONTRACT, Vol. XII., pp. 413-417, Nos. 3331-3353.

Implied covenants.—*See* CONTRACT, Vol. XII., pp. 607-628.

Agriculture—Covenants of the country.—*See* AGRICULTURE, Vol. II., p. 10, Nos. 31-34.

Covenants as to trees.—*See* AGRICULTURE, Vol. II., pp. 98, 99, Nos. 791-803.

Arbitration—Covenants to submit to.—*See* ARBITRATION, Vol. II., p. 356, Nos. 295-310.

Agreements for compulsory purchase.—*See* COMPULSORY PURCHASE OF LAND & COMPENSATION, Vol. XI., p. 167, Nos. 447-451.

Assignment, sale & licence of patents.—*See* PATENTS.

Bankruptcy—Covenants by creditor—To forfeit claim.—*See* BANKRUPTCY & INSOLVENCY, Vol. V., p. 1158, Nos. 9391-9397.

To indemnify bankrupt.—*See* BANKRUPTCY & INSOLVENCY, Vol. V., p. 1159, Nos. 9400-9404.

To pay insurance premiums.—*See* BANKRUPTCY & INSOLVENCY, Vol. IV., p. 301, Nos. 2826-2830.

Building contracts.—*See* BUILDING & BUILDING CONTRACTS, Vol. VII., pp. 338, 347, Nos. 34-37, 62-66.

Bonds.—*See* BONDS, Vol. VII., p. 190, Nos. 297-298.

Charterparties.—*See* SHIPPING & NAVIGATION. *Covenants running with the land.*—*See* LANDLORD & TENANT; SALE OF LAND.

Covenants for title.—*See* SALE OF LAND.

Covenants to stand seised.—*See* GIFTS.

Covenants in charitable bequests.—*See* CHARITIES, Vol. VIII., pp. 328, 382, Nos. 1105, 1909.

Covenants between master & servant.—*See* MASTER & SERVANT.

Covenants in restraint of trade.—*See* TRADE & TRADE UNIONS.

Insurance policies.—*See* INSURANCE; SHIPPING & NAVIGATION.

Leases.—*See* LANDLORD & TENANT.

Marriage settlements.—*See* SETTLEMENTS; HUSBAND & WIFE.

Mortgages.—*See* MORTGAGES.

Partnership deeds & agreements.—*See* PARTNERSHIP.

Restrictive covenants.—*See* EQUITY; SALE OF LAND.

Sale of goods.—*See* SALE OF GOODS.

Sale of land.—*See* SALE OF LAND.

Separation deeds.—*See* HUSBAND & WIFE.

Settlements.—*See* SETTLEMENTS.

Transfer of stocks & shares & matters relating to promotion of companies.—*See* COMPANIES; STOCK EXCHANGE.

See, also, TITLES *passim*.

SECT. 2.—PROVISOS.

Proviso for re-entry or forfeiture.—*See* LANDLORD & TENANT.

2138. *Definition.*—PEMBROOK (EARL) v. BARKLEY (1601), Gouldsb. 130; Poph. 116; Cro. Eliz. 384, 560; 75 E. R. 1014.

Annotations:—*Refd.* Harrington v. Wise (1596), Cro. Eliz. 486; Cromwell's Case (1601), 2 Co. Rep. 69 b; Doe d. Henniker v. Watt (1828), 8 H. & C. 308. *Mentl.* Woodward v. Fox (1691), 2 Vent. 267.

2139. *Qualification implied in.*—The words "provided always" are to be considered as words of reference to all that has gone before them. They constitute a qualification of the preceding limitations.—MARTELLI v. HOLLOWAY (1872), L. R. 5 II. L. 532; 42 L. J. Ch. 26, H. 1.

Annotations:—*Refd.* Re Mortimer, Gray v. Gray, [1905] 2 Ch. 502; Re Parker, Parker v. Parkin, [1910] 1 Ch. 581; Re Stamford & Warrington, Payne v. Grey, [1912] 1 Ch. 343; Re Atkinson, Atkinson v. Atkinson, [1916] 1 Ch. 91. *Mentl.* Re Fothergill's Estate, Price-Fothergill v. Price, [1903] 1 Ch. 149; Re Lewis, Busk v. Lewes, [1918] 2 Ch. 308; Portman v. Portman, [1922] 2 A. C. 473.

Sect. 2.—Provisoes.]

2140. When amounting to condition—Not where coupled with words of covenant & grant.]—HUNTINGTON (EARL) & MOUNTJOYE'S (LORD) CASE (1589), 4 Leon. 147; Moore, K. B. 174; 74 E. R. 786; sub nom. MOUNTJOY (LORD) & HUNTINGTON'S (EARL) CASE, Godb. 17; 5 Co. Rep. 3 b; 1 And. 307.

Annotations:—*Refd.* Townshend v. Windham (1750), 2 Ves. Sen. 1; Chetham v. Williamson (1804), 4 East, 469; Doe d. Hanley v. Wood (1819), 2 B. & Ald. 724. **Mentd.** Harvy v. Thomas (1591), Cro. Eliz. 216; Worcester's Case (1605), 6 Co. Rep. 37 a; Gee v. Freedland (1626), Cro. Car. 47; R. v. Knowles (1694), 12 Mod. Rep. 55; Orby v. Mohun (1706), Freem. Ch. 291; Scott v. A'Chez (1743), Park. 21; Taylor d. Atkyns v. Horde (1757), 1 Burr. 60; Wolferstan v. Lincoln (Bp.) (1763), 2 Wils. 174; Goodright d. Fowler v. Forrester (1807), 8 East, 552; Doe d. Bartlett v. Rendle (1814), 3 M. & S. 99; Doe d. Vaughan v. Meyler (1814), 2 M. & S. 276; Doe d. Shrowsbury v. Wilson (1822), 5 B. & Ald. 363; R. v. Trent & Mersey Canal Co. (1825), 3 L. J. O. S. K. B. 140; Doe d. Douglas v. Lock (1835), 2 Ad. & El. 705; Delacherois v. Delacherois (1864), 4 New Rep. 501; Low Moor Co. v. Stanley Coal Co. (1875), 33 L. T. 436; Sutherland v. Heathcote, [1892] 1 Ch. 475; *Re* Aldam's S. E., [1902] 2 Ch. 46.

2141. — Where relating to estate passed—Entailing forfeiture of estate.]—THOMAS v. WARD (1590), Cro. Eliz. 202; 78 E. R. 458.

2142. — Proviso against alienation.]—SYMPSON v. TITTEREL (1591), 1 And. 267; 123 E. R. 465; sub nom. SIMPSON v. TITTERELL, Cro. Eliz. 242.

Annotations:—*Refd.* Pembroke v. Berkley (1595), Cro. Eliz. 384; Cromwel's Case (1601), 2 Co. Rep. 69 b; Doe d. Henniker v. Watt (1828), 8 B. & C. 308; Dawson v. Dyer (1833), 5 B. & Ad. 584; Bastin v. Bidwell (1881), 18 Ch. D. 238.

2143. — Bond is substantive & independent.]—CROMWEL'S CASE, No. 1135, ante.

2144. — "To have & to hold provided always."]—ANON. (undated), Bro. N. C. 42; 73 E. R. 865.

2145. — "Provided & it is agreed."]—The words "provided, & it is agreed etc." make a condition, & not a covenant.—GEERY v. REASON (1628), Cro. Car. 128; 79 E. R. 713.

Annotation:—*Refd.* Brookes v. Drysdale (1877), 3 C. P. D. 52.

2146. — "It is stipulated & conditioned."]—In an agreement enuring as a lease, "It is stipulated & conditioned that the lessee shall not underlet:—*Held*: these words created a condition, upon a breach of which the lessor might maintain ejectment, without an express clause of re-entry.—DOE d. HENNIKER v. WATT (1828), 8 B. & C. 308; 1 Man. & Ry. K. B. 694; 6 L. J. O. S. K. B. 185; 108 E. R. 1057.

PART IV. SECT. 2.

2140 i. When amounting to condition—Not where coupled with words of covenant in grant.]—Deft. claimed under a deed in fee, in which, after the habendum, was contained a proviso that the conveyance should be void, & the estate revert to the grantor, if the grantee should make default in performing the covenant, thereafter contained. This covenant was, that the grantee should cultivate the land during the life of the grantor for his benefit:—*Held*: the proviso was void, as being inconsistent with the grant.—BROWN v. STUART (1854), 12 U. C. R. 510.—CAN.

2140 ii. —.]—M. covenanted that W. might use water for manufacturing purposes "When & at all times when water is & remains in said pond sufficient for driving the machinery of M. Provided always, that when & whenever there is a scarcity of water in the mill pond, W. shall be at liberty to use only so much of the water as shall be sufficient to turn one water wheel":—*Held*: M. was en-

titled to sufficient water to drive his mill before deft. could use any; & deft. was not by the proviso entitled to enough to turn one water wheel.—CRASKE v. HUFFMAN (1867), 27 U. C. R. 116.—CAN.

2140 iii. —.]—Land vested in the Crown was patented to a city corp. with the following clause in the patent: "Provided always, & this grant is subject to the following conditions; the land shall be dedicated by the corp. for the purpose of a public park for all time to come":—*Held*: the words "Provided always, & this grant is subject to the following conditions," did not create a condition annexed to the estate granted.—KENNEDY v. TORONTO CITY (1886), 12 O. R. 211.—CAN.

2154 i. When amounting to a covenant—Dependent on intention of parties if qualified.]—A lessee covenanted to build on the demised premises during the term, "provided always, & it is the true intent & meaning of these presents & the parties thereunto, that at the expiration of the demise the

2147. — Proviso enabling lessor to take possession.]—Proviso in a lease as follows: "In case the lessor shall at any time or from time to time during the continuance thereof be desirous of having any part of the said piece or parcel of land & premises hereby demised delivered up to him, & sign three months' notice in writing, the lessee covenants to give up; & that the lessor shall & may take peaceable & quiet possession, paying a reasonable & fair compensation in respect of the moneys which may have been laid out by the lessee in improving the condition of the land given up." The lessor gave a notice under this proviso, containing an offer to pay compensation to the lessee "in respect of any repairs which may have been done by you" & took possession of the premises before the three months had expired. In ejectment by the lessee to recover possession:—*Held*: the lessor was entitled under the proviso to require possession of the whole of the premises.

The proviso does not operate by way of covenant merely, for it expressly gives the lessor the power to take possession (DENMAN, C.J.).—DOE d. GARDNER v. KENNARD (1848), 12 Q. B. 244; 11 L. T. O. S. 63, 288; 12 Jur. 821; 116 E. R. 860.

Annotation:—*Refd.* Liddy v. Kennedy (1871), L. R. 5 H. L. 134.

2148. — Dependent on intention of parties.]—BIRCHALL v. SMETHURST (1722), Bunb. 114; 145 E. R. 615.

2149. When amounting to a covenant—If qualified.]—ARCHDEACON v. JENNOR (1598), Cro. Eliz. 604; 78 E. R. 847.

2150. —.]—CROMWEL'S CASE, No. 1135, ante.

2151. — Proviso containing words "It is agreed"—Following covenant to repair.]—HOLDER v. TAXLOE (1615), 1 Roll. Abr. 518.

Annotations:—*Consd.* Thomas v. Cadwallader (1744), Willes, 496; Miles v. Tobin (1868), 16 W. R. 465; Westacott v. Hahn, [1917] 1 K. B. 605. *Refd.* Pordage v. Cole (1669), 1 Sid. 423; Cloake v. Hooper (1673), Freem. K. B. 122; Line v. Stevenson (1838), 1 Arn. 294; Monypenny v. Monypenny (1858), 4 K. & J. 174. **Mentd.** Adams v. Gibney (1830), 4 Moo. & P. 491; Baynes v. Lloyd, [1895] 2 Q. B. 610.

2152. —.]—LUSHFORD v. SANDERS (1599), Cro. Eliz. 690; 78 E. R. 926.

2153. — Where equivalent to a promise to pay money.]—CLAPHAM v. MOYLE (1664), 1 Lev. 155; 1 Keb. 842, 860; 83 E. R. 345; sub nom. MOYL v. CLAPHAM, 1 Keb. 807.

2154. — Dependent on intention of parties.]—BIRCHALL v. SMETHURST (1722), Bunb. 114; 145 E. R. 615.

2155. — Where two separate things agreed to

buildings erected shall be paid for at the valuation of two indifferent persons":—*Held*: a covenant to pay.—MCFATRIDGE v. TALBERT (1845), 2 U. C. R. 156.—CAN.

2154 ii. —.]—In 1917 plff. conveyed a farm & some chattels to his son. Following the provisos in the conveyance, which was under the Short Forms of Conveyances Act, there was a provision that the son should not sell or mtge. the farm or chattels without the written consent of the grantor & his wife. In Feb. 1920, the son entered into an agreement with M. for the sale of the farm to M. on plff.'s death. Plff. brought this action to have the deed of 1917 declared null & void, & the son's rights under it forfeited, & to have the agreement with M. declared void & its registration vacated:—*Held*: the provision against selling or mortgaging was not in form or in effect a condition upon which the conveyance was to become void; it was merely a covenant, & the only remedy for a breach of it was an action for damages.—PAUL v. PAUL (1921), 50 O. L. R. 211.—CAN.

be done—Lease—Proviso for lessor to re-acquire land.]—Where in an agreement to demise a certain piece of land for a term of years, at a certain annual rent, in which there was no clause of re-entry, there was the following stipulation, viz. " & it is also further agreed & clearly understood, that in case the lessor or his heirs, exors., or assigns, should want any part of the said land to build, or otherwise, or cause to be built, then the lessee or his heirs, exors. or assigns, should give up that part of the land as should be requested by the lessor, by his making an abatement in proportion to the rent charged, & also to pay for so much of a fence, at a fair valuation, as he should have occasion from time to time to take away, by his giving or leaving six months' notice of what he intended to do":—*Held*: this only operated as a covenant, & not in the nature of a condition in defeasance of the estate, so as to entitle the lessor to maintain an action of ejectment.

Where an agreement between two parties contains a stipulation that certain things shall be done by each, it is a mere covenant, & not a condition (BURROUGH, J.).—*DOE v. WILSON v. PHILLIPS* (1824), 2 Bing. 13; 9 Moore, C. P. 46; 2 L. J. O. S. C. P. 103; 130 E. R. 208.

2156. — Proviso containing the consideration.]—An agreement between deft., who was the exor., & plff., who was the widow of a testator, recited that the testator had verbally declared his desire that his widow should have his dwelling-house, & then proceeded thus, " now these presents witness, & it is hereby agreed & declared, that in consideration of such desire" deft. would convey the dwelling-house to plff." provided nevertheless, & it is hereby further agreed & declared, that A., plff., shall pay to B., deft., the sum of £1 yearly, towards the ground rent payable in respect of the said dwelling-house, & other premises thereto adjoining, & will keep the said dwelling-house & premises in good & tenantable repair:—*Held*: the stipulation as to the payment of the £1 ground rent & the repair was not a mere proviso. It contained the real consideration for deft.'s promise to convey the dwelling-house.—*THOMAS v. THOMAS* (1842), 2 Q. B. 851; 2 Gal. & Dav. 226; 11 L. J. Q. B. 104; 6 Jur. 645; 114 E. R. 330.

2157. —]—R. & W., being seised as tenants in common of M. & T. farms, & the subsoils & minerals beneath, by a partition deed (wherein the agreement of partition was recited, & that by the said agreement the coals, mines, veins, etc., should be had & taken between them under such payments, restraints, & liabilities as were therein mentioned) conveyed to S. & his heirs " the several manors, lands, & hereditaments therein particularly mentioned, comprising M. & T. farms, & all the estate, right, title, interest, use, trust, possession, property, claim, & demand whatever, both at law & in equity," of them, the said R. & W. to hold to S. his heirs & assigns for ever, upon the trusts therein mentioned; that is to say, as to M. farm, to the use of W., his heirs & assigns for ever; & as to T. farm, to the use of R., his heirs & assigns for ever. Provided always, that all ore of tin & coal mines, etc., & the rents & profits of all such mines, etc., in or to be found within the said premises, should be thenceforth had, received, & taken, & the costs of getting, taking, or carrying away the same, & all trespass & damage done in or upon the lands thereby, should be paid & borne by R. & W., their heirs & assigns, equally in such manner as if the lands wherein the same are or should be found had not been divided, etc., but still remained in common between them; provided that he or they in whose lands or share of

such lands minerals might be found, might dispose of them, paying the other, his heirs, administrators, or assigns, half the profits, & that such other might employ a banksman in the lands where the minerals, etc., might be found in order to have a fair account:—*Held*: under the deed R. & W. each took a moiety of both the subsoil & surface of the partitioned lands, & the tenancy in common, both as to the subsoil & surface, & the proviso was not sufficient to cut down the effect of the previous operative words, & was intelligible as a provision for working the mines in partnership.—*WILLIAMSON v. BATEMAN* (1854), 3 W. R. 110, Ex. Ch.; *affg.* S. C. *sub nom.* *BATEMAN v. WILLIAMSON*, 23 L. T. O. S. 296.

2158. Where amounting to a qualification of preceding covenant—Covenant to pay rent to one person—& on failure of a condition to another.]—*SCOT v. SCOT* (1587), Cro. Eliz. 73; 78 E. R. 333.

2159. — Covenant that another shall pay rent—Covenantor to pay after 40 days in arrear.]—Lease by plff. to J. for years of a messuage & farm, at a yearly rent, payable quarterly, & J. covenants to pay the rent at the days & in manner therein mentioned, & also to pay interest in case the rent should be behind three quarters; & deft. covenants that J. shall at all times during the term, well & truly pay to plff. the said rent at the respective days, & also interest, & shall duly observe all the covenants, & that in case J. should neglect to pay the rent for forty days, deft. shall pay on demand:—*Held*: deft. was not chargeable until after forty days & demand made, & plff. having declared generally, assigning for breach, rent arrear, & it appearing upon oyer that the lease contained the qualification above stated, the breach was ill assigned.—*SICKLEMORE v. THISTLETON* (1817), 6 M. & S. 9; 105 E. R. 1146.

Annotations:—*Consd.* *Bank v. Sutcliffe*, [1918] 2 K. B. 833. *Reid. Re Colnaghi, Ex p. Marks* (1838), 3 Douc. 133; *Re Brown's Estate, Brown v. Brown*, [1893] 2 Ch. 300. *Mentd.* *Hoggett v. Exley* (1840), 6 Bing. N. C. 207; *Macintosh v. Midland Counties Ry.* (1845), 14 M. & W. 548; *Jowett v. Spencer* (1846), 15 M. & W. 602.

2160. — Covenant by lessee to repair—Provided lessor find timber—No words of "agreement."]—*ANON.* (undated), Bro. N. C. 42; 73 E. R. 865.

2161. — — — — —.]—*HOLDER v. TAYLOR*, No. 2151, *ante*.

2162. — — — — —.]—*WESTACOTT v. HAHN*, No. 1980, *ante*.

2163. — Proviso not to sue for time stated.]—Defts. agreed to purchase an estate from plff. & by deed covenanted to pay the purchase-money by instalments at the times & subject to the provisos & agreements, & in the manner therein after expressed. Provided, that no instalment payable pursuant to the covenants should be recoverable or capable of being enforced, nor should any proceedings for that purpose be commenced until after the expiration of one month from the day upon which the same should have become payable:—*Held*: the proviso that no action should be brought for a month, did not operate merely as a covenant not to sue, but that the effect was to extend the period for payment for one month, & therefore, no action was maintainable until the month had expired.—*FOLEY (LADY) v. FLETCHER* (1858), 3 H. & N. 769; 28 L. J. Ex. 100; 33 L. T. O. S. 11; 22 J. P. 819; 5 Jur. N. S. 342; 7 W. R. 141; 157 E. R. 678.

Annotations:—*Reid.* *Horton v. Sayer* (1859), 29 L. J. Ex. 28. *Mentd.* *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877), 2 App. Cas. 394; *City of London Contract Corp. v. Styles* (1887), 2 Tax Cas. 239; *Clerical Medical & General Life Assce. Soc. v. Carter* (1888), 21 Q. B. D. 339; *Psalm & Hymns Trustees (The Baptist)*; *v. Whitwell* (1890), 7 T. L. R. 184; *Secretary of*

Sect. 2.—Provisoes.]

State in Council for India v. Scobel, [1903] A. C. 299; East Indian Ry. v. Secretary of State for India (1904), 21 T. L. R. 3; Chadwick v. Pearl Life Insce., [1905] 2 K. B. 507; Delarge v. Nugget Polish Co. (1905), 92 L. T. 682; East Indian Ry. v. Secretary of State in Council of India (1905), 92 L. T. 495; Surbiton U. D. C. v. Callender's Cable & Construction Co. (1910), 8 L. G. R. 244; Howe v. I. R. Comrs., [1919] 2 K. B. 336; Jones v. I. R. Comrs., [1920] 1 K. B. 711; R. v. Income Tax Special Comrs., *Ex p.* Shaftesbury Homes & Arethusa Training Ship, [1922] 2 K. B. 729.

2164. — Proviso that no covenant implied.]—A covenant in a lease, followed by the declaration, "There shall not be implied in this lease any covenant or provision whatever on the part of either of the parties hereto," must be construed as qualified & controlled by the declaration.—*ECCLES v. MILLS* (1898), A. C. 360; 67 L. J. P. C. 25; 78 L. T. 206; 46 W. R. 398; 14 T. L. R. 270, P. C.

*Annotations:—***Consd.** *Re Hughes, Ellis v. Hughes*, [1913] 2 Ch. 491. **Mentd.** *Re Betty, Betty v. A.-G.*, [1899] 1 Ch.

821; *Re Giers, Cooper v. Giers*, [1899] 2 Ch. 54; *Stuart v. Joy*, [1904] 1 K. B. 362.

2165. Whether amounting to a penalty—Covenant to pay debt by instalments—Proviso if default made.]—A., being indebted to B. in a sum of money payable by instalments, & having made default in payment of an instalment, executed a deed whereby, in consideration of B. forbearing to take proceedings in bkpcy. against him, he covenanted to pay the debt by fresh instalments, with a proviso, that, if he should make default in payment of any instalment, the whole debt should be immediately recoverable:—*Held*: the proviso was not a penalty against which relief could be had in equity, but an essential part of the security created by the deed.—*STERNE v. BECK* (1863), 1 De G. J. & Sm. 595; 2 New Rep. 346; 32 L. J. Ch. 682; 8 L. T. 588; 11 W. R. 791; 46 E. R. 236, L. J.J.

*Annotation:—***Mentd.** *Protector Loan Co. v. Grice* (1880), 5 Q. B. D. 592.

Part V.—Stamp Duties.

See REVENUE.

DEEDS OF ASSIGNMENT.

See BANKRUPTCY AND INSOLVENCY.

DEER.

See GAME.

DEFAMATION.

See LIBEL AND SLANDER.

DEFEASANCE.

See BILLS OF SALE ; BONDS ; MORTGAGE ; TRUSTS AND TRUSTEES.

DEL CREDERE AGENT.

See AGENCY ; SALE OF GOODS.

DELEGATION.

See AGENCY ; CORPORATIONS.

DEMISE.

See LANDLORD AND TENANT.

DEMISE OF THE CROWN

See CONSTITUTIONAL LAW.

DEMURRAGE.

See SHIPPING AND NAVIGATION.

DENTISTS.

See MEDICINE AND PHARMACY.

DEPENDENCIES

INCLUDING

DOMINIONS, DEPENDENCIES, COLONIES AND BRITISH POSSESSIONS.

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Colonial Solicitors See SOLICITORS.
Judicial Committee of the Privy Council „ COURTS.

NOTE. —The word *Dependencies* is placed first in this title in order to conform to the classification in *The Laws of England*.

Part I.—In General.

SECT. 1.—DEFINITIONS.

1. "Dependency—"Colony"—"Dominion."—A power for trustees to invest capital money in any stock or securities of "any British colony or dependency" does not justify an investment in stocks issued by individual provinces of the Dominion of Canada.

Then there is the word "dependency." This also has no definite technical meaning; it is, in my opinion, a wider & perhaps more dignified phrase than "colony." The Oxford Dictionary defines it as "A country or province subject to the control of another of which it does not form an integral part." None of the six provinces in this case can properly be called a "dependency"; they are all parts of the Dominion of Canada, one of the greatest dependencies of the United Kingdom, but are not themselves separate dependencies. The word probably found its way into Davidson's Forms because it has never been usual to speak of Canada as a colony. The phrase used to be "dependency" or "province," & is now "dominion" (FARWELL, L.J.).—*Re MARYON-WILSON'S ESTATE*, [1912] 1 Ch. 55; 81 L. J. Ch. 73; 105 L. T. 692; 28 T. L. R. 49, C. A.

SECT. 2.—PROTECTORATES.

2. Declaration of war by protecting Power.—*Ionian Islands*.—Claim in the High Ct. of Admty. for the restitution of the *Leucade*, an Ionian vessel captured during the war with Russia for trading with the enemy. The Ionian islands came into the possession of Great Britain during the Napoleonic war, & at the conclusion of the war, the following articles were agreed upon between Great Britain, Austria, Russia, & Prussia by the Treaty of Paris, of Nov. 5, 1815, to which other Powers afterwards acceded:—(a) The United States of the Ionian Islands to form a single, free, & independent State under the immediate & exclusive protection of the King of Great Britain, & the guarantee of the other contracting Powers. (b) Internal affairs to be regulated by the State with the approbation of the protecting Power, which should employ a particular solicitude with regard to the legislation & administration of the States, & name a High Comr. for that purpose. A constitutional charter to be drawn up by a Legislative Assembly & ratified by the protecting Power. (c) The protecting Power to have control of military forces. (d) The trading flag of the States to be recognised as the flag of a free & independent State. (e) None but commercial agents or consuls to be credited to the States:—*Held*: the protecting Power, being possessed of the sole military & diplomatic power under the treaty, possessed also the power of making peace & war on behalf of the States; but as the States had been recognised as a free & independent State with a separate trading flag, a declaration of war by the protecting Power on its own behalf would not of itself put them in a state of war; nor could that effect be attributed to a proclamation of the States' Senate notifying the declaration of war by the

protecting Power.—*IONIAN SHIPS* (1855), 2 Ecc. & Ad. 212; Spinks 193; 164 E. R. 394; *sub nom.* THE *LEUCADE*, 8 State Tr. N. S. 434; 25 L. T. O. S. 312; 1 Jur. N. S. 549.

Annotation:—*Mentd.* R. v. Crewe, *Ex p.* Sekgome, [1910] 2 K. B. 576.

3. Whether a foreign country.—*Within Foreign Jurisdiction Act, 1890* (c. 37)—*Bechuanaland*.—The Bechuanaland Protectorate is a foreign country in which His Majesty has jurisdiction within the meaning of Foreign Jurisdiction Act, 1890 (c. 37). It is not a foreign dominion of the Crown within Habeas Corpus Act, 1862 (c. 20), s. 1.—*R. v. CREWE* (EARL), *Ex p.* SEKGOME, [1910] 2 K. B. 576; 79 L. J. K. B. 874; 102 L. T. 760; 26 T. L. R. 439, C. A.

4. Whether a foreign dominion of the Crown.—*Within Habeas Corpus Act, 1862* (c. 20), s. 1.—*Bechuanaland*.—*R. v. CREWE* (EARL), *Ex p.* SEKGOME, No. 3, *ante*.

SECT. 3.—MODE OF ACQUISITION.

SUB-SECT. 1.—IN GENERAL.

5. Conquest.—*By British arms*.—(1) A country conquered by the British arms becomes a dominion of the King in the right of his Crown; & therefore, necessarily subject to the Legislature, the Parliament of Great Britain (*per CUR.*).

(2) The conquered inhabitants once received under the King's protection, become subjects, & are to be universally considered in that light, not as enemies or aliens (*per CUR.*).

(3) The articles of capitulation upon which the country is surrendered, & the articles of peace by which it is ceded, are sacred & inviolable according to their true intent & meaning (*per CUR.*).

(4) The law & legislative Govt. of every dominion, equally affects all persons & all property within the limits thereof, & is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privilege distinct from the natives (*per CUR.*).

(5) The laws of a conquered country continue in force until they are altered by the conqueror: the absurd exception as to pagans, mentioned in *Calvin's Case*, No. 243, *post*, shows the universality & antiquity of the maxim. For that distinction could not exist before the Christian era, & in all probability arose from the mad enthusiasm of the Crusades. In the present case the capitulation expressly provides & agrees, that the inhabitants shall continue to be governed by their own laws, until His Majesty's further pleasure be known (*per CUR.*).

(6) If the King, & when I say the King, I always mean the King without the concurrence of Parliament, has a power to alter the old & to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new

change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; & so in many other instances which might be put (*per* CUR.).

It is absurd that in the colonies they should carry all the laws of England with them; they carry only such as are applicable to their situation. I remember it has been determined in the Council. There was a question whether the Statute of Charitable Uses operated on the island of Nevis. It was determined it did not, & no laws but such as were applicable to their condition, unless expressly enacted (LORD MANSFIELD, C.J.).—*CAMPBELL v. HALL* (1774), 1 Cowp. 204; Lofft, 655; 20 State Tr. 239; 98 E. R. 1045.

Annotations.—As to (1) *Reid*. The *Foltina* (1814), 1 Dods. 450. As to (4) *Reid*. *Sottomayer v. De Barros* (1879), 5 P. D. 94; *R. v. Crewe, Ex p. Sekgome*, [1910] 2 K. B. 576. As to (5) *Reid*. *Ruding v. Smith* (1821), 2 Hag. Can. 371; *Lions Corp'n. v. East India Co.* (1836), 1 Moo. Ind. App. 175. As to (6) *Reid*. *Cameron v. Kyte* (1835), 3 Knapp, 332; *Jephson v. Riera* (1835), 3 Knapp, 130; *R. v. Crewe, Ex p. Sekgome*, [1910] 2 K. B. 576. Generally, *Reid*. *Bedrechund v. Elphinstone* (1830), 2 State Tr. N. S. 379. *Mentd.* *Snowdon v. Davis* (1808), 1 Taunt. 359; *A.-G. v. Stewart* (1817), 2 Mer. 143; *Re Island of Cape Breton* (1846), 6 State Tr. N. S. 283; *Ex p. Anderson* (1860), 25 J. P. 116; *Phillips v. Kyre* (1870), 10 B. & S. 1004; *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391; *A.-G. for Canada v. Cain, A.-G. for Canada v. Gihula*, [1906] A. C. 542.

6. —[No point is more clearly settled in the *cts.* of common law than that a conquered country forms immediately part of the King's dominions. In a late instance, we know that an island so acquired, Guadeloupe, was transferred to a third Power, subject, undoubtedly to the shadowy right of the former proprietor. It is said that a conquest of this kind may be re-acquired *flagranti bello* by the State from which it was taken; but so may any other possession, though forming part of the original & established dominions of the Crown of this country, if the enemy has it in his power to make the conquest. The same observation is applicable to the Isle of Wight, as well as to Heligoland, for the enemy has the same right to make a conquest of the one as the other. It is said that the enemy may recover back the island of Heligoland when peace takes place; but it is equally true that the conqueror may retain it if he can; & if nothing is said about it in the treaty, it remains with the possessor, whose title cannot afterwards be called in question (SIR W. SCOTT).—THE *FOLTINA* (1814), 1 Dods. 450.

Annotation.—*Mentd.* The *Anichab*, etc., [1921] P. 218.

7. —By British chartered company.]—A conquest of territory by the arms of a British chartered co. is made on behalf of the Crown; it rests with the advisers of the Crown to determine how the territory shall be dealt with. A proclamation of annexation is not essential to constitute the Crown owner of the territory as completely as any sovereign can be owner of lands *publici juris*; a manifestation of the Crown's intention

to that effect by Orders in Council dealing with the lands & their administration is sufficient for the purpose.

If the co. administers the territory by the authority of the Crown, & in so doing expends its own money, the co. is presumptively entitled to be reimbursed, either by a direct payment or in such manner as the circumstances indicate to have been the intention.

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages & conceptions of rights & duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law & then to transmute it into the substance of transferable rights of property as we know them. On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied & understood they are no less enforceable than rights arising under English law (*per* CUR.).—*Re SOUTHERN RHODESIA*, [1919] A. C. 211; 88 L. J. P. C. 1; 119 L. T. 689; 34 T. L. R. 595, P. C.

8. Cession.—Occupation in time of peace.]—Occupation of territory in time of peace, with the concurrence of the sovereign is presumptive evidence that it is the result of cession by treaty.—THE *BOLLETTA* (1809), Edw. 171.

Annotation.—*Reid*. *Cremld v. Powell, The Gerasimo* (1857), 11 Moo. P. C. C. 88.

9. Settlement.—Uninhabited or barbarous country.]—ADVOCATE-GENERAL OF BENGAL *v. SURNOMOYE DOSSEE (RANEE)*, No. 252, *post*.

10. Whether proclamation of annexation necessary.—Intention of Crown shown by administrative Orders in Council.]—*Re SOUTHERN RHODESIA*, No. 7, *ante*.

11. Date of commencement of Crown Dominion.—Presumption from grant of lands by Crown.]—

II. was a Spanish possession, in which British subjects had the right by treaty of cutting timber. The Spaniards withdrew from the country in 1798. In 1802 it was finally annexed to the British dominions by proclamation, but grants of land were made by the Crown as early as 1817:—*Held*: this was evidence that the Crown had assumed territorial dominion in H. as early as that year.—A.-G. FOR BRITISH HONDURAS *v. BRISTOWE* (1880), 6 App. Cas. 143; 50 L. J. P. C. 15; 44 L. T. 1, P. C.

SUB-SECT. 2.—EFFECT OF ANNEXATION.

12. Conquered country.—Articles of peace inviolable.]—*CAMPBELL v. HALL*, No. 5, *ante*.

13. Financial liabilities of conquered State to individuals.—Whether binding on conquering State.]—There is no principle of international law by

PART I. SECT. 3, SUB-SECT. 2.

a. Contractual liabilities of conquered state to individuals.—Whether binding on conquering state.]—In 1898 the govt. of the late South African Republic by a contract which was registered in the Deeds Office granted *resps.* predecessor in title the right to supply light to the township of V. *Resps.* did not claim to exercise the right until long after annexation of such Republic by the British Crown:—

Held: the contract not having been specifically recognised by the British govt. after annexation was not binding on it or its successor in title.—*VERENIGING MUNICIPALITY v. VERGENIGING ESTATES, LTD.* (1919), T. P. D. 159.—S. A.F.

b. —.—Cannot be sued in its own courts.]—A conquering state cannot validly be sued in its own *cts.* in respect of a contract, conferring merely personal rights made by a state which

it has conquered & annexed.—*RAND-JESLAOTE SYNDICATE v. THE GOVERNMENT* (1908), T. S. 404.—S. A.F.

c. —.—Set-off.]—A conquering state cannot be sued in its own *cts.* in respect of contractual obligations incurred by the conquered state, nor can such contractual obligations be set-off against a debt due to the conquering state.—*POSTMASTER-GENERAL v. TAUTE* (1905), T. S. 582.—S. A.F.

Sect. 3.—Mode of acquisition: Sub-sect. 2. Part II.
Sects. 1 & 2: Sub-sect. 1, A.]

which, after annexation of conquered territory, the conquering State becomes liable, in the absence of express stipulation to the contrary, to discharge financial liabilities of the conquered State incurred before the outbreak of war.—WEST RAND CENTRAL

GOLD MINING Co. v. R., [1905] 2 K. B. 391; 74 L. J. K. B. 753; 93 L. T. 207; 53 W. R. 660; 21 T. L. R. 562; 49 Sol. Jo. 552, D. C.

Annotations:—*Refd.* *Salaman v. Secretary of State for India*, [1906] 1 K. B. 613. *Mentd.* *Re Ferdinand, Ex-Tsar of Bulgaria*, [1921] 1 Ch. 107; *Luther Aktionsrnoye Obschestvo A. M. Luther v. Sagor*, [1921] 1 K. B. 456.

See, also, Nos. 215, 216, *post*.

Part II.—Colonial and Dominion Government.

SECT. 1.—PREROGATIVE OF THE CROWN.

14. Runs to colonies—When not expressly limited.]—(1) The prerogative of the Crown, when not expressly limited by local law or statute, is as extensive in the colonial possessions of the Crown as in Great Britain.

(2) The British North America Act, 1867 (c. 3), in no respects curtails the rights & privileges of the Crown, or affects the relations subsisting between the Sovereign & the several Provinces of the Dominion.

(3) By British North America Act, 1867 (c. 3), s. 58, the appointment of Provincial Governor is made by the "Governor-General in Council by instrument under the Great Seal of Canada," or, in other words, by the Executive Govt. of the Dominion, which is, by sect. 9, expressly declared to "continue & be vested in the Queen."

(4) There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers & no functions except as representatives of the Crown. The act of the Governor-General & his council in making the appointment is, within the meaning of the statute, the act of the Crown; & a Lieutenant-Governor, when appointed, is as much the representative of her Majesty for all purposes of provincial govt., as the Governor-General himself is for all purposes of Dominion Govt. (*per Cur.*).—**MARITIME BANK OF CANADA (LIQUIDATORS) v. NEW BRUNSWICK (RECEIVER-GENERAL)**, [1892] A. C. 437; 61 L. J. P. C. 75; 67 L. T. 126; 8 T. L. R. 677, P. C.

Annotations:—*As to (4)* *Refd.* *Bonanza Creek Gold Mining Co. v. R.*, [1916] 1 A. C. 566; *Re Initiative & Referendum Act*, [1919] A. C. 985.

15. Power to create legislative assembly—Settled colony.]—(1) The House of Assembly of the Island of Newfoundland does not possess, as a legal incident, the power of arrest, with a view of adjudication on a contempt committed out of the House; but only such powers as are reasonably necessary for the proper exercise of its functions

& duties as a local legislature:—*Semble*: The House of Commons possesses this power only by virtue of ancient usage & prescription, the *lex et consuetudo Parliamenti*.

(2) *Semble*: The Crown, by its prerogative, can create a Legislative Assembly in a settled colony, subordinate to Parliament, but with supreme power within the limits of the colony for the govt. of its inhabitants.

Qu.: whether it can bestow upon it an authority, viz. that of committing for contempt, not incidental to it by law.

(3) Newfoundland is a settled, not a conquered colony, & to such colony there is no doubt that the settlers from the mother-country carried with them such portion of its common & statute law as was applicable to their new situation, & also the rights & immunities of British subjects (*PARKE, B.*).—*KIELLEY v. CARSON* (1842), 4 Moo. P. C. C. 63; 4 State Tr. N. S. 609; 7 Jur. 137; 13 E. R. 225, P. C.

Annotations:—*As to (1)* *Refd.* *Fenton v. Hampton* (1858), 11 Moo. P. C. C. 347; *Ex p. Brown* (1864), 5 B. & S. 280; *Dill v. Murphy* (1864), 1 Moo. P. C. C. N. S. 487; *Doyle v. Falconer* (1866), L. R. 1 P. C. 328; *A.-G. of New South Wales v. Macpherson* (1870), 7 Moo. P. C. C. N. S. 49; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; *Barton v. Taylor* (1886), 11 App. Cas. 197. *As to (2)* *Refd.* *Ex p. Brown* (1864), 5 B. & S. 280; *Dill v. Murphy* (1864), 1 Moo. P. C. C. N. S. 487; *Doyle v. Falconer* (1866), L. R. 1 P. C. 328; *A.-G. of New South Wales v. Macpherson* (1870), 7 Moo. P. C. C. N. S. 49. *As to (3)* *Refd.* *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1.

16. — Whether conquered, ceded or settled colony.]—In bar to an action for assault & false imprisonment of pltf. in the island of Jamaica, deft. pleaded, that since the grievances complained of an Act of Indemnity had been passed by the Legislature of Jamaica, & assented to by the Crown, which enacted that all personal actions, suits, indictments, prosecutions, & proceedings, present or future, against any persons for acts done in good faith after the proclamation of martial law in the suppression of a rebellion which had broken out in the island, should be discharged & made void, & that any

PART II. SECT. 1.

14 i. Runs to colonies—When not expressly limited—Right to gold & silver mines.]—*WOOLLEY v. IRONSTONE HILL LEAD GOLD-MINING Co.* (1875), 1 V. L. R. (Eq.) 237.—**AUS.**

14 ii. —.]—The Sovereign has the right, by Order in Council, to deal with all matters respecting the govt. of the country or the administration of its public affairs when its

action is not restricted by a constitutional principle or by a prohibitory statute.—*QUEBEC PROVINCE v. ATLANTIC & LAKE SUPERIOR RY. Co.* (1898), Q. R. 8 Q. B. 42.—**CAN.**

d. Legislative powers of Crown—Western Pacific Islands.]—H.M. has jurisdiction & power by virtue of the royal prerogative & of inherent right to make laws for the govt. of British subjects within the Western Pacific Islands by Orders in Council.—*R. v. WEAVER* (1889), Udal 155.—**FIJI.**

e. — Crown colony.]—In a Crown Colony properly so called, the Crown has absolute & exclusive right of legislation within the scope of its prerogative.—*NATAL (Br.) v. GREEN* (1868), N. L. R. 138.—**S. AF.**

f. Power of Crown to issue commission to hold assize.]—*AMER v. R.* (1878), 2 S. C. R. 592.—**CAN.**

g. Power to cede territory—In British India.]—The British Crown has the power, without the intervention of

person by whom such acts had been done should be acquitted & indemnified against the Queen & all other persons; & that deft., the governor of the island, & all acting under his authority, were indemnified in respect of all acts done in order to put an end to the rebellion, & such acts were made & declared to be lawful; that the grievances complained of were acts done within the scope of the Act. Pltf. replied that deft. at the time of the passing of the Act, was the governor of Jamaica, & was a necessary party to the passing of the Act, & the Act could not have become the law of Jamaica without deft.'s assent as governor. On demurrers to the plea & replication:—*Held*: (1) the Crown had power to create a local legislature in a dependency of the Crown whether conquered, ceded, or settled; (2) the governor of a colony could legally give his official assent to a legislative measure in which he is personally interested.

(3) It was further argued that the Act in question was contrary to the principles of English law, & therefore void. This is a vague expression, & must mean either contrary to some positive law of England, or to some principle of natural justice, the violation of which would induce the ct. to decline giving effect even to the law of a foreign sovereign state. In the former point of view, it is clear that the repugnancy to English law which avoids a colonial Act means repugnancy to an imperial statute or order made by authority of such statute applicable to the colony by express words or necessary intendment; & that, so far as such repugnancy extends, & no further, the colonial Act is void (*WILLES, J.*).—*PHILLIPS v. EYRE* (1870), *L. R. 6 Q. B. 1*; *10 B. & S. 1004*; *40 L. J. Q. B. 28*; *22 L. T. 869, Ex. Ch.*

Annotations:—*As to* (3) *Reid. R. v. Crewe, Ex p. Sekgome, [1910] 2 K. B. 576. Generally, Mentd. Harris v. Quine (1869), L. R. 4 Q. B. 653; Ellis v. McHenry (1871), L. R. 6 C. P. 228; A.-G. for Colony of Hong Kong v. Kwok-A-Sing (1875), L. R. 5 P. C. 179; Rouquette v. Overmann (1875), 33 L. T. 420; The M. Moxham (1876), 46 L. J. P. 17; Musgrave v. Pulido (1879), 41 L. T. 629; Batthyany v. Walford (1886), 33 Ch. D. 624; Bath Grdins. v. Berwick-upon-Tweed Grdins., [1892] 1 Q. B. 731; British South Africa Co. v. Companhia de Moçambique, [1893] A. C. 602; Fielding v. Thomas, [1896] A. C. 600; Machado v. Fontes, [1897] 2 Q. B. 231; Carr v. Francis Times, [1902] A. C. 176; Rayment v. Rayment & Stuart, Chapman v. Chapman & Bulst, [1910] P. 271; Batt v. Metropolitan Water Board, [1911] 1 K. B. 845; McMillan v. Canadian Northern Ry., [1923] A. C. 120; Walpole v. Canadian Northern Ry., [1923] A. C. 113.*

17. Power of Crown to revoke constitution of colony.—By the treaty of Paris, of Feb. 10, 1763, the Island of Cape Breton was ceded by France to the King & Crown of Great Britain. By a proclamation issued by the King in Oct. 1763, the Islands of Cape Breton & St. John's were annexed to the Govt. of Nova Scotia, & the proclamation authorised the Governor to call General Assemblies, in the said Govts. respectively, as soon as the circumstances of the colonies would admit. In the year 1784, the Crown, by a commission to the Governor-in-Chief of Nova Scotia, & the Islands of St. John's & Cape Breton, granted a constitution to the Island of Cape Breton, to consist of a Lieutenant-Governor, Council, & Assembly, distinct from that of Nova Scotia. The govt. of the Island continued, however, to be

regulated by a Lieutenant-Governor & Council, but no General Assembly was convened, as directed by the commission of 1784. In the year 1820, the Crown, in the commission to the Governor-in-Chief of Nova Scotia, annexed Cape Breton to Nova Scotia. The inhabitants of Cape Breton petitioned the Crown, complaining of the illegality of the re-annexation by the act of the Crown alone, without their consent, or by an act of the Imperial Parliament, as contrary to the proclamation of 1763 & the commission of 1784:—*Held*: such re-annexation was legal, & petitioners were not entitled to a separate constitution under the commission of 1784.—*Re CAPE BRETON* (1846), *5 Moo. P. C. C. 259*; *13 E. R. 489, P. C.*

18. Grant of precedence to judges.—*Re BEDARD* (1849), *7 Moo. P. C. C. 23*; *7 State Tr. N. S. 973*; *13 Jur. 641*; *13 E. R. 788, P. C.*

19. Priority of Crown as creditor—Whether affected by colonial statute.—Where a bank had suspended payment, & a large sum was due by it, at the date of the winding up order, to Her Majesty, it had been held that the right of the Crown to payment in full in priority to other creditors had not been taken away by the Cos. Acts, 1862 (c. 89) & 1867 (c. 131), or by the Jud. Act, 1875 (c. 77), s. 10, or by the Bkpcy. Act, 1883 (c. 52), s. 150. The question now came before the ct. whether such prerogative was ousted in the colony of Victoria by the Crown Remedies & Liabilities Statute, 1865 (No. 241), s. 17:—*Held*: the statute had no force outside the colony, but was a mere procedure statute, & could not operate as a waiver by the Crown of its prerogative to sue in this country, because that right could only be barred by express words in the Act, or by words of necessary implication in the same Act, & the prerogative of the Crown must prevail, & the sums claimed be paid in full.

The Victorian statute is a mere procedure statute regulating the procedure by the Crown in Victoria in respect of Crown debts. The statute is also a colonial statute & has no force outside the colony (*CHITTY, J.*).—*Re ORIENTAL BANK CORPN.* (No. 2) (1885), *54 L. J. Ch. 327*; *52 L. T. 172.*

Annotation:—*Reid. Re Webb* (Smithfield, London), [1922] 2 Ch. 369.

20. — Whether affected by British North America Act, 1867 (c. 3)—Relations between Crown & provinces of Canada.—*MARITIME BANK OF CANADA (LIQUIDATORS) v. NEW BRUNSWICK (RECEIVER-GENERAL)*, No. 14, *ante*.

See, also, CONSTITUTIONAL LAW, Vol. XI., p. 502, Nos. 42 *et seq.*

Legislative powers of Crown.—*See* No. 5, *ante*, Nos. 35, 243, 246, 254, 258, 260, 672, *post*.

SECT. 2.—THE EXECUTIVE.

SUB-SECT. 1.—THE GOVERNOR.

A. Nature and Scope of Authority.

21. No sovereign authority—Authority limited to powers conferred by commission.—The

the Imperial Parliament, to make a cession of territory within British India to a foreign prince or feudatory.—*LACHMI NARAIN v. PARTAB SINGH* (1878), *1 L. R. 2 All. 1.*—*IND.*

h. Power to assent to laws extra-territorial in scope.—The Chinese Extradition Ordinance, 1889, though extra-territorial in its scope, having

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been assented to by the Sovereign in the exercise of his prerogative right of legislation is not *ultra vires* the legislature of the colony.—*Re JU KI SHING (alias JRU CHOW), Re CHINESE EXTRADITION ORDINANCE, 1889* (1908), *3 Hong Kong L. R. 20.*—*HONG KONG.*

k. —.—*Re CHAN YUE SHAN,*

Ex p. CHAN KING PO (1908), *4 Hong Kong L. R. 128.*—*HONG KONG.*

PART II. SECT. 2, SUB-SECT. 1.—A.

21. No sovereign authority—Authority limited to powers conferred by commission.—As between the Governor & a subject, the Governor of a Colony has not a delegation of the

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Sec. 2.—The executive: Sub-sect. 1, A.]

Governor of a colony has not, by virtue of his appointment, the sovereign authority delegated to him, & an act done by him on his own authority, unauthorised either by his commission, or expressly or impliedly by any instructions, is not equivalent to such an act being done by the Crown itself, & is consequently not valid.—*CAMERON v. KYTE* (1835), 3 Knapp, 332; 3 State Tr. N. S. 607; 12 E. R. 678, P. C.

Annotations:—*Fold. Musgrave v. Pulido* (1879), 5 App. Cas. 102. *Reid. Hill v. Bigge* (1841), 3 Moo. P. C. G. 465. *Mentd. Secretary of State in Council of India v. Kamachee Boye Sahaba* (1859), 13 Moo. P. C. C. 22; A.-G. for Dominion of Canada *v. Cairn A.-G. for Dominion of Canada v. Gillhula*, [1906] A. C. 542.

22. — Court to determine whether act within authority.]—Trespass for seising & detaining at Kingston in Jamaica a schooner of which pltf. was charterer, & which had, as alleged, put into the port of Kingston in distress & for repairs. Plea in substance of privilege & to the jurisdiction, that deft. was Captain-General & Governor-in-Chief of the Island of Jamaica, that the acts complained of were done by him as Governor of the island & in the exercise of his reasonable discretion as such, & as acts of state:—*Held*: the judgment *respondent* ouster was right & must be affirmed. The Governor of a colony in ordinary cases cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission & limited to the powers thereby expressly or impliedly entrusted to him. It is within the province of Municipal Cts. to determine whether any act of power done by a Governor is within the limits of his authority & therefore an act of state.

When it is established that the particular act in question is really an act of state policy done under the authority of the Crown, the defence is complete, & the cts. can take no further cognisance of it (*per Cur.*).—*MUSGRAVE v. PULIDO* (1879), 5 App. Cas. 102; 40 L. J. P. C. 20; 41 L. T. 629; 28 W. R. 373, P. C.

Annotations:—*Reid. Nircaha Tamaki v. Baker*, [1901] A. C. 561; *Bonanga Creek Gold Mining Co. v. R.*, [1916] 1 A. C. 566. *Mentd. Johnstone v. Pedlar*, [1921] 2 A. C. 262.

23. — Restriction by constitutional practice of colony—Newfoundland.]—By rule 278 of the rules & orders for the proceedings of the House of Assembly of Newfoundland, made under Representation Act, 1892 (Newfoundland), s. 4, "In all contracts extending over a period of years & creating a public charge, actual or prospective, entered into by the govt., there shall be inserted

the condition that the contract shall not be binding until it has been approved by a resolution of the House."

In 1909, the Governor in Council entered into a contract with applts. under the great seal of Newfoundland for the extension of a transatlantic cable to Newfoundland & ancillary matters; the contract, which was to continue for 25 years, provided for an annual payment by the govt. to applts., & that applts. should have entry duty free for all cables, instruments, tools, & supplies necessary for carrying it out, but did not contain the provision required by rule 278. The cable was laid & certain other work carried out, but upon a change of the Ministry the new govt. repudiated the contract & declined to submit it for legislative sanction. By the letters patent under which the Governor was appointed his powers were to be exercised according to (*inter alia*) "such laws & ordinances as are or shall be in force in Our said Colony":—*Held*: the prerogative power of the Governor under the letters patent was subject to the restrictions imposed by the constitutional practice of the colony.—*COMMERCIAL CABLE CO. v. NEWFOUNDLAND GOVERNMENT*, [1916] 2 A. C. 610; 86 L. J. P. C. 19; 115 L. T. 574; 33 T. L. R. 2, P. C.

Annotation:—*Mentd. Mackay v. A.-G. for British Columbia*, [1922] 1 A. C. 457.

24. Scope of general authority—Grant of waste lands within colony—New Zealand.]—*Qu.*: whether the Governor of the Colony of New Zealand, has, under his general authority, as such Governor, vested in him, so much of the prerogative of the Crown, as relates to the making of grants of waste lands within the colony?

A grant of lands made by the Governor to a land claimant, founded upon the recommendation contained in the report of a comr., such grant embracing a quantity of land exceeding the amount prescribed by Ordinance, Sess. 1, No. 2, of 1841:—*Held*: void, & judgment given for the Crown.—*R. v. CLARKE* (1851), 7 Moo. P. C. C. 77; 13 E. R. 808, P. C.

Annotation:—*Mentd. R. v. Hughes* (1866), L. R. 1 P. C. 81.

25. — To act as ordinary—Crown colony.]—*Semble*: the governor of a British colony has the ecclesiastical power of an ordinary, without that authority being expressly named in his commission.—*BASHAM v. LUMLEY* (1829), 3 C. & P. 489; 2 State Tr. N. S. 321, N. P.

26. Power to assent to colonial legislation—Where personal interest involved.]—*PHILLIPS v. EYRE*, No. 10, *ante*.

whole royal authority, his powers being limited by the express terms of his commission.—*FAURE v. COLONIAL SECRETARY* (1880), F. 82.—S. AF.

23 i. — Restriction by constitutional practice of colony—New Zealand.]—The authority given by clause 7 of the Letters Patent to the Governor to appoint comrs. & other officers is a delegation of the prerogative or exclusive power of the Crown to appoint judges, comrs., & other officers; & the power so delegated must be exercised in accordance with law & constitutional practice.—*COCK v. A.-G.* (1909), 28 N. Z. L. R. 405.—N.Z.

1. — To appoint marshal of Vice-Admiralty Court.]—The office of marshal of the Vice-Admiralty Ct. is not in the grant of the Crown in its regal character, & cannot therefore be in the appointment of the Governor unless he holds a civil commission as Vice-Admiral.—*STEWART v. HUTCHINGS* (1817), 1 Nfld. L. R. 58.—NFLD.

m. Scope of general authority—Disposition of Crown lands.]—By Land Act, 1898 (s. 39), the Governor is authorised to exempt from sale, & either to reserve to H.M. or to dispose of in such other manner as for the public interest may seem best, any lands vested in the Crown that may be required for certain specified objects or purposes, which include public health, safety, utility, convenience, or enjoyment, or for otherwise facilitating the improvement & settlement of the colony.—A.-G. FOR WESTERN AUSTRALIA *v. PILLING* (1913), 15 W. A. L. R. 117.—AUS.

n. — Whether grant of sea coast—Newfoundland.]—The whole of the sea coast of Newfoundland is dedicated to the fishery by 10 & 11 Will. 3, c. 25, & the Governor cannot grant any part thereof.—*HOWE v. STREET* (1820), 1 Nfld. L. R. 213.—NFLD.

o. — Revoking Order in Council.]—An Order in Council was made after

7 Will. 4, c. 118, & before 4 & 5 Vict. c. 100, appropriating land to religious purposes:—*Held*: under sect. 27 of the latter statute, the Governor in Council had power to revoke such appropriation.—*SIMPSON v. GRANT* (1855), 5 Gr. 267.—CAN.

p. Power to assent to colonial legislation—Bye-laws.]—By Meat Industry Act, 1915, s. 30, the Metropolitan Meat Industry Board, constituted by that Act, may make bye-laws. Such bye-laws are to be submitted to the Governor for his approval, & when approved & published in the Gazette, subject to the Act, have the force of law.—A.-G. *v. METROPOLITAN MEAT INDUSTRY BOARD* (1917), 18 S. R. N. S. W. 9; 34 N. S. W. N. N. 51.—AUS.

q. ——*Re EDMONTON BYE-LAW* (1900), 4 Terr. L. R. 450; 21 C. L. T. 100.—CAN.

r. ——*Where a municipality is empowered to make rules &*

27. Legislative power conferred by colonial act—Proclamation of laws in annexed territory.—No authority to make new laws.]—Pondoland Annexation Act, 1894, s. 2, gives authority to the Governor to add to the existing laws, already proclaimed & in force in the territories annexed, such laws as he "shall from time to time by proclamation declare to be in force in such territories":—*Held*: this sect. did not, according to its true construction, authorise the Governor to make new laws, but only to transplant to the new territories & enact there such laws as were already in force in other parts of the colony.—*SPRIGG v. SIGCAU*, [1897] A. C. 238; 66 L. J. P. C. 44; 76 L. T. 127; 13 T. L. R. 246, P. C.

Annotations.—*Refd.* *R. v. Halliday*, [1917] A. C. 260. *Mentd.* *R. v. Crews*, *Ex p. Sekgome*, [1910] 2 K. B. 576.

28. No power to add to number of judges.—New Zealand.]—*BUCKLEY v. EDWARDS*, No. 200, *post*.

29. Power to remit sentence—Contempt of colonial court—Bahama Islands.—Letters patent appointing the Governor of a colony empowered the Governor to pardon any offender "convicted of any crime," & to "remit any fines, penalties, or forfeitures":—*Held*: a Governor so appointed, had power to remit a sentence of fine & imprisonment imposed for contempt by a ct. of justice in the colony.—*Re BAHAMA ISLANDS, SPECIAL REFERENCE FROM*, [1893] A. C. 138; *sub nom. Re MOSELEY*, 62 L. J. P. C. 79; 68 L. T. 105; 57 J. P. 277, P. C.

Annotation.—*Mentd.* *Seaward v. Paterson*, [1897] 1 Ch. 545.

regulations, such rules & regulations must be bye-laws duly sanctioned by the Governor.—*CLAREMONT MUNICIPALITY v. HUDSON* (1899), 16 S. C. 380.—S. AF.

s. Legislative power conferred by Colonial Act—Pensions.—An order was made by the Governor in Council under Constitution Act for regulating the granting of pensions to persons retiring or being released from office on political grounds, & a patent for a pension was issued under the Order. *Scire facias* was brought to repeal the patents on the ground that the order had not been well made under the Act. On demurrer:—*Held*: the Order was well made & the patent well granted.—*R. v. IRELAND* (1863), 2 W. & W. 291.—AUS.

t. Proclamation prohibiting importation of opium.—A proclamation by the Governor-General in Council under Customs Act, 1901, s. 52 (g), prohibiting the importation into the Commonwealth of opium suitable for smoking, is valid.—*BAKTER v. AH WAY* (1909), 8 C. L. R. 626.—AUS.

u. Act construed strictly.—Regulations made by the Governor in Council under Sugar Cane Prices Act, 1915, s. 22, are *ultra vires* if they enact provisions which go beyond the plain intention of the legislature appearing from a strict construction of the words of the Act.—*COLONIAL SUGAR REFINING CO., LTD. v. A. G. OF QUEENSLAND* (1916), S. R. Q. 278.—AUS.

v. Morrison v. Hoare. [1920] V. L. R. 270.—AUS.

w. A delegated power of legislation must be exercised strictly in accordance with the powers creating it; & in the absence of express power so to do the authority cannot be delegated to any other person or body.—*GERAGHTY v. PORTER* (1917), 36 N. Z. L. R. 554.—N.Z.

x. The power to make regulations for "preserving good

order among persons engaged in fishing" which is conferred upon the Governor in Council by Fisheries Act, 1908, s. 5 (f), will not cover a regulation forbidding the owner or crew of any licensed fishing-boat to "carry on board any firearms unless authorised to do so in writing by the Collector of Customs."—*JORGENSEN v. RIDINGS*, [1917] N. Z. L. R. 980.—N.Z.

d. Miners' liens.—*Re STEINBERGER* (1906), 5 W. L. R. 93.—CAN.

e. Absolute discretion.—Where enactments authorise the Governor in Council to prohibit acts which "in his opinion" are injurious, & to make such regulations as he thinks advisable, the cts. have no power to pronounce upon the advisableness or propriety of any particular regulation.—*HACKETT v. LANDER & SOLICITOR-GENERAL*, [1917] N. Z. L. R. 947.—N.Z.

f. Licenses to cut trees.—By Indian Act, 1886 (c. 43), s. 54, the Superintendent-General, or any officer or agent authorised by him to that effect, may grant licences to cut trees on reserves & ungranted Indian lands at such rates & subject to such conditions, regulations & restrictions as are, from time to time, established by the Governor in Council.—*BOOTH v. R.* (1913), 12 E. L. R. 144; 51 S. C. R. 20.—CAN.

g. Provincial Governor—Power to present to vacant rectory.—Prior to 32 Vict. (c. 6), the Lieutenant-Governor of the province had, by virtue of the Queen's prerogative, & the laws of the Church of England in this province, the right to collate & to present to a vacant rectory.—*Doe d. ST. GEORGE'S CHURCH (RECTOR) v. COUBLE & MAYES* (1870), 2 Han. 96.—CAN.

h. Power to appoint magistrates.—The power to appoint police magistrates is vested in the Lieutenant-Governors of the Provinces under B. N. A. Act, 1867, s. 92.—*RICHARDSON v. RANSOM* (1885), 10 O. R. 387; 4 Cart. 630.—CAN.

30. Right to statutory bounties for seizure of slaves—Governor absent from colony.—The governor of a colony being the person to whom the general management of such colony is entrusted is the person entitled to the bounties payable in respect of a seizure of slaves, even though he is absent from the colony at the time the seizure is made.—*Re BOUNTIES PAYABLE IN RESPECT OF SEIZURE OF CERTAIN SLAVES AT SIERRA LEONE* (1863), Brown. & Lush. 148; 32 L. J. P. M. & A. 189; 9 Jur. N. S. 1254.

31. Powers exercisable "on sufficient grounds shown to his satisfaction"—Duty to hold inquiry—Transfer of indenture of immigrant.—The power given by s. 203 of the Immigration Ordinance Trinidad to the Governor, "on sufficient ground shown to his satisfaction," to transfer the indentures of immigrants from one employer to another cannot properly be exercised without inquiry; except in special circumstances such as an emergency, any person against whom a complaint is made must be given a fair opportunity to make any relevant statement, & to controvert any relevant statement made to his prejudice.—*DE VERTEUIL v. KNAGGS*, [1918] A. C. 557; 87 L. J. P. C. 128, P. C.

Annotation.—*Mentd.* *Weinberger v. Inglis*, [1919] A. C. 606.

32. Provincial governor—Appointment by executive government—Under British North America Act, 1867 (c. 3), s. 58—Status.—*MARITIME BANK OF CANADA (LIQUIDATORS) v. NEW BRUNSWICK (RECEIVER-GENERAL)*, No. 14, *ante*.

Governor of Channel Islands.—See Part X., Sect. 2, *post*.

k. Power to exercise Crown's prerogative.—Provincial Lieutenant-Governors, since confederation, represent the Crown in a modified manner, & are entitled to exercise the prerogative rights of the Crown in respect to all matters declared by B. N. A. Act, 1867, to be provincial & to be dealt with by the local govt., in the same manner as before confederation.—*PROVINCIAL GOVERNMENT v. MARITIME BANK LIQUIDATORS* (1888), 27 N. B. R. 379.—CAN.

l. Power to dismiss municipal health officer.—It is competent for the Lieutenant-Governor in Council to dismiss a municipal health officer appointed by municipal by-law.—*A. G. of BRITISH COLUMBIA v. MILNE* (1892), 2 B. C. R. 190.—CAN.

m. Power to prohibit day when Act comes into force—No subsequent power to postpone day.—*COPE & TAYLOR v. SCOTTISH UNION INSURANCE CO.* (1896), 5 B. C. R. 329.—CAN.

n. Power to extend time for assessment work.—*PETERS v. SAMSON* (1898), 63 B. C. R. 405.—CAN.

o. No power to authorise illegal survey.—*BUTON v. PORT CARLING VILLAGE* (1902), 22 C. L. T. 139; 3 O. L. R. 445; 1 O. W. R. 67.—CAN.

p. Power to make election regulations.—*Re PROVINCIAL ELECTIONS ACT* (1903), 10 B. C. R. 114.—CAN.

q. No power to prohibit licenses over reserved lands.—*BAKER v. SMART, LECKIE v. WATT* (1906), 12 B. C. R. 129; 3 W. L. R. 505.—CAN.

r. Power to dissolve societies.—The power of Lieutenant-Governor in Council to dissolve societies created under Benevolent Societies Act, though not for any public purpose, is one of the powers of govt. exercisable by the executive.—

Sect. 2.—The executive: Sub-sect. 1, A., B., C. & D.]

83. Decision to forfeit lease—Necessity of overt act unequivocally expressed—Ultra vires cancellation of lease previously approved—Liability to damages on petition of right.]—MINISTER OF MINES v. HARNEY, [1901] A. C. 347; 70 L. J. P. C. 38; 84 L. T. 369; 17 T. L. R. 374, P. C.

Re RAILWAY PORTERS' CLUB (1906), 11 B. C. R. 398; 2 W. L. R. 162.—CAN.

a. — Power to assent to proposed law unalterable by provincial legislature.]—The provincial legislature can create a method of enacting laws without the approval of the legislature, so long as it leaves intact the office of the Lieutenant-Governor. The absence of reference in the Initiative & Referendum Act to a message from the Crown as a pre-requisite to money bills is such an attempted amendment or alteration of the office of the Lieutenant-Governor as is explicitly forbidden by the B. N. A. Act, 1867. It is immaterial whether a provincial legislature by an Act seeks to add to or take from the rights, powers or authorities which, by virtue of his office, a Lieutenant-Governor exercises. In either case it is *ultra vires* legislation. The Lieutenant-Governor cannot assent to any proposed law which has not been submitted to & passed by the Assembly. A provincial legislature may not delegate powers which would have the effect of causing others to take the place of, or perform the functions of, the legislature.—**Re INITIATIVE & REFERENDUM ACT, [1917] 1 W. W. R. 1012; [1919] A. C. 935.—CAN.**

i. — Exercise of discretion conferred by legislature—Cannot be controlled by court.]—ELECTRIC, ETC., CO., LTD. v. A.-G. & HYDRO COMMISSION (1917), 38 O. L. R. 383; *reced.*, [1919] A. C. 687.—CAN.

a. Power to remove judge—Without cause assigned.]—Each individual judge of county cts. holds his office at the pleasure of the Governor in Council & may be removed without cause assigned.—**It. v. ROGERS, Ex p. LEWIS (1878), 4 V. L. R. 334.—AUS.**

b. Power to inquire into judge's conduct—Cannot be delegated.]—Charges having been preferred against a county ct. judge, a commission was issued under the great seal of Canada, reciting the facts & the provisions of 22 Geo. 3, c. 75 (Imp.), & directing the comrs. to examine into the charges, & for that purpose to summon witnesses & require them to give evidence on oath & produce papers; & to report thereupon. The inquiry proceeded, & a motion was made for a prohibition:—**Held:** inquiries under the Imperial Act should be made before the Governor-General in Council, & the authority could not be delegated, nor inquiry upon oath authorised by commission.—**Re SQUIER (1882), 46 U. C. R. 474.—CAN.**

c. No power to override bye-law lawfully passed.]—R. v. SALTERIO, R. v. MCKENZIE, R. v. TUMULTY (1890), 1 Terr. L. R. 301; 11 C. L. T. 27.—CAN.

d. Interference with navigation—Power conferred on Crown—Exercisable by Governor-General.]—Wherever by an Act of a Provincial Legislature passed before the Union authority is given to the Crown to permit an interference with the public right of navigation, such authority is exercisable by the Governor-General & not by the Lieutenant-Governor of the Province.—**It. v. FISHER (1891), 2 Exch. C. R. 365.—CAN.**

e. Absolute discretion—Repair of public work.]—Whether the repair of a

public work should be made or the money voted by Parliament expended is within the discretion of the Governor in Council or of the Minister of the Crown under whose charge the work is; & for the exercise of that discretion he & they are responsible to Parliament alone, & such discretion cannot be reviewed by the cts.—**HAMBURG AMERICAN PACKET CO. v. R. (1902), 33 S. C. R. 252.—CAN.**

f. Power to grant ferry licences—Governor-General.]—The Governor-General in Council, if authorised by Parliament, may confer, by licence or otherwise, an exclusive right to any such ferry.—**Re INTERNATIONAL & INTERPROVINCIAL FERRIES (1905), 36 S. C. R. 206.—CAN.**

g. — Lieutenant - Governor.]—NORTH VANCOUVER FERRY & POWER CO. v. BUNBURY (1911), 17 W. L. R. 450; 16 B. C. R. 170.—CAN.

h. Extent of power to refer matters for consideration of Supreme Court.]—54 & 55 Vict. c. 25, s. 4, does not empower the Governor-General in Council to refer to the Supreme Ct. of Canada, for hearing & consideration, supposed or hypothetical legislation which the legislature of a province might enact in the future. The Governor in Council may refer important questions of law or fact touching specified subjects, or touching any other matter with reference to which he sees fit to exercise this power.—**Re SUNDAY LAWS (1905), 25 C. L. T. 77; 35 S. C. R. 581.—CAN.**

k. Power to exclude immigrants—Cannot be delegated.]—The power conferred upon the Governor-General in Council by Dominion Immigration Act, 1907, s. 30, to prohibit the landing of immigrants of a specified class, cannot be delegated to the Minister of the Interior:—**Held:** an Order in Council to that effect was *ultra vires*, & aliens who had been detained on landing were discharged.—**Re BEHAMI LAL (1908), 8 W. L. R. 129; 13 B. C. R. 415.—CAN.**

l. Power given by statute to approve plans—No power to disapprove on grounds of public policy.]—61 Vict. (c. 107), (D), incorporated a co. for the purpose of constructing & operating a canal. Sect. 22 provided that before the work of constructing the canal was begun, the plans, etc., were to be approved by the Governor in Council:—**Held:** the Governor in Council had no discretionary power to refuse approval of the plans on the ground that the undertaking authorised by the Parliament was opposed to public policy.—**LAKE CHAMPLAIN, ETC., CANAL CO. v. R. (1916), 54 S. C. R. 401; 35 D. L. R. 670.—CAN.**

m. Absolute power to order banishment.]—The power of the Governor in Council under the Banishment Ordinance, No. 1 of 1882, to issue an order of banishment is absolute, & the ct. has no power to review the action taken thereon.—**Re LO TSUN MAN, Re LAI YIT NGAM, Re KUONG TSY KING (1910), 5 Hong Kong L. R. 166.—HONG KONG**

n. Legislative power—Offences committed outside territorial limits not included.]—The Governor-General of India in Council has no power to

B. Civil Liability.

See, generally, PUBLIC AUTHORITIES & PUBLIC OFFICERS.

34. Whether liable to be sued in England—For injury committed in colony—Trespass & false imprisonment.]—Trespass & false imprisonment lies in England by a native Minorquin, against a Governor of Minorca, for such injury committed

legislate for offences committed on the high seas outside the territorial limits of British India, though he has power to legislate in respect of offences committed on the high seas within three miles of its coasts.—**It. v. KASTYA RAMA (1871), 8 Bom. 63.—IND.**

o. — Indian Councils Act, 1861 (c. 67).]—The Governor-General in Council has power to make laws & regulations binding on all persons within the Indian territories under the dominion of H.M., no matter when such territories were acquired. His legislative powers are not limited to those territories which, at the date of Indian Councils Act, 1861 (c. 67), were under the dominion of H.M.—**ABDULLA v. MOHAN GHK (1889), 1 L. R. 11 All. 490.—IND.**

p. — —.]—Under Indian Councils Act, 1861, s. 23, no Ordinance can have any force of law for more than six months from its promulgation, but the Governor-General in Council has the power to pass an Act embodying the provisions of an Ordinance. The Governor-General in Council has also the power to oust the jurisdiction of the cts., & Ordinance III., 1914, s. 11, which is embodied in Act I, 1915, & which seeks to oust the jurisdiction of the cts., does not offend against Indian Councils Act, 1861 (c. 67), s. 22.—**Re JEWIA NATHOO (1917), 1 L. R. 44 Calc. 489.—IND.**

q. Power to transfer territory to jurisdiction of High Court.]—The Governor-General in Council has authority to transfer a portion of the territory originally comprised within the jurisdiction of the ct. of the Judicial Comr. of the Central Provinces & place it within the jurisdiction of the High Ct.—**BALESHWAR BAGARI v. BHAGHATH DAS (1908), 1 L. R. 35 Calc. 701; 12 C. W. N. 657.—IND.**

r. Power to appoint commission of inquiry.]—The Governor has power to appoint a Commission to inquire into charges made by a prisoner against a warden of a gaol.—**JELICOE v. HASELDEN (1902), 22 N. Z. L. R. 313.—N.Z.**

aa. Power to appoint sheriff—While regular sheriff absent on leave.]—The Governor has power to appoint a Sheriff for a district during the absence on leave of the Sheriff already appointed for that district, & an appointment expressed to be during the absence on leave of the Sheriff already appointed is valid.—**It. v. PEDDLE (1907), 26 N. Z. L. R. 972.—N.Z.**

bb. No power to vary Act of Parliament.]—The Governor in Council cannot vary the provisions of an Act of Parliament.—**CAPE TOWN, TOWN COUNCIL v. TABLE BAY HARBOUR BOARD (1906), 23 S. C. 639.—S. AF.**

cc. Power to mobilise forces.]—The power of the Governor-General to mobilise the military forces of the Union in time of war includes all subsidiary powers ancillary & necessary thereto, such as the enlistment & payment of recruits, in order to bring the forces up to the strength necessary to cope with the emergency of war.—**DEFENCE MINISTER v. TERBRUGGE (1920), C. P. D. 280.—S. AF.**

by him in Minorca.—**MOSTYN v. FABRIGAS** (1774), 1 Cowp. 161; 98 E. R. 1021; *affg.* S. C. *sub nom.* **FABRIGAS v. MOSTYN** (1773), 2 Wm. Bl. 929.

Annotations :—**Consd.** *Hill v. Bigge* (1841), 3 Moo. P. C. C. 465; *Phillips v. Eyre* (1869), L. R. 4 Q. B. 225; *Musgrave v. Pulido* (1879), 5 App. Cas. 102. **Refd.** *R. v. Johnson* (1805), 6 East. 583; *Muro v. Kaye* (1811), 4 Taunt. 34; *Warden v. Bailey* (1811), 4 Taunt. 67; *Morris v. Robinson* (1824), 5 Dow. & Ry. K. B. 34; *Bedrechund v. Elphinstone* (1830), 2 State Tr. N. S. 379; *The Bailey* (1868), 5 Moo. P. C. C. N. S. 262; *Hart v. Gumpach* (1873), 9 Moo. P. C. C. N. S. 241; *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453; *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602; *Adam v. British & Foreign S.S. Co.*, [1898] 2 Q. B. 430; *Board v. Board*, [1919] A. C. 956. **Mentd.** *Sutton v. Johnstone* (1786), 1 Term Rep. 493; *R. v. Johnson* (1805), 2 Smith K. B. 591; *Shackell v. Macaulay* (1824), 3 L. J. O. S. Ch. 30; *A.-G. v. Bovet* (1846), 15 M. & W. 60; *Munden v. Brunswick* (1847), 16 L. J. Q. B. 300; *R. v. Upton St. Leonards* (1847), 10 Q. B. 827; *Houlden v. Smith* (1850), 19 L. J. Q. B. 170; *Rucknaboy v. Lulloobhoy Mottichund* (1852), 8 Moo. P. C. C. 4; *Magnay v. Edwards* (1853), 21 L. T. O. S. 103; *A.-G. v. Kont* (1862), 1 H. & C. 12; *Scott v. Seymour* (1862), 32 L. J. Ex. 61; *Di Sora v. Phillips* (1863), 10 H. L. Cas. 625; *Feather v. R.* (1865), 6 B. & S. 257; *Ellis v. McHenry* (1871), L. R. 6 C. P. 228; *Whitaker v. Forbes* (1875), 45 L. J. Q. B. 140; *De Greuchy v. Wills* (1879), 43 J. P. 818; *Re Hawthorne, Graham v. Massey* (1883), 23 Ch. D. 743; *Gilbey v. Cossey* (1912), 106 L. T. 607.

35. — Wrongful commitment.—**DUTTON v. HOWELL** (1693), Show. Parl. Cas. 24; 1 E. R. 17, II. L.

Annotations :—**Consd.** *Hill v. Bigge* (1841), 3 Moo. P. C. C. 465. **Mentd.** *Lyons Corp'n. v. East India Co.* (1836), 1 Moo. P. C. C. 175.

36. — Confirmation of sentence of court martial—On person not subject to martial law.—**COMYN v. SABINE** (1738), cited 1 Cowp. 169; 98 E. R. 1026.

37. — Cruel & oppressive imprisonment—For disobedience to orders.—**WALL v. McNAMARA** (1779), cited 1 Term Rep. 536; 99 E. R. 1239. *Annotation* :—**Refd.** *Sutton v. Johnstone* (1786), 1 Term Rep. 493.

38. — Wrongful suspension of judge—Approval by Crown.—**SUTHERLAND v. MURRAY** (1783), cited 1 Term Rep. 538; 99 E. R. 1240. *Annotation* :—**Refd.** *Feather v. R.* (1865), 6 B. & S. 257.

39. — Assault & false imprisonment—Responsibility for acts of subordinate.—In an action against the Governor of Gibraltar for assault & false imprisonment, it was proved that a party of soldiers under the command of his military secretary, surrounded pltf.'s house, & that, while a search was making in the adjoining house for a Spaniard, who was suspected to be concealed there, pltf., in attempting to leave his house, was prevented from doing so by a sentinel placed at the door, who compelled him to return. It was also proved that deft.'s secretary, being unattached, could not employ the troops on such a service except by his directions & that deft. had never called his secretary to account for what had occurred.

The jury having returned their verdict for pltf. :—**Held** : they were warranted in coming to the conclusion that deft. had ordered the search, & the act complained of was a necessary consequence of deft.'s orders.—**GLYNN v. HOUSTON** (1811), 2 Man. & G. 337; 4 State Tr. N. S. App. A. 1308; 2 Scott, N. R. 548; 5 Jur. 195; 133 E. R. 775.

Annotation :—**Mentd.** *Scott v. Seymour* (1862), 10 W. R. 739.

See, also, No. 22, *ante*.

PART II. SECT. 2, SUB-SECT. 1.—B.
b. *Whether liable to be sued in courts of colony—Cause of action connected with official capacity.*—The Governor of Bombay & Members of Council are by Statute exempt from

the jurisdiction of the High Ct., so far as acts done in their public capacity are concerned.—**JEHANGIR M. CURSETJI v. SECRETARY OF STATE FOR INDIA** (1902), 1 L. R. 27 Bom. 189.—**IND.**

As to Acts of State, *see, generally*, **PUBLIC AUTHORITIES & PUBLIC OFFICERS.**

40. Whether liable to be sued in courts of colony—During term of office—Cause of action unconnected with official capacity.—**Applt.**, whilst holding the office of Lieutenant-Governor of the Island of Trinidad, was sued to judgment in Trinidad by resps. on a bond executed before the date of his entering on the governorship :—**Held** : an action will lie against the governor of a colony in the cts. of the colony, while he is such governor for a cause of action unconnected with his official capacity.

Semle : though judgment be given against such governor, his person is not liable to be taken in execution.—**HILL v. BIGGE** (1841), 3 Moo. P. C. C. 465; 4 State Tr. N. S. 723; 6 Jur. 21; 13 E. R. 189, P. C.

Annotations :—**Refd.** *Musgrave v. Pulido* (1879), 5 App. Cas. 102. **Mentd.** *Munden v. Brunswick* (1847), 10 Q. B. 658.

41. Whether liable to arrest—In execution of judgment obtained against—Action of debt.—**HILL v. BIGGE**, No. 40, *ante*.

C. Criminal Liability.

See, generally, **CRIMINAL LAW.**

42. Liability to be tried in England—Crime or misdemeanour in exercise of office.—**WALL'S CASE** (1802), 28 State Tr. 51.

43. — — — — ——**R. v. PICTON** (1805), 30 State Tr. 225.

Annotations :—**Refd.** *Re Eyre* (1868), 16 W. R. 754. **Mentd.** *Lacon v. Higgins* (1822), 3 Stark. 178; *Rowe v. Brontou* (1828), 3 Man. & Ry. K. B. 133; *Barnes v. Stuart* (1834), 1 Y. & C. Ex. 119; *De Bode's Case* (1845), 8 Q. B. 208; *Scott v. Seymour* (1862), 1 H. & C. 219; *Anderson v. Gorrie*, [1895] 1 Q. B. 668.

44. — — — — — 11 & 12 Will. 3, c. 12—42 Geo. 3, c. 85.—By 11 & 12 Will. 3, c. 12, & 42 Geo. 3, c. 85, if any Governor of a colony or other person holding or having held public employment out of Great Britain has been guilty of any crime or misdemeanour in the exercise of his office, every such crime, etc., may be prosecuted or inquired of, & heard & determined in the Ct. of King's Bench in England either upon information by the A.-G. or upon indictment found, & such crime, etc., may be laid to have been committed in Middlesex.—**R. v. EYRE** (1868), L. R. 3 Q. B. 487; 37 L. J. M. C. 159; 18 L. T. 511; 32 J. P. 518; 11 Cox, C. C. 162; *Finlason's Report*; *sub nom. Re EYRE*, 16 W. R. 754; *sub nom. R. v. VAUGHAN & EYRE*, 9 B. & S. 329.

Annotation :—**Refd.** *Marnis v. General Officer Commanding the Lines of Communication & A.-G. of Cape Colony* (1901), 71 L. J. P. C. 42.

D. Privilege of Official Communications.

See, generally, **DISCOVERY, INSPECTION, & INTERROGATORIES; EVIDENCE.**

45. Communication between governor & Attorney-General.—(1) Communications which take place between a Governor & his Attorney-General are confidential, & if a witness is interrogated as to their substance in a Ct. of Justice, he is not bound to answer any questions respecting them.

(2) The delivery of a pamphlet by a Governor to his Attorney-General, not for any public purpose,

PART II. SECT. 2, SUB-SECT. 1.—D.
c. *Resolution of colonial government.*—A resolution of the Bombay Govt. stated that, after careful consideration of the facts disclosed in certain papers & of the explanation

Sect. 2.—The executive: Sub-sect. 1, D.; sub-sects. 2, 3, 4, 5 & 6. Sect. 3: Sub-sects. 1 & 2, A.]

but in order that he might peruse it, is such a publication as will make him responsible in an action, if the pamphlet be a libel.

(3) In an action against a Governor of a colony by the Surveyor-General, who held that appointment in the colony such office being an office at will, for suspending him, maliciously, & without probable cause, it is necessary for *pltf.* to prove express & positive malice.—*WYATT v. GORE* (1816), *Holt*, N. P. 299, N. P.

Annotations:—As to (1) Consd. Home v. Bentinck (1820), 2 *Brod. & Bing.* 130. *Generally, Mentd. Blake v. Pilfold* (1832), 1 *Mood. & R.* 198.

46. Orders in writing to subordinate officer—Destruction of factory.]—Orders in writing were given by the Governor of Sierra Leone to an officer under him for the destruction of a factory. Called as a witness in a suit against the Governor for trespass the officer objected to the production of the orders on the ground that it would be attended with inconvenience to the public, that such orders should be divulged. His objection was upheld.—*COOKE v. MAXWELL* (1817), 2 *Stark.* 183, N. P.

47. Communication between Secretary of State for Colonies & Governor—Between Royal Commissioner & Governor—Between Royal Commissioner & Secretary of State.]—An action for libel was brought by the Governor of a colony, the alleged libel consisting in a statement made by *deft.* in a newspaper that *pltf.*, as Governor, had sent to the Secretary of State for the Colonies garbled accounts of certain proceedings in the Colonial Assembly. *Deft.* pleaded that the statement was true. On *appln.* for discovery by *deft.*, *pltf.* in his affidavit specified certain documents to the production of which he objected, as follows: "I have in my custody, but acquired & held by me in my capacity of Her Majesty's Governor of Mauritius & subject to the directions of Her Majesty's Secretary of State for the Colonies, a number of copies of various despatches, reports, & other communications, with the enclosures referred to therein, which passed either between Her Majesty's Secretary of State for the Colonies & myself as such Governor as aforesaid, or between the Royal Commissioner appointed by Her Majesty to inquire into the affairs of Mauritius & myself as such Governor as aforesaid, or between the Royal Commissioner & the Secretary of State. The attention of the Secretary of State has been directed to the nature & dates of the documents, & he has directed me not to produce or disclose the documents, & to object to their production in these proceedings on the ground of the interest of the state & of the public service. In consequence of those instructions & of the rules & regulations of Her Majesty's Colonial Service I am unable to produce

the documents, & I object to produce them on the ground aforesaid." No affidavit or statement was made on behalf of the Secretary of State in support of the objection:—*Held*: it sufficiently appeared that the documents in question were privileged from discovery, & the application must be refused.

—*HENNESSY v. WRIGHT* (1888), 21 *Q. B. D.* 509; 57 *L. J. Q. B.* 530; 59 *L. T.* 323; 53 *J. P.* 52; 4 *T. L. R.* 597, D. C.

Annotations:—Refd. Wright v. Mills (1890), 62 *L. T.* 558. *Mentd. Ford v. Blest* (1890), 6 *T. L. R.* 295; *Marks v. Beyfus* (1890), 54 *J. P.* 775; *Hughes v. Vargas* (1893), 9 *R.* 661; *Re Hargreaves*, [1900] 1 *Ch.* 347; *Asiatic Petroleum Co. v. Anglo-Persian Oil Co.*, [1918] 1 *K. B.* 822; *Ronnfeldt v. Phillips* (1918), 34 *T. L. R.* 556.

SUB-SECT. 2.—THE EXECUTIVE COUNCIL.

48. Power to remove judge—Misbehaviour & neglect of duty.]—The Governor & Council of a Colony or Plantation have power, under 22 *Geo. 3*, c. 75, to remove a judge from his office, for misbehaviour or neglect of duty.

Where a judge availed himself of his judicial office, through an incident connected with the constitution of the Supreme Ct. in Van Dieman's Land, to obstruct his creditor from recovering a debt due from him, & upon an investigation by the Governor & Council, was found to be involved to a large extent in bill transactions & pecuniary embarrassment:—*Held*: by the Judicial Committee sufficient to justify the Governor & Council in removing him from office.—*MONTAGU v. VAN DIEMAN'S LAND (LIEUT.-GOV.)* (1849), 6 *Moo. P. C. C.* 489; 13 *E. R.* 773, P. C.

49. Provincial Secretary—Duty to submit petition to Lieutenant-Governor—Liability for definite refusal—Action for damages.]—Under the British Columbia Crown Procedure Act, s. 4, it is the duty of the Provincial Secretary to submit to the Lieut.-Governor a petition left with him as therein directed for that purpose. His definite refusal to do so gave petitioner a cause of action involving damages which must be submitted to a jury.—*FULTON v. NORTON*, [1908] *A. C.* 451; 78 *L. J. P. C.* 29; 99 *L. T.* 455; 24 *T. L. R.* 794, P. C. *Annotation:—Mentd. Ruffy-Arnell & Baumann Aviation Co. v. R.*, [1922] 1 *K. B.* 599.

SUB-SECT. 3.—SUITS AGAINST THE CROWN.

See CONSTITUTIONAL LAW, Vol. XI., pp. 523 *et seq.*

SUB-SECT. 4.—SUITS AGAINST PUBLIC OFFICIALS.

See PUBLIC AUTHORITIES & PUBLIC OFFICERS.

tendered by *pltf.*, the Governor in Council had come to the conclusion that *pltf.* had been guilty of misconduct reflecting gravely on his reputation for honesty & trustworthiness:—*Held*: the resolution, being an official communication, was absolutely privileged.—*JEHANGIR M. CURSETJI v. SECRETARY OF STATE FOR INDIA* (1902), 1 *L. R.* 27 *Bom.* 189.—*IND.*

PART II. SECT. 2, SUB-SECT. 2.

d. Provincial Secretary—No power to bind Crown—Signature to letter of credit.]—The Provincial Secretary of Quebec wrote the following letter to D. with the assent of his colleagues, but not being authorised by Order-in-

Council: "The Govt. will vote in the budget for 1891-2 an item of 4,000 piastres which will be paid you for printing the 'List of Crown Lands' ordered from you"—*Held*: the letter constituted no contract between D. & the govt., the provincial secretary having no power to bind the Crown by his signature to such document: & a subsequent vote of the Legislature of a sum of money for printing a "List of Crown Lands," etc., was not a ratification of the agreement with D., the govt. not being obliged to expend the money, though authorised to do so, & the vote containing no reference to the contract with D. nor to the letter of credit.—*JACQUES-CARTIER*

BANK v. R. (1895), 25 *S. C. R.* 84.—*CAN.*

e. Minister of Interior—Use of Ordinance lands—Authority of Governor necessary.]—The Minister of the Interior cannot lease or authorise the use of ordinance lands without the authority of the Governor in Council.—*QUEBEC SKATING CLUB v. R.* (1893), 3 *Exch. C. R.* 387.—*CAN.*

f. Cabinet not recognised by constitution.]—*R. v. TOOTH* (1874), 4 *Q. S. C. R.* 96.—*AUS.*

g. —.]—*R. v. DAVENPORT* (1874), 4 *Q. S. C. R.* 99.—*AUS.*

SUB-SECT. 5.—TENURE OF OFFICE OF CROWN SERVANTS.

See CONSTITUTIONAL LAW, Vol. XI., pp. 505 et seq.

SUB-SECT. 6.—ADMINISTRATION BY CHARTERED COMPANY.

Acts of State.]—See PUBLIC AUTHORITIES & PUBLIC OFFICERS.

50. Administration on behalf of Crown—Expenses of company—Right to reimbursement.]—*Re SOUTHERN RHODESIA*, No. 7, ante.

SECT. 3.—THE LEGISLATURE.

SUB-SECT. 1.—STATUS OF LEGISLATIVE ASSEMBLY.

51. Permanent body—New South Wales—Payment of members.]—By New South Wales Parliamentary Representatives' Allowance Act, 1889, s. 2, every member of the Legislative Assembly then serving or thereafter to serve therein was to receive an allowance, which was to be payable to every such member of that present Legislative Assembly then serving & to every such member thereafter elected from the time of his taking his seat, & in every case until he should resign, or his seat be vacated, or until Parliament should be dissolved, or should expire by effluxion of time:—*Held*: for the purposes of the Act the Legislative Assembly must be regarded as a permanent body, & the allowance was intended to be made to members of future assemblies as well as of that which existed when the Act was passed.

According to the ordinary use of the term "Legislative Assembly," it means the assembly created by the Constitution Act, which, though liable to be dissolved or to expire by effluxion of time, is an essential part of the constitution of the colony & must be regarded as a permanent body (*per cur.*).—A.-G. FOR NEW SOUTH WALES v. RENNIE, [1896] A. C. 376; 65 L. J. P. C. 52; 74 L. T. 532; 12 T. L. R. 393, P. C.

52. Readjustment of provincial representation—Canada—British North America Act, 1867 (c. 3), s. 51.]—The British North America Act, 1867 (c. 3), s. 51, provides that the number of members for a province may be readjusted in the manner provided by the Act, in the proportion which the population of the province bears to the aggregate population of Canada:—*Held*: Canada in the sect. must be taken to mean the whole Dominion of Canada, & not only the four original provinces

existing at the date of the passing of the Act, & the sect. applied to the representatives of provinces subsequently incorporated; & the representation of such provinces might be decreased on a first readjustment.—A.-G. FOR PROVINCE OF PRINCE EDWARD ISLAND v. A.-G. FOR DOMINION OF CANADA, A.-G. FOR PROVINCE OF NEW BRUNSWICK v. A.-G. FOR DOMINION OF CANADA, [1905] A. C. 37; 74 L. J. P. C. 9; 91 L. T. 636; 21 T. L. R. 25, P. C.

SUB-SECT. 2.—POWERS AND PRIVILEGES OF COLONIAL LEGISLATURES.

A. In General.

53. Dominion law applicable equally to all persons & property within limits—No privilege in favour of Englishmen.]—*CAMPBELL v. HALL*, No. 5, ante.

54. Not delegate of Imperial Legislature.]—*POWELL v. APOLLO CANDLE CO.*, No. 64, post.

See, also, No. 90, post.

55. Ordinance passed in pursuance of Order in Council—Not disapproved by Crown—Whether void for excess.]—(1) Appeal allowed though the security for prosecuting the same had not been perfected in due time, such omission being occasioned by the suspension & removal of the judges in the colony, & the imperfect constitution of the Ct. in consequence thereof.

(2) An ordinance passed in pursuance of an Ord. in Council, & not altered or disapproved by Her Majesty in Council, though seemingly more extensive than contemplated by the Order, is not void for the excess, but will be considered as duly authorised by the Order, & taken in conjunction with it.—*INGLIS v. DE BARNARD* (1841), 3 Moo. P. C. C. 425; 13 E. R. 172, P. C.

Annotation:—As to (2) *Reid*. *Phillips v. Eyre* (1870), 10 B. & S. 1004.

56. Exercise of powers—Whether absolute or conditional.]—*R. v. BURAH*, No. 197, post.

57. Colonial statute binding on Admiralty Courts—Compulsory pilotage.]—Colonial statutes, imposing compulsory pilotage upon vessels navigating in the waters of the colony, & relieving owners from liability for the negligence of pilots taken under such compulsion, are binding equally upon the High Ct. of Admty. & the Vice-Admty. Cts.

In the present case the law invoked is contained in an Act of the legislature of a colony belonging to the Crown, & ratified by the express sanction of Her Majesty. Their Lordships have no doubt whatever that this law, in every case to which it is applicable, is of binding authority, equally in

PART II. SECT. 3, SUB-SECT. 2.—A.

h. Whether members of legislature privileged from arrest in civil cases—Even if House be sitting.]—*NORTON v. CHICK* (1894), 15 N. S. W. L. R. 172.—AUS.

k. — — — — —]—*CUVILLIER v. MUNRO* (1848), 4 L. C. R. 146.—CAN.

l. — — — — —]—*Same privilege as in England*.]—*R. v. GAMBLE* (1852), 9 U. C. R. 546.—CAN.

m. Resolution imposing customs duties—Whether valid.]—*STEVENSON v. R.* (1865), 2 W. W. & A. B. 143.—AUS.

n. — — — — —]—*DEANE & JOHNSON v. FIELD* (1864), 1 R. 163.—S. AF.

o. Resolution conflicting with ex-

isting rights—Whether valid.]—The govt. was authorised by resolution of both Houses of Parliament to grant a piece of land in the W. Municipality to an agricultural society for public purposes:—*Held*: notwithstanding such resolution the govt. was not entitled to make a grant conflicting with the existing rights of the inhabitants.—*WORCESTER MUNICIPALITY v. COLONIAL GOVERNMENT* (1907), 24 S. C. 67; 17 C. T. R. 178.—S. AF.

p. Cannot compel attendance of witnesses—Before committee.]—The Colonial Legislature cannot compel attendance of witnesses before a committee of the legislative assembly.—*Re KELLY, Ex p. THE SHERIFF* (1860), 2 Legge, 1275.—AUS.

q. Power of Speaker to preserve

order in House.]—The public have access to the legislative chambers & precincts of the House of Assembly, as a matter of privilege only, under licence either tacit or express, which can be revoked whenever necessary in the interest of order & decorum. The power of the Speaker & officers of the House to preserve order may be exercised during the intervals of adjournment between sessions as well as when the House is sitting. A staircase leading from the street entrance up to the corridor of the House is a part of the precincts of the House, & a member of the public who conducts himself thereon so as to interfere with the discharge by members of their public duties may lawfully be removed.—*PAYSON v. HUBERT* (1903), 34 S. C. R. 400.—CAN.

Sect. 3.—The legislature: Sub-sect. 2, A., B., C., D. & E.]

the Queen's High Ct. of Admty. & in the Vice-Admty. Ct. of Canada, from which it is to be observed their Lordships are now sitting as a Ct. of Appeal (PHILLIMORE, J.).—THE HIBERNIAN (1872), 27 L. T. 725; 1 Asp. M. L. C. 491, C. P.

58. Cannot affect jurisdiction of Judicial Committee of Privy Council.]—A.-G. FOR DOMINION OF CANADA v. A.-G. FOR ONTARIO, A.-G. FOR QUEBEC v. A.-G. FOR ONTARIO, No. 370, *post*.

B. Repugnancy to English Law.

59. Nature of doctrine.]—PHILLIPS v. EYRE, No. 16, *ante*.

60. Effect of Colonial Laws Validity Act, 1865 (c. 63).—Legislative right of Imperial Parliament preserved.]—The obvious meaning of the Colonial Laws Validity Act, 1865 (c. 63), is to preserve to the Imperial Parliament a right to legislate for a colony to which a local legislature has been assigned, & to forbid the local legislature to enact anything repugnant to Imperial legislation so effected, but not otherwise to derogate from the general powers of colonial legislatures.—R. v. MARAIS, *Ex p. MARAIS*, [1902] A. C. 51; 71 L. J. P. C. 32; 85 L. T. 363; 17 T. L. R. 704, P. C.

61. Grant of conditional pardon—Whether *ultra vires*.]—Writs of *habeas corpus* were issued by a judge in vacation for bringing up W. & others, prisoners in the gaol of Liverpool.

The keeper of the gaol brought up the prisoners, & returned in the case of each prisoner in substance, that by a statute of Upper Canada the Lieutenant-Governor in Council was empowered to grant a pardon on such conditions as might appear proper; that prisoner was so pardoned on condition of transportation to Van Diemen's Land:—*Held*: the statute of Upper Canada authorising conditional pardons was not *ultra vires*, either on the ground of repugnancy to English law or on the ground that the performance of the condition must take place out of Upper Canada.—WATSON'S CASE (1839), 9 Ad. & El. 731; 112 E. R. 1389; *sub nom.* R. v. WIXON, 8 L. J. Q. B. 129; *sub nom.* CANADIAN PRISONERS' CASE, 3 State, Tr. N. S. 963; *sub nom.* R. v. BATCHELDOR, 1 Per. & Dav. 516; 2 Will. Woll. & H. 10.

Annotations:—*Reid*. *Re Brennan & Gallan* (1847), 11 Jur.

775. *Mentd. Re Clarke* (1842), 2 Q. B. 619; *Re Hammond* (1846), 15 L. J. M. C. 136; *Bowdler's Case* (1848), 12 Q. B. 612; *Re Hakewill* (1852), 12 C. B. 223; *Re Barnard*, *Ex p. Wetherell* (1853), 20 L. T. O. S. 241; *Atlee v. Hook* (1854), 2 W. R. 511; *Swann v. Dakins* (1855), 3 C. L. R. 802; *Re Timson* (1870), L. R. 5 Exch. 257; *R. v. Mount* (1875), L. R. 6 P. C. 283; *R. v. Brixton Prison*, *Ex p. Stallmann* (1912), 107 L. T. 553.

C. Territorial Limitation.

62. General rule.]—The laws of a colony cannot extend beyond its territorial limits (TURNER, C.J.).—Low v. ROUTLEDGE (1865), 1 Ch. App. 42; 35 L. J. Ch. 114; 13 L. T. 421; 30 J. P. 4; 11 Jur. N. S. 939; 14 W. R. 90, L. J.J.; *on appeal*, *sub nom.* ROUTLEDGE v. LOW (1868), L. R. 3 H. L. 100, H. L.

Annotations:—*Reid*. *Davidson v. Hill*, [1901] 2 K. B. 606. *Mentd.* *Low v. Ward* (1868), L. R. 6 Eq. 415; *Mathieson v. Harrod* (1868), L. R. 7 Eq. 270; *Graves' Case* (1869), L. R. 4 Q. B. 715; *Reid v. Maxwell* (1896), 2 T. L. R. 790; *Collingridge v. Enmott* (1887), 57 L. T. 864.

63. —.]—*Re ORIENTAL BANK CORPN.* (No. 2), No. 19, *ante*.

64. —.]—*Jurisdiction confined to territory*.]—(1) A Colonial Legislature is not a delegate of the Imperial Legislature. It is restricted in the area of its powers, but within that area it is unrestricted.

(2) Customs Regulation Act, 1879 (No. 19), s. 133, is not *ultra vires* the Colonial Legislature.—POWELL v. APOLLO CANDLE CO. (1885), 10 App. Cas. 282; 54 L. J. P. C. 7; 53 L. T. 638, P. C.

65. —.]—*Powers of colonial Master in Lunacy*.]—B. having become of unsound mind, was admitted as an insane patient into the public hospital at P., in the colony of New South Wales. On a petition presented by the Master in Lunacy of New South Wales, & by the lunatic by her next friend asking that the whole of the fund might be paid out to the Master:—*Held*: although by 42 Vict., No. 7, the New South Wales statute relating to the insane, the Master was empowered to collect the assets of the lunatic in the colony, no such power was given to him with reference to assets in England.

This Act is compulsory as against any person residing within the limits of the colony; but no Act of the Legislature of New South Wales can compel any one here in England to pay to the Master, who has no title to the property, anything belonging to the insane patient. No trustee in England can be compelled to obey the Act of Parliament of New South Wales (COTTON, L.J.).—

PART II. SECT. 3, SUB-SECT. 2.—B.

59 i. Nature of doctrine.]—The only repugnancy that would invalidate a colonial Act, is a repugnancy to the statute of the Imperial Parliament affecting the colony, or some order or regulation made thereunder, or to some of the leading principles of the common law.—R. v. WHELAN (1868), 6 W. W. & A.B. 7.—AUS.

59 ii. —.]—No colonial Act can be "repugnant" to an Act of the British Parliament within the meaning of Colonial Laws Validity Act, 1865 (c. 63), s. 2, unless it involve, either directly or ultimately, a contradictory proposition, probably, contradictory duties or contradictory rights.—QUEENSLAND A.-G. v. COMMONWEALTH A.-G. (1915), 20 C. L. R. 148.—AUS.

59 iii. —.]—A statute made & passed by the General Assembly of New Zealand is not void for repugnancy to the law of England, unless it is opposed to some Act of the Imperial Parliament made expressly binding upon & applicable to the colony.

ROBINSON v. REYNOLDS, Mac. 562.—N.Z.

PART II. SECT. 3, SUB-SECT. 2.—C.

64 i. General rule.—*Jurisdiction confined to territory*.]—The legislative enactments of a country have no binding force *proprio vigore* in another country, & a legislature cannot authorise corps created by it to carry on business in a foreign country. Where, however, a legislature assumes so to do, such authority is only a legislative sanction to the agreement of the corporators to transact their business abroad as well as at home.—CLARKE v. UNION FIRE INSURANCE CO. (1884), 10 P. R. 313.—CAN.

64 ii. —.]—No province can pass laws to operate outside its own territory, & no tribunal established by a province can extend its process beyond the province so as to subject persons or property elsewhere to its decisions.—DEACON v. CHADWICK (1901), 1 O. L. R. 346.—CAN.

64 iii. —.]—JONES v. TWOHEY (1908), 8 W. L. R. 295; 1 Alta. L. R. 267.—CAN.

64 iv. —.]—A warrant for a provincial offence cannot be given effect to outside the limits of that province. Provincial legislation attempting to authorise it would be *ultra vires*.—*Ex p. ELI* (1920), 1 W. W. R. 661.—CAN.

64 v. —.]—Prisoner, who was a British subject, married in New Zealand, & subsequently, while he was serving as a member of the New Zealand Expeditionary Force & his wife was still alive, went through the form of marriage with another woman in England. On his return to New Zealand, prisoner was indicted for bigamy & convicted under the Crimes Act, 1908, s. 224, which defines the offence as "the act of a person who, being married, goes through a form of marriage with any other person in any part of the world":—*Held*: an enactment purporting to deal with crime beyond the territorial limits of the Dominion was beyond the power of the New Zealand Parliament, & the conviction must be set aside.—R. v. LANDER, [1919] N. Z. L. R. 305.—N.Z.

Re BARLOW'S WILL (1887), 36 Ch. D. 287; *sub nom. Re BARLOW'S WILL TRUSTS, Re BARLOW, BARTON v. SPENCER*, 50 L. J. Ch. 795; 57 L. T. 95; 35 W. R. 737; 3 T. L. R. 695, C. A.

Annotations.—*Consd.* *Re Brown*, [1895] 2 Ch. 666. *Mentd.* *Re De Linden, Re Spurrier's Settlement, De Hayn v. Garland*, [1897] 1 Ch. 453; *Re Chatard's Settlement*, [1899] 1 Ch. 712; *Diddisheim v. London & Westminster Bank*, [1900] 2 Ch. 15; *Thiley v. Chalmers, Guthrie*, [1900] 1 Ch. 80; *Re Solot's Trusts*, [1902] 1 Ch. 488; *Re Carr's Trusts, Carr v. Carr*, [1904] 1 Ch. 792.

66. — Offence committed without colony.—The Criminal Law Amendment Act of N. S. Wales, 1883 (s. 54), enacts that whosoever being married marries another person during the life of the former husband or wife, whosoever such second marriage takes place, shall be liable to penal servitude for seven years:—*Held*: these words must be intended to apply to those actually within the jurisdiction of the legislature, & consequently there was no jurisdiction in the colony to try applt. for the offence of bigamy alleged to have been committed in the U.S.A.

Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute . . . it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories, & the maxim which has been more than once quoted, "*Extra territorium jus dicenti impune non prestatur*," would be applicable to such a case (*EARL OF HALSBURY, C.*).—*MACLEOD v. A.-G. FOR NEW SOUTH WALES*, [1891] A. C. 455; 60 L. J. P. C. 55; 65 L. T. 321; 7 T. L. R. 703; 17 Cox, C. C. 341, P. C.

Annotations.—*Consd.* *A.-G. for Canada v. Cain, Same v. Gihula*, [1906] A. C. 542. *Refd.* *Makin v. A.-G. of New South Wales* (1893), 69 L. T. 778; *Swift v. A.-G. for Ireland*, [1912] A. C. 276.

67. Statute authorising performance of condition outside territory—Whether ultra vires.—*WATSON'S CASE*, No. 61, *ante*.

68. Large bay—Point beyond three miles from shore—Newfoundland.—Injunction granted by the Supreme Ct. of Newfoundland to prevent applts. from infringing certain exclusive rights granted to resp. co. under 17 Vict. c. 2. It appeared that applts. had brought & laid a telegraph cable to a buoy more than thirty miles within Conception Bay, the average width of the bay being fifteen miles. The buoy & cable were more than three miles from the shore of the bay:—*Held*: (1) according to the true construction of 17 Vict. c. 2, the intention of the Legislature of Newfoundland was to prohibit for the benefit of resp. co. the use of any part of the territory of Newfoundland by any other person for telegraphic communication, whether within the island or as a mere means of transit between places outside the territory. (2) By 59 Geo. 3, c. 38, the Imperial Legislature asserted exclusive dominion over the bay, & by 35 & 36 Vict. c. 45, conferred upon the Legislature of Newfoundland the right to legislate with regard to it.—*DIRECT UNITED STATES CABLE CO. v. ANGLO AMERICAN TELEGRAPH CO.* (1877), 2 App. Cas. 394; 46 L. J. P. C. 71; 36 L. T. 265, P. C.

Annotations.—*Refd.* *The Locken* (1918), 34 T. L. R. 594. *Mentd.* *London & India Docks Co. v. Thames Steam Tug & Lighterage Co.*, [1909] A. C. 15

D. Legislation affecting Absentees.

See, generally, CONFLICT OF LAWS.

69. Subjection of absentees to colonial tribunals.—The Colonial legislature has power under New Zealand Constitution Act, 1852 (c. 72), to subject to its tribunals persons who are neither by themselves nor their agents present in the colony:—*Held*: the law of the local legislature authorising the local cts. in any case of contracts made or to be performed in the colony to decide whether they will or not proceed in the absence of deft. is *intra vires* & reasonable.

Whether a judgment against an absentee without service of the writ will be enforced by the cts. of another country is a question for those cts., & does not affect the validity of the local law.—*ASHBURY v. ELLIS*, [1893] A. C. 339; 62 L. J. P. C. 107; 69 L. T. 159; 9 T. L. R. 517; 1 R. 388, P. C.

Annotations.—*Consd.* *Rayment v. Rayment & Smart, Chapman v. Chapman & Bulst*, [1910] P. 271. *Refd.* *Gavin, Gibson v. Gibson*, [1913] 3 K. B. 379; *Phillips v. Batho*, [1913] 3 K. B. 25.

E. Punishment for Contempt.

See, generally, CONTEMPT OF COURT, ATTACHMENT, & COMMITTAL, Vol. XVI.

Contempt of British Parliament, *see* PARLIAMENT.

70. Whether power to punish inherent in legislative assemblies—Contempt committed outside precincts—Or direct contempt of authority.—The power of punishing contempts is inherent in every assembly possessing a supreme legislative authority; whether they are such as lend indirectly to obstruct their proceedings, or directly to bring their authority into contempt.

It appears that it, Jamaica, was a conquered island, & as in other territories obtained by conquest, such laws are in force as the King by supreme authority may choose to direct (*PARKE, B.*).—*BEAUMONT v. BARRETT* (1836), 1 Moo. P. C. O. 59; 3 State, Tr. N. S. App. A. 1283; 12 E. R. 734, P. C.

Annotations.—*Expld.* *Kielley v. Carson* (1842), 4 Moo. P. C. C. 63. *Consd.* *Fenton v. Hampton* (1858), 11 Moo. P. C. C. 347; *Doyle v. Falconer* (1866), L. R. 1 P. C. 328. *Refd.* *Dill v. Murphy* (1864), 1 Moo. P. C. C. N. S. 487; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; *Barton v. Taylor* (1886), 2 T. L. R. 382.

71. — Limited to powers necessary for existence of body & exercise of functions.—*KIELEY v. CARSON*, No. 15, *ante*.

72. — Immaterial whether legislature established by Crown or by statute.—The power of arrest with a view to punish for an alleged contempt committed beyond its own precincts is not incident to a colonial legislative chamber, & it is immaterial whether such legislature is established by statute, or by the Crown.

The *lex et consuetudo Parliamenti* was not introduced into the colony by the Australian Cts. Act, 1828 (c. 83), s. 9, which provided that all laws & statutes in force in England at the passing of the Act, not being inconsistent therewith, should be applied in the administration of justice in the colony, so far as they could be applied there.—*FENTON v. HAMPTON* (1858), 11 Moo. P. C. C. 347;

PART II. SECT. 3, SUB-SECT. 2.—E.

r. Whether power to punish inherent in legislative assembly.—A warrant of commitment for contempt by the legislative assembly recited that the legislative assembly did resolve that G. was guilty of contempt & breach of the privileges of the said legislative assembly & that the legis-

lative assembly had adjudged that he be for the said offence, taken into custody, etc.:—*Held*: inasmuch as the assembly had only such privileges as were enjoyed by the House of Commons in 1855, & possessed therefore limited powers only, the warrant should contain averments or state grounds to show that these powers had not been exceeded, & the warrant

was therefore bad & prisoner was discharged.—*Re GLASS* (1869), 6 W. W. & A'B. 45.—*AUS.*

s. What constitutes contempt—Libel on members of assembly.—The legislative council & legislative assembly of Victoria have all the privileges, immunities & powers which were legally held, enjoyed & exercised by

Sect. 3.—The legislature: Sub-sect. 2, E.; sub-sects. 3 & 4, A. (a).]

8 State, Tr. N. S. 873; 6 W. R. 341; 14 E. R. 727, P. C.

*Annotations:—*Consd. *Doyle v. Falconer* (1866), L. R. 1 P. C. 328. *Reid. Dill v. Murphy* (1864), 1 Moo. P. C. C. N. S. 487; *A.-G. of New South Wales v. Macpherson* (1870), L. R. 3 P. C. 268.

73. ————.]—The power of a colonial Legislative Assembly to commit a member or others for contempt committed in the presence of the House can only be given by express grant, & cannot be maintained by analogy to the privileges of the House of Commons, or the powers of a Court of Record, nor can such a power be implied as inherent in the very nature of a legislative body, such power neither being essential to its existence, nor to the proper discharge of its functions.

It is necessary to distinguish between a power to punish for a contempt, which is a judicial power, & a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self-preservation. If a member of a colonial House of Assembly is guilty of disorderly conduct in the House whilst sitting, he may be removed or excluded for a time, or even expelled, but there is a great difference between such powers & the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing; the right to inflict punishment is another. The former is all that is warranted by the legal maxim, "*Quando lex aliquid concedit concedere videtur et illud sine quo res ipsa esse non potest*," but the latter is not its legitimate consequence.

The privileges of the House of Commons, that of punishing for contempt being one, belong to it by virtue of the *lex et consuetudo Parliamenti*, which is a law peculiar to & inherent in the two Houses of Parliament of the United Kingdom. It cannot, therefore, be inferred from the possession of certain powers by the House of Commons, by virtue of that ancient usage & prescription, that the like powers belong to the Legislative Assemblies of comparatively recent creation in the dependencies of the Crown (*per curiam*).—*DOYLE v. FALCONER* (1866), L. R. 1 P. C. 328; 4 Moo. P. C. C. N. S. 203; 36 L. J. P. C. 33; 15 W. R. 366; 16 E. R. 293, P. C.

*Annotations:—*Consd. *Barton v. Taylor* (1886), 11 App. Cas. 197. *Distd. Fielding v. Thomas*, [1896] A. C. 600. *Reid. A.-G. of New South Wales v. Macpherson* (1870), L. R. 3 P. C. 268.

74. ———— Not punitive action or unconditional suspension of member.]—Resp. having entered the chamber of the New South Wales Assembly, of which he was a member, within a week after it had passed a resolution that he be "suspended from the service of the House," he was removed therefrom & prevented from re-entering it:—*Held*: the standing order of the Legislative Assembly, adopting so far as is applicable to its proceedings the rules, forms, & usages in force in the British House of Commons, & assented to by the Governor, was valid, but must be construed to relate to only such rules, forms, & usages as were in existence at the date of the order.

The powers incident to or inherent in a Colonial Legislative Assembly are "such as are necessary to the existence of such a body & the proper

exercise of the functions which it is intended to execute," & do not extend to justify punitive action, or unconditional suspension of a member during the pleasure of the Assembly.—*BARTON v. TAYLOR* (1886), 11 App. Cas. 197; 55 L. J. P. C. 1; 55 L. T. 158; 2 T. L. R. 382, P. C.

*Annotation:—**Distd. Fielding v. Thomas*, [1896] A. C. 600.

75. Acquisition of power to punish—Not incidental by law—Whether Crown can confer.]—*KIELLEY v. CARSON*, No. 15, *ante*.

76. ——— Only by express grant.]—*DOYLE v. FALCONER*, No. 73, *ante*.

77. Distinction between power to punish for contempt—& power to remove obstructions—Judicial functions not exercised by colonial houses of assembly.]—*DOYLE v. FALCONER*, No. 73, *ante*.

78. As to what constitutes contempt—Incidental power of assembly to decide—Statutory jurisdiction to punish.]—By the Constitution Act for the colony of Victoria (Victoria Constitution Act, 1885 (c. 55), & the Colonial Act, 20 Vict. No. 1) power is given to the Legislative Assembly of Victoria to commit by a general warrant for contempt & breach of privilege of that assembly.

G. was declared by the House of Assembly of Victoria to have committed a contempt & breach of privilege, & under the Speaker's warrant, which was in general terms, without specifying any specific offence, G. was committed to gaol. G. was afterwards brought up by *habeas corpus* & discharged out of custody by the Chief Justice of the Supreme Ct. in the colony, on the ground that the above Constitution Statute & Colonial Act did not confer upon the Legislative Assembly the same powers, privileges, & immunities as are possessed by the House of Commons:—*Held*: (1) the Statute & Act gave to the Legislative Assembly the same powers & privileges as the House of Commons had at the time of the passing of the Victoria Constitution Act (c. 55), of committing for contempt; (2) incident to those powers & privileges, there was vested in the Legislative Assembly the right of judging for itself what constituted a contempt, & of ordering the commitment to prison of persons adjudged by the House to have been guilty of a contempt & breach of privilege, by a general warrant, without setting forth the specific grounds of such commitment; (3) as G. had been guilty of a contempt & breach of the privilege of the Legislative Assembly, & had been duly committed, therefore the Supreme Ct. had no power to discharge him out of custody. Special leave to appeal granted on the ground that the question raised was one of public interest, involving the constitutional rights of a Colonial Legislative Assembly. On reversing the order of the ct. below no costs were given, as the appeal was only allowed to decide the abstract question.—*VICTORIA LEGISLATIVE ASSEMBLY (SPEAKER) v. GLASS* (1871), L. R. 3 P. C. 5; 7 Moo. P. C. C. N. S. 449; 40 L. J. P. C. 17; 2 L. T. 317; 20 W. R. 42; 17 E. R. 170, P. C.

79. ——— Apart from statute & prescription—House of Keys.]—A legislative body, such as the House of Keys, in the Isle of Man, has not, merely from its being endowed with legislative functions, the power to commit for contempt.

The Isle of Man is not a foreign dominion of the Crown within the meaning of 25 Vict. c. 20.—*Ex p. BROWN* (1864), 5 B. & S. 280; 4 New Rep. 163; 33 L. J. Q. B. 193; 10 L. T. 458; 28 J. P.

the Commons House of Parliament at the time of the passing of the Constitution Act; & publication outside the parliament house of a newspaper

article adjudged by the assembly to be a libel on the assembly, on a select committee thereof, & on a member of each in his capacity of such member

is a contempt for which the assembly has authority to commit.—*Re DILL* (1862), 1 W. & W. 171.—*AUS.*

566; 12 W. R. 821; 10 Jur. N. S. 945; 122 E. R. 835.

Annotation.—*Reid. R. v. Secretary of State for Home Affairs, Ex p. O'Brien*, [1923] 2 K. B. 361.

80. Comparison of powers of British House of Commons & colonial legislatures—*Lex et consuetudo Parliamenti not applicable to colonial legislatures.*—KIELLEY v. CARSON, No. 15, *ante*.

81. ——— By introduction of English Common Law.]—FENTON v. HAMPTON, No. 72, *ante*.

82. ———.]—DOYLE v. FALCONER, No. 73, *ante*.

83. Right of Assembly to assume powers of Court of Record—To deal with breaches of privilege & contempt—By way of committal—Not for criminal offence.]—FIELDING v. THOMAS, [1896] A. C. 600; 65 L. J. P. C. 103; 75 L. T. 216; 12 T. L. R. 548, P. C.

Power of British Houses of Parliament to punish for contempt, *see* PARLIAMENT.

84. Adoption of rules, forms & usages of British House of Commons—By colonial statute—Power given to colonial legislature to define privileges.]—The Legislative Assembly of Victoria was constituted by the Colonial Act of 1854, which Act was ratified & set out in the schedule to the Victoria Constitution Act (c. 55). By sect. 35 of the Act of 1854, the Legislature of Victoria is empowered to "define" the privileges, immunities, & powers, to be held, enjoyed, & exercised by the Council & Assembly, & by the Members thereof respectively. In pursuance of this power, the Colonial Legislature by an Act, 20 Vict., No. 1, enacted that the Legislative Council & Legislative Assembly of Victoria, respectively, & the Committees & Members thereof respectively, should hold, enjoy, & exercise such & the like privileges, immunities, & powers as, at the time of the passing of the Victoria Constitution Act (c. 55), were held, enjoyed, & exercised by the Commons House of Parliament of Great Britain & Ireland, & by the Committees & Members thereof :—*Held*: this enactment had properly defined these privileges & sufficiently exercised the power delegated to the Local Legislature.—DILL v. MURPHY (1864), 1 Moo. P. C. C. N. S. 487; 3 New Rep. 444; 10 L. T. 170; 10 Jur. N. S. 549; 12 W. R. 491; 15 E. R. 784, P. C.

Annotations.—*Consd. Victoria Legislative Assembly (Speaker) v. Glass* (1871), L. R. 3 P. C. 560. *Reid. Doyle v. Falconer* (1866), L. R. 1 P. C. 328.

85. ———.]—FIELDING v. THOMAS, No. 83, *ante*.

86. ——— By standing order—Application only to forms & usages in existence at date of order.]—BARTON v. TAYLOR, No. 74, *ante*.

—.]—*See, also*, Nos. 83, 84, *ante*.

87. Statutory power to punish—Commitment by general warrant—No jurisdiction of superior court to discharge from custody.]—VICTORIA LEGISLATIVE ASSEMBLY (SPEAKER) v. GLASS, No. 78, *ante*.

88. Standing order giving power to punish—

87 i. Statutory power to punish—Commitment by general warrant—House sitting as court of record.]—*Re. Thomas*, 21 C. L. T. 503.—CAN.

i. Comparison of privileges of British House of Commons & Colonial legislatures.]—The legislative assembly does not enjoy all the privileges which the House of Commons enjoys by virtue of ancient usages & prescription, but only those privileges which are necessary to the existence of such a body as the legislative assembly.—NORTON v. CHICK (1894), 15 N. S. W.

L. R. 172.—AUS.

a. ———.]—The power for arrest for contempt committed outside the Legislature belongs to the Imperial House of Commons only by virtue of ancient usage & prescription. The House of Assembly of Newfoundland does not possess this power.—*Re. KIELLEY* (1838), 2 Nfld. L. R. 72.—NFLD.

b. Whether Speaker has power to arrest member when outside house for disorder committed in it.]—WILLIS v. PERRY (1912), 13 C. L. R. 592.—AUS.

Made under Colonial Act & approved by Governor—Relating to orderly conduct of assembly—Whether within terms of power conferred.]—A standing order of the Legislative Assembly of New South Wales made under the Constitution Act No. 32 of 1902, s. 15, & approved by the Governor, empowered the House to suspend a member charged with an offence until a verdict given or further order :—*Held*: the standing order, being to regulate the orderly conduct of the Assembly, was within the terms of the power conferred. The House was sole judge as to the occasion requiring it; & a ct. of law could not question its validity so long as it related to orderly conduct.—HARNETT v. CRICK, [1908] A. C. 470; 78 L. J. P. C. 38; 99 L. T. 601; 24 T. L. R. 869, P. C.

SUB-SECT. 3.—EFFECT OF GRANT OF SUPPLIES.

89. Supplies granted to Crown.]—A Colonial Govt. represents the Crown, & supplies granted by a Colonial Legislature are granted to the Crown as much as supplies granted by the Imperial Legislature.—WILLIAMS v. HOWARTH, [1905] A. C. 551; 74 L. J. P. C. 115; 93 L. T. 115; 21 T. L. R. 670, P. C.

Annotation.—*Mentd. Leaman v. R.*, [1920] 3 K. B. 663.

SUB-SECT. 4.—SPECIAL FEATURES OF COLONIAL LEGISLATION.

A. Canada.

(a) In General.

90. Provincial legislature—Extent of powers—No delegation from Imperial Parliament.]—The Liquor Licence Act, 1877, of Ontario, provides licensing boards for the province, & gives power to such boards to regulate the liquor traffic & to impose penalties :—*Held*: such Act was not "The Regulation of Trade & Commerce," within the meaning of British North America Act, 1867 (c. 3), s. 91, & was within the powers of the Provincial Legislature, & such Legislature had power to delegate its authority to licensing boards.

The legislatures of the Provinces of Canada are in no sense delegates of, or acting under any mandate from, the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, & that its legislative assembly should have exclusive authority to make laws for the Province & for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary & as ample within the limits prescribed by sect. 92 as the Imperial Parliament

PART II. SECT. 3, SUB-SECT. 4.—A. (a).

c. Imperial Parliament sovereign—Dominion Parliament & provincial legislatures.]—The question of supremacy in relation to subjects of legislation, as distributed by the B. N. A. Act, 1867 (c. 3), arises only as between the Dominion Parliament & the provincial legislatures. The Imperial Parliament is sovereign to both.—METHERELL v. MEDICAL COUNCIL OF BRITISH COLUMBIA & MILNE (REGISTRAR OF THE COUNCIL) (1892), 2 B. C. R. 186.—CAN.

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in the plenitude of its power possessed & could bestow. Within these limits of subject & area the local legislature is supreme, & has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make bylaws or resolutions as to subjects specified in the enactment, & with the object of carrying the enactment into operation & effect (*per* CUR.).—HODGE v. R. (1883), 9 App. Cas. 117; 53 L. J. P. C. 1; 50 L. T. 301, P. C.

Annotations:—*Consd.* Powell v. Apollo Candle Co. (1885), 10 App. Cas. 282. *Fold.* Maritime Bank of Canada Liquidators v. New Brunswick, Receiver General, [1892] A. C. 437; A.-G. for Ontario v. A.-G. for the Dominion, [1896] A. C. 348. *Reid.* A.-G. for Canada v. Cain, Same v. Gilhula, [1906] A. C. 542; A.-G. for Canada v. A.-G. for Alberta & A.-G. for British Columbia, [1916] 1 A. C. 588; *Re Initiative & Referendum Act*, [1919] A. C. 935.

See, also, No. 64, *ante*.

91. Statute making judgment of court of appeal final in matters of insolvency—Whether infringement of Royal prerogative.]—The British North America Act, 1867 (c. 3), s. 91, in assigning to the Dominion Parliament the subjects of bkpcy. & insolvency, intended to confer & did confer on it legislative power to interfere with property, civil rights, & procedure within the provinces, so far as these latter might be affected by a general law relating to those subjects. Consequently the Dominion enactment, 40 Vict. c. 41, s. 28, amending the Canadian Insolvent Act, & providing that the judgment of the Ct. of Appeal in matters of insolvency should be final, *i.e.*, not subject to the appeal as of right to Her Majesty in Council allowed by the Civil Procedure Code, art. 1178, is within the competence of the Canadian Parliament, & does not infringe the exclusive powers given to the Provincial Legislature by sect. 92 of the Imperial statute. Neither does it infringe the Queen's prerogative, for it only limits the right of appeal as given by the Code. The section, according to the true construction of the word "final" therein, excludes appeals to Her Majesty, but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace. It, therefore, does not interfere with the prerogative of the Crown. *Qu.*: what powers may be possessed by the Parliament in Canada so to do.—CUSHING v. DUPUY (1880), 5 App. Cas. 409; 40 L. J. P. C. 63; 42 L. T. 445, P. C.

Annotations:—*Consd.* Tennant v. Union Bank of Canada, [1894] A. C. 31. *Reid.* *Re* Wl Matua's Will, [1908] A. C. 448; Canadian Pacific Ry. v. City of Toronto Corp'n. & Grand Trunk Ry. of Canada, [1911] A. C. 461. *Mentd.* Citizens Insee. of Canada v. Parsons, Queen Insee. v. Parsons (1881), 7 App. Cas. 96; A.-G. for Ontario v. A.-G. for the Dominion, [1896] A. C. 348.

92. Transfer of proprietary rights vested in provinces to Dominion—Not presumed from grant of legislative jurisdiction to Dominion—Effect of British North America Act, 1867 (c. 3).]—A.-G. FOR DOMINION OF CANADA v. A.-G. FOR PROVINCES OF ONTARIO, QUEBEC, & NOVA SCOTIA, A.-G. FOR PROVINCE OF ONTARIO v. A.-G. FOR DOMINION OF CANADA, A.-G. FOR PROVINCES OF QUEBEC, & NOVA SCOTIA v. A.-G. FOR DOMINION OF CANADA, No. 119, *post*.

93. Cancellation of contractual rights of railway co.—Railway transferred to Dominion Government subject to existing contracts.]—Under British North America Act, 1867 (c. 3), s. 103, read in connection with the 3rd schedule thereto, all railways belonging to the province of Nova Scotia,

including the railway in suit, passed to & became vested on July 1, 1867, in the Dominion of Canada, but not for any larger interest therein than at that date belonged to the province. The railway in suit being at the date of the statutory transfer subject to an obligation on the part of the provincial Government, confirmed by Provincial Act, 30 Vict. c. 36, to enter into a traffic arrangement with resp. co., the Dominion Government, in pursuance of that obligation, entered into a further agreement relating thereto of the 22nd of September, 1871:—*Qu.*: whether it was *ultra vires* the Dominion Parliament by an enactment to that effect to extinguish the rights of resp. co. under the said agreement:—*Held*: Dominion Act, 37 Vict. c. 16, did not, upon its true construction, purport so to do. Although it authorised a transfer of the railway to applt. it did not enact such transfer in derogation of resp.'s rights under the agreement of Sept. 22, 1871, or otherwise.—WESTERN COUNTIES RY. CO. v. WINDSOR & ANNAPOLIS RY. CO. (1882), 7 App. Cas. 178; 51 L. J. P. C. 43; 46 L. T. 351, P. C.

Annotations:—*Reid.* Windsor Ry. v. R. (1886), 51 J. P. 260; Public Works Comrs., Cape Colony v. Logan, [1903] A. C. 355; *Re* New River Co. & Metropolitan Water Board (1904), 68 J. P. 329; Central Control Board, Liquor Traffic v. Cannon Brewery Co., [1919] A. C. 744. *Mentd.* Exchange Bank of Canada v. R. (1886), 11 App. Cas. 157; Slattery v. Naylor (1888), 13 App. Cas. 446; *Re* Ellis & Ruislip-Northwood U. D. C., [1920] 1 K. B. 343

94. Enactment of criminal procedure unknown to English Common Law—For territory outside any province—Whether ultra vires powers of Dominion Parliament.]—By the Imperial statute 34 & 35 Vict. c. 28, s. 4, it is enacted that the Parliament of Canada may from time to time made provision for the administration, peace, order, & good government of any territory not for the time being included in any province:—*Held*: these words authorised the enactment of provisions & forms of criminal procedure unknown to the English common law; & further, the fact that a ct. of law might come to the conclusion that a particular enactment was not calculated as a matter of fact & policy to secure peace, order, & good government, would not entitle them to regard it as *ultra vires* the Dominion Parliament to enact.—RIEL v. R. (1885), 10 App. Cas. 675; 55 L. J. P. C. 28; *sub nom.* R. v. RIEL, 54 L. T. 339; 16 Cox, C. C. 48, P. C.

Annotations:—*Consd.* R. v. Crewe, *Ex p.* Sokgome, [1910] 2 K. B. 576. *Mentd.* Ibrahim v. R., [1914] A. C. 599.

95. Imposition of duty on foreign-built ship—"Goods imported into Canada"—Whether repugnant to Merchant Shipping Act, 1894 (c. 60).]—A foreign-built ship brought to Canada comes under the head of "goods imported into Canada" within the meaning of the Customs Tariff Act, 1897, & the imposition of a duty upon such ship under the Act prior to registration in Canada is not repugnant to the provisions of the Imperial M. S. Act, 1894 (c. 60).—ALGOMA CENTRAL RY. CO. v. R., [1903] A. C. 478; 72 L. J. P. C. 108; 89 L. T. 109; 19 T. L. R. 623; 9 Asp. M. L. C. 431, P. C.

96. Power to refer to courts for opinion on questions of law or fact—By executive governments of Dominion & Provinces.]—In 1875, 1891, & 1906 Acts were passed by the Dominion Parliament authorising the Executive Government of the Dominion to obtain by direct request answers from the Supreme Ct. of Canada on questions both of law & fact, & nearly all the provinces have passed Acts in similar terms requiring their own cts. to answer questions put by the provincial

Govts. :—Held : it was *intra vires* of the respective Legislatures to impose this duty on the cts. Though powers to that effect were not granted in express terms by the British North America Act, 1867, they were not repugnant thereto, but incidental to the complete self-government of Canada which was contemplated by that Act. The answers are only advisory, & by giving them it cannot be said that a ct. ceases to be such a judiciary as the Act provides for.—**A.-G. FOR ONTARIO v. A.-G. FOR CANADA**, [1912] A. C. 571; 81 L. J. P. C. 210; 106 L. T. 916; 28 T. L. R. 446, P. C.

97. Establishment of board to fix prices of commodities—Statute ultra vires Dominion Legislature.]—The Combines & Fair Prices Act, enacted by the Parliament of Canada in 1919, authorised the Board of Commerce, created by another statute of that year, to restrain & prohibit the formation & operation of such trade combinations for production & distribution in the Provinces as that Board might consider to be detrimental to the public interest. The Board might also restrict accumulation of food, clothing, & fuel beyond the amount reasonably required, in the case of a private person for his household, & in the case of a trader for his business, & require the surplus to be offered for sale at fair prices, & could attach criminal consequences to any breach of the Act which it determined to be improper :—**Held :** the Acts were *ultra vires* the Dominion Legislature, since they interfered seriously with "property & civil rights in the Provinces," a subject reserved exclusively to the Provincial Legislatures by s. 92 (2), of the British North America Act, 1867, & were not passed in any highly exceptional circumstances, such as war or famine, which conceivably might render trade combinations & hoarding subjects outside sect. 92 & within the general power given by sect. 91.—**Re BOARD OF COMMERCE ACT, 1919, & COMBINES & FAIR PRICES ACT, 1919**, [1922] 1 A. C. 191; 91 L. J. P. C. 40; *sub nom.* **A.-G. OF CANADA v. A.-G. OF ALBERTA, ETC.**, & **A.-G. OF QUEBEC**, 126 L. T. 290; 38 T. L. R. 90, P. C.

Annotation :—**Consol. Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.**, [1923] A. C. 695.

98. Bona vacantia—Right of Crown in right of province.]—*Bona vacantia* found in the Province of British Columbia belong to the Crown in right of the Province & not in right of the Dominion.—**R. (ON THE INFORMATION OF A.-G. FOR CANADA) v. A.-G. FOR BRITISH COLUMBIA** (1923), 40 T. L. R. 13; 68 Sol. Jo. 138, P. C.

(b) *Distribution of Powers between Dominion and Provincial Legislatures.*

i. *In General.*

99. Dominion legislation paramount—Matters enumerated in British North America Act, 1867 (c. 3), s. 91—Although trenching on matters assigned to province.]—Although warehouse re-

ceipts granted to itself by a firm which has not the custody of any goods but its own are not negotiable instruments within the meaning of Mercantile Amendment Act (c. 122 of Revised Statutes of Ontario) :—**Held :** (1) Dominion Bank Act (46 Vict. c. 120), while in force dispensed with that limitation, validated such receipts, & transferred to the indorsees thereof the property therein; (2) Bank Act was *intra vires* of the Dominion Parliament.

British North America Act, 1867, s. 91 (15), gives to that parliament power to legislate over every transaction within the legitimate business of a banker, notwithstanding that the exercise of such power interferes with property & civil rights in the province (see sect. 92, sub-sect. 13), & confers upon a bank privileges as a lender which the provincial law does not recognise.

The legislation of the Dominion Parliament, so long as it strictly relates to subjects enumerated in sect. 91 of the above Act, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by sect. 92.—**TENNANT v. UNION BANK OF CANADA**, [1894] A. C. 31; 63 L. J. P. C. 25; 69 L. T. 774; 10 T. L. R. 147; 6 R. 382, P. C.

Annotations :—*As to* (2) **Refd.** **A.-G. for Ontario v. A.-G. for the Dominion**, [1896] A. C. 348; **Grand Trunk Ry. of Canada v. A.-G. of Canada**, [1907] A. C. 65; **Great West Saddlery Co. v. R.**, [1921] 2 A. C. 91.

100. ——— Although conferring rights not recognised by provincial law.]—**TENNANT v. UNION BANK OF CANADA**, No. 99, *ante*.

101. ——— Matters equally competent for Dominion or province.]—British North America Act, 1867 (c. 3), s. 91, provides that the Parliament of Canada may make laws for the peace, order, & good government of Canada. Sect. 92 provides that the Legislature of the provinces may exclusively make laws relating to shops, saloons, taverns, & other licences in order to the raising of a revenue, or relating to property & civil rights in the province, or relating to matters of a merely local or private nature :—**Held :** an Act regulating the sale of intoxicating liquors throughout Canada was not a matter exclusively assigned to the provincial legislatures, but was a matter within the powers of the Parliament of Canada.—**RUSSELL v. R.** (1882), 7 App. Cas. 829; 51 L. J. P. C. 77; 46 L. T. 889, P. C.

Annotations :—**Consol. Hodge v. R.** (1883), 9 App. Cas. 117. **Fold.** **A.-G. for Ontario v. A.-G. for the Dominion**, [1896] A. C. 348. **Consol.** **A.-G. of Manitoba v. Manitoba Licence Holders' Assoc.**, [1902] A. C. 73; **A.-G. for Canada v. A.-G. for Alberta**, [1921], 38 T. L. R. 90. **Refd.** **A.-G. for Canada v. A.-G. for Alberta**, [1916] 1 A. C. 588; *Re* Board of Commerce Act, 1919, & Combines & Fair Prices Act, 1919, [1922] 1 A. C. 191.

102. ———.]—In cases in which it is equally competent for the Parliament of Canada & for the Provincial Legislatures to make laws, & a conflict arises, the legislation of the Dominion Parliament must prevail.

The Act of the Parliament of Canada, 4 Ed. VII., c. 31, which prohibits through railway cos. which are

PART II. SECT. 3, SUB-SECT. 4.—
A. (b) i.

99 i. Dominion legislation paramount—Matters enumerated in British North America Act, 1867 (c. 3), s. 91—Although trenching on matters assigned to province.]—The Dominion Parliament is paramount in its legislatures of the provinces, & acting under the power conferred by s. 91 of the above Act in the making of laws for the peace, order & good government of Canada, is paramount in legislating in respect to all matters coming within said sect., & its

legislation is to prevail, although it may be that the Dominion Parliament may trench upon matters assigned to the provincial legislatures.—**Re MUNSHI SINGH** (1914), 29 W. L. R. 45; 6 W. W. R. 1347; 20 B. C. R. 243.—**CAN.**

101 i. ——— Matter equally competent for Dominion or Province.]—*Re* **MONTREAL CITY, Ex p. FILLON** (1883), 27 L. C. J. 216.—**CAN.**

d. ———.]—The requirements of the various sects. of the Dominion Acts

governing railways are so at variance with the recognition of mechanics' liens thereon under a provincial statute, that it is impossible for the two to stand together, & therefore the Dominion legislation must prevail.—**LORSON v. NELSON & FORT SHEPPARD RY. Co.** (1895), 4 B. C. R. 151.—**CAN.**

e. ———.]—If a conflict arises between the rules of evidence established by a provincial statute & those subsisting by virtue of a Dominion statute, the latter will prevail.—**R. v.**

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within the jurisdiction of the Dominion Parliament from contracting out of their liability to pay damages for personal injury to their servants, is an Act ancillary to railway legislation, & as such, within the competency of the Dominion Parliament, though it may affect "civil rights in the province," which, by British North America Act, 1867 (c. 3), s. 92 (13), are left to the exclusive jurisdiction of the provincial legislature.—**GRAND TRUNK RY. OF CANADA v. A.-G. OF CANADA**, [1907] A. C. 65; 76 L. J. P. C. 23; 95 L. T. 631; 23 T. L. R. 40, P. C.

Annotations:—*Consol. Toronto City v. Canadian Pacific Ry.* (1907), 77 L. J. P. C. 29. *Fold. Crown Grain Co. v. Day*, [1908] A. C. 504.

103. ———.]—CROWN GRAIN CO., LTD. v. DAY, No. 173, *post*.

104. ———.]—Where a given field of legislation is within the competence both of the Dominion & Provincial Legislatures, & both have legislated, the Dominion enactment must prevail:—*Held*: resp. co., which under Dominion Act, 60 & 61 Vict. c. 72, was empowered to supply, sell, & dispose of gas & electricity, with other powers, could not be restrained from operating thereunder at the suit of applts., who under later Quebec statutes had exclusive power of so operating in the locality chosen by resps.—**COMPAGNIE HYDRAULIQUE DE ST. FRANÇOIS v. CONTINENTAL HEAT & LIGHT CO.**, [1909] A. C. 194; 78 L. J. P. C. 60; 99 L. T. 786, P. C.

105. ———.]—By Insurance Act, 1910 (s. 4), enacted by the Parliament of Canada, in Canada, except as otherwise provided by that Act, no co. or underwriters or other person should carry on any business of insurance unless it were done by or on behalf of a co. or underwriters holding a licence from the Minister:—*Held*: the above legislation was *ultra vires* of the Parliament of Canada, since the authority conferred by the British North America Act, 1867, s. 91, head (2), to legislate as to "the regulation of trade & commerce" did not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces, & since it could not be enacted under the general power conferred by s. 91 to legislate for the peace, order, & good government of Canada as it trenching upon the legislative authority conferred on the provinces by s. 92, head (13), to make laws as to "civil rights in the province."—**A.-G. FOR CANADA v. A.-G. FOR ALBERTA**, [1916] 1 A. C. 588; 85 L. J. P. C. 124; 114 L. T. 772; 32 T. L. R. 339, P. C.

Annotation:—*Reid. Re Board of Commerce Act, 1919, & Combines & Fair Prices Act, 1919*, [1922] 1 A. C. 191.

106. ——— Cannot directly repeal provincial legislation—Virtual repeal by repugnancy—Adjudication by tribunals.]—The general power of legislation conferred upon the Dominion Parliament by British North America Act, 1867 (c. 3),

s. 91, in supplement of its therein enumerated powers, must be strictly confined to such matters as are unquestionably of national interest & importance, & must not trench on any of the subjects enumerated in sect. 92 as within the scope of provincial legislation, unless they have attained such dimensions as to affect the body politic of the Dominion.

Dominion enactments, when competent, override but cannot directly repeal provincial legislation. Whether the Dominion enactments have in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, & cannot be determined by either the Dominion or Provincial Legislature. By Canada Temperance Act, 1864, which was a provincial statute for Upper Canada, the present province of Ontario, municipal councils were authorised to pass byelaws, if approved by a majority of electors, prohibiting liquor traffic. By Canada Temperance Act, 1886, which applied to all provinces of the Dominion, the electors of every county or city were authorised to adopt the prohibitory provisions contained therein. This Act purported to repeal the 1864 Act. By Ontario Local Option Act, 1890, s. 18, municipal councils were empowered, as therein mentioned, to prohibit the retail sale of liquor:—*Held*: the Ontario Legislature had jurisdiction in the matter, as it came within the subjects assigned to provincial legislation by British North America Act, 1867 (c. 3), s. 91, notwithstanding the local option clauses of the 1886 Act.

It appears to their lordships that neither the Parliament of Canada nor the provincial legislatures have authority to repeal statutes which they could not directly enact. The Parliament of Canada would have no power to pass a prohibitory law for the province of Ontario & could therefore have no authority to repeal in express terms an Act which is limited in its operations to that province (**LORD WATSON**).—**A.-G. FOR ONTARIO v. A.-G. FOR THE DOMINION**, [1896] A. C. 348; 65 L. J. P. C. 26; 74 L. T. 533; 12 T. L. R. 388, P. C.

Annotations:—*Apld. A.-G. of Manitoba v. Manitoba Licence Holders' Assn.*, [1902] A. C. 73. *Consol. Montreal City v. Montreal Street Ry.*, [1912] A. C. 333; *Great West Saddlery Co. v. R.*, [1921] 2 A. C. 91. *Reid. Canadian Pacific Wine Co. v. Tuley*, [1921] 2 A. C. 417.

107. Dominion legislation on matters not enumerated in British North America Act, 1867 (c. 3), s. 91—Must not trench on matters assigned to province—Unless affecting whole dominion.]—**A.-G. FOR ONTARIO v. A.-G. FOR THE DOMINION**, No. 106, *ante*.

108. ——— Unless affecting safety of whole Dominion.]—**FORT FRANCES PULP & PAPER CO. v. MANITOBA FREE PRESS CO.**, [1923] A. C. 695, P. C.

109. ——— Must be confined to matters of national importance.]—**A.-G. FOR ONTARIO v. A.-G. FOR THE DOMINION**, No. 106, *ante*.

110. Repugnancy of provincial statutes—How determined.]—**A.-G. FOR ONTARIO v. A.-G. FOR THE DOMINION**, No. 106, *ante*.

O'BRYAN (1900), 7 Exch. C. R. 19.—**CAN.**

f. ———.]—The railway co. was incorporated in 1896, by the provincial legislature, one of the powers given it being to build branch lines, & on June 13, 1898, by an Act of the dominion parliament its objects were declared to be works for the general advantage of Canada & thereafter to be subject to the legislative authority

of the dominion parliament & to the provisions of the Railway Act:—*Held*: the co.'s power to acquire land for branch lines after June 13, 1898, must be exercised in accordance with the Dominion Railway Act.—*Re COLUMBIA & WESTERN RY. CO.* (1901), 8 B. C. R. 415.—**CAN.**

g. ———.]—**ARMSTRONG v. MCGIBBON** (1906), Q. R. 15 K. B. 345.—**CAN.**

h. ———.]—**CIE HYDRAULIQUE ST.**

FRANÇOIS v. CONTINENTAL HEAT & LIGHT CO. (1907), Q. R. 16 K. B. 406; [1909] A. C. 194.—**CAN.**

k. ———.]—Where a given field of legislation is within the competence of both the Parliament of Canada & a provincial legislature, & both have legislated the dominion enactment must prevail if the two are in conflict.—**R. v. THORBURN** (1918), 41 O. L. R. 39; 29 Can. Crim. Cas. 329; 13 O. W. N. 173; 39 D. L. R. 300.—**CAN.**

ii. Powers of Dominion Legislature.

111. Election petitions—Provision of mode of determining—Jurisdiction committed to provincial courts.]—The Dominion Controverted Elections Act of 1874 (Canadian Statute, 37 Vict. c. 10) does not contravene British North America Act, 1867 c. 3), s. 92, sub-sect. 14. The sub-sect. does not relate to election petitions, while sect. 41 of the same Act reserved to the Parliament of Canada the power of creating a jurisdiction to determine them. The Parliament of Canada has power to commit such jurisdiction to existing provincial courts.

Special leave refused to appeal from two concurrent judgments of the cts. in Canada affirming the competency & validity of the said Act of 1874; it appearing that there was no substantial question requiring to be determined, nor any doubt of the soundness of the decisions, nor any reason to apprehend difficulty or disturbance from leaving the decisions untouched.—*VALIN v. LANGLOIS* (1879), 5 App. Cas. 115; 49 L. J. P. C. 37; 1 L. T. 662, P. C.

*Annotations:—**Appl. Prince v. Gagnon* (1882), 8 App. Cas. 103. *Consd. Kennedy v. Purcell* (1883), 59 L. T. 279. *Reid. Cushing v. Dupuy* (1880), 42 L. T. 445; *Baldwin v. O'Brien*, [1919] W. N. 182.

112. Insolvency—Judgment of Court of Appeal made final.]—*CUSHING v. DUPUY*, No. 91, *ante*.

See Nos. 131, 173, *post*.

113. Intoxicating liquors—Power to regulate trade.]—*RUSSELL v. R.*, No. 101, *ante*.

114. — Prohibition.]—A.-G. FOR ONTARIO v. A.-G. FOR THE DOMINION, No. 106, *ante*.

See No. 90, *ante*, Nos. 148, 149, *post*.

115. Incorporation of company—Power to carry on business within dominion—Company confining exercise of powers to one province.]—Canadian Act, 37 Vict. c. 103, which created a corp. with power to carry on certain definite kinds of business within the Dominion, is within the legislative competence of the Dominion Parliament. The fact that the corp. chose to confine the exercise of its powers to one province & to local & provincial objects does not affect its status as a corp., or operate to render its original incorporation illegal as *ultra vires* of the said Parliament.—*COLONIAL BUILDING & INVESTMENT ASSOCN. v. A.-G. OF QUEBEC* (1883), 9 App. Cas. 157; 53 L. J. P. C. 27; 40 L. T. 789, P. C.

*Annotations:—**Reid. Toronto Corp. v. Bell Telephone Co. of Canada*, [1905] A. C. 52; *John Deere Plow Co. v. Wharton*, [1915] A. C. 330; *Great West Saddlery Co. v. R.*, [1921] 2 A. C. 91.

116. — — — Limitation of powers by provincial legislature.]—It is not competent to a provincial legislature to impose conditions precedent to the exercise of powers conferred by the Dominion Parliament, upon an undertaking which extends beyond the limits of the province, such undertakings being under the exclusive jurisdiction of the Dominion Parliament.—*TORONTO CORPN. v. BELL TELEPHONE CO. OF CANADA*, [1905] A. C. 52; 74 L. J. P. C. 22; 91 L. T. 700; 21 T. L. R. 45, P. C.

*Annotation:—**Reid. A.-G. for British Columbia v. Canadian Pacific Ry.*, [1906] A. C. 204.

117. — — —]—The exclusive power conferred by British North America Act, 1867 (c. 3), s. 91, sub-sect. 2, on the Dominion Parliament, of making laws for the regulation of trade & commerce, enables that Parliament to prescribe to what extent the power of cos., the objects of which extend to the entire Dominion, shall be exercisable, & what limitations shall be placed on those powers; & therefore, a provincial legislature has no power under sect. 92, sub-sect. 11, of the Act, which gives power to make laws for the incorporation of cos. with provincial objects, to pass an Act requiring a Dominion co. to be licensed or registered under the Act before it can carry on business in the province.—*JOHN DEERE PLOW CO., LTD. v. WHARTON*, [1915] A. C. 330; 84 L. J. P. C. 64; 112 L. T. 183; 31 T. L. R. 35, P. C.

*Annotations:—**Consd. Great West Saddlery Co. v. R.*, [1921] 2 A. C. 91. *Reid. A.-G. for Canada v. A.-G. for Alberta*, [1916] 1 A. C. 588; *A.-G. for Ontario v. A.-G. for Canada*, [1916] 1 A. C. 598. *Mentd. Re Board of Commerce Act, 1919, & Combines & Fair Prices Act, 1919*, [1922] 1 A. C. 191.

See No. 104, *ante*, Nos. 168, 171, *post*.

118. Banking—Validation of warehouse receipts.]—*TENNANT v. UNION BANK OF CANADA*, No. 99, *ante*.

119. Fisheries—Grant of fishing rights.]—Whatever proprietary rights vested in the provinces at the date of British North America Act, 1867 (c. 3), remained so unless by its express enactment transferred to the Dominion. Such transfer is not to be presumed from the grant of legislative jurisdiction to the Dominion in respect of the subject-matter of those proprietary rights.

With regard to fisheries & fishing rights:—*Held: (1)* sect. 91 did not convey to the Dominion any proprietary rights therein, although the legislative jurisdiction conferred by the section

PART II. SECT. 3, SUB-SECT. 4.—A. (b) ii.

111 i. Election petitions—Provision of mode of determining—Jurisdiction committed to provincial courts.]—*OWENS v. CUSHING* (1875), 20 L. C. J. 86.—CAN.

111 ii. — — —]—*Re SOUTH ONTARIO ELECTION CASE, Re WEST HASTINGS ELECTION CASE, WALBRIDGE v. BROWN* (1878), 29 C. P. 270.—CAN.

111 iii. — — —]—*Re NIAGARA ELECTION CASE, PLUMB v. HUGHES* (1878), 29 C. P. 261; 4 A. R. 407.—CAN.

111 iv. — — —]—*Re MORRIS PROVINCIAL ELECTION* (1907), 7 W. L. R. 233.—CAN.

1. Insolvency.]—*CHROMBIE v. JACKSON* (1874), 34 U. C. R. 575; 1 Cart. 685.—CAN.

m. — —]—*MCLEOD v. MCGUIRE* (1874), 2 Pug. 248.—CAN.

n. — —]—*ALLEN v. HANSON* (1890), 16 Q. L. R. 79; 18 S. O. R. 667.—CAN.

o. — —]—*Re COLONIAL INVESTMENT CO.* (1912), 26 W. L. R. 361.—CAN.

113 i. Intoxicating liquors—Power to regulate trade.]—The dominion authority alone has power to tax & regulate the trade of a brewer, which is a branch of trade & commerce, & having done so, the Ontario Legislature has not the power to restrain it, unless in a qualified manner, & for the mere purposes of police.—*R. v. TAYLOR* (1875), 36 U. C. R. 183.—CAN.

114 i. — Prohibition.]—*Ex p. FLANAGAN* (1898), 34 N. B. R. 577.—CAN.

114 ii. — — —]—*R. v. WIPPER* (1902), 34 N. S. R. 202.—CAN.

114 iii. — — —]—*R. v. THORBURN* (1918), 41 O. L. R. 39.—CAN.

115 i. Incorporation of company or corporation—Power to carry on business within dominion—Company confining exercise of powers to one province.]—

LORANGER v. COLONIAL BUILDING & INVESTMENT ASSOCN. (1882), 2 Cart. 275.—CAN.

115 ii. — — —]—*Re GRAND JUNCTION RY. CO. v. PETERBOROUGH COUNTY* (1881), 6 A. R. 339.—CAN.

p. — — Society of teachers—Ultra vires.]—The incorporation of a society as a co. of teachers for the Dominion of Canada is *ultra vires* of the Parliament of Canada.—*Re CANADA CHRISTIAN SCHOOLS (BROTHERS OF)* (1876), Cout. 1.—CAN.

118 i. Banking—Validation of warehouse receipts.]—The Dominion Act, 34 Vict. c. 5, s. 46, which authorises the transfer of warehouse receipts to banks by direct indorsement, is within the powers assigned to the Dominion Parliament & is valid.—*SMITH v. MERCHANTS' BANK* (1881), 8 S. C. R. 512.—CAN.

q. — —]—*QUIRT v. R.* (1892), 19 S. C. R. 510.—CAN.

Sect. 3.—The legislature: Sub-sect. 4, A. (b) ii.]

enables it to affect those rights to an unlimited extent, short of transferring them to others.

(2) A tax by way of licence as a condition of the right to fish is within the powers conferred by sub-sects. 4 & 12.

(3) The same power is conferred on the Provincial Parliament by sect. 92.

(4) Revised Statutes of Canada, c. 95, s. 4, so far as it empowers the grant of exclusive fishing rights over provincial property, is *ultra vires* the Dominion.

(5) Revised Statutes of Ontario, c. 24, s. 47, is with a specific exception *intra vires* the province.

As regards Ontario Act, 1892, the regulations therein which control the manner of fishing are *ultra vires*. Fishing regulations & restrictions are within the exclusive competence of the Dominion.

(6) The Judicial Committee will not deal with questions affecting the rights of persons not parties to the litigation.—A.-G. FOR DOMINION OF CANADA v. A.-G. FOR PROVINCES OF ONTARIO, QUEBEC & NOVA SCOTIA, A.-G. FOR PROVINCE OF ONTARIO v. A.-G. FOR DOMINION OF CANADA, A.-G. FOR PROVINCES OF QUEBEC & NOVA SCOTIA v. A.-G. FOR DOMINION OF CANADA, [1898] A. C. 700; 67 L. J. P. C. 90; 78 L. T. 697, P. C.

Annotations:—As to (1) *Reid*. Ontario Mining Co. v. Seybold, [1903] A. C. 73; A.-G. for British Columbia v. A.-G. for Canada, [1914] A. C. 153; A.-G. for Canada v. A.-G. for Quebec, [1921] 1 A. C. 413; Brooks-Bidlake & Whittall v. A.-G. for British Columbia, [1923] A. C. 450. As to (2) *Reid*. A.-G. for British Columbia v. A.-G. for Canada, [1914] A. C. 153; A.-G. for Canada v. A.-G. for Quebec, [1921] 1 A. C. 413. As to (6) *Reid*. A.-G. for Ontario v. A.-G. for Canada, [1912] 106 L. T. 916. *Generally, Mendt*. A.-G. for British Columbia v. Canadian Pacific Ry., [1906] A. C. 204; A.-G. for Canada v. Ritchie Contracting & Supply Co., [1919] A. C. 999.

120. — Regulation of tidal rivers.]—Having regard to the public right of fishing declared by 29 Vict. (Can.) c. 11, s. 6, & previous enactments having force in the Province of Quebec, the govt. of that Province has not power to grant the exclusive right of fishing in the tidal waters, so far as navigable, of the rivers, streams, gulfs, bays, straits or arms of the sea of the Province & of the high sea washing its coasts, nor has the legislature of the Province power to authorise the govt. to do

so. 29 Vict. (Can.) c. 11, s. 3, which empowers the Comr. of Crown Lands to issue fishing lease must be read with s. 6, which maintains the right of the public. The power no longer exists in entirety; so far as it was regulative it passed to the Dominion under British North America Act 1867 (c. 3), s. 91, head 12. The Dominion power of regulation must be exercised so as not to deprive the Province or private persons of proprietary rights which they possess.—A.-G. FOR CANADA v. A.-G. FOR QUEBEC, [1921] 1 A. C. 413; 90 L. J. P. C. 58; 124 L. T. 517; 37 T. L. R. 140, P. C.

Annotation:—*Reid*. Brooks-Bidlake & Whittall v. A.-G. for British Columbia, [1923] A. C. 450.

121. Railways connecting provinces—Regulations as to repair, construction & alteration.]—B the true construction of British North America Act, 1867 (c. 3), s. 91, sub-sect. 29, & s. 92, sub-sect. 10, the Dominion Parliament has exclusive right to prescribe regulations for the construction, repair & alteration of applt. railway; & the provincial legislature has no power to regulate the structure of a ditch forming part of its authorised works. But the provisions of the municipal code of Quebec which prescribe the cleaning of the ditch & the removal of an obstruction which has caused inundation on neighbouring land, are *intra vires* of the provincial legislature.—CANADIAN PACIFIC RY. CO. v. NOTRE DAME DE BONSECOUR CORPN., [1899] A. C. 307; 68 L. J. P. C. 54; 8 L. T. 434, P. C.

Annotations:—*Distd.* Madden v. Nelson & Fort Sheppard, [1899] A. C. 626. *Reid*. A.-G. for British Columbia v. Canadian Pacific Ry., [1906] A. C. 204; A.-G. for Alberta v. A.-G. for Canada, [1915] A. C. 363; Great West Saddlery Co. v. R., [1921] 2 A. C. 91.

122. — Grant of right over provincial foreshore.]—British North America Act, 1867 (c. 3) s. 108, empowers the Dominion Parliament to legislate for any land, including foreshore, which proved to form part of a public harbour. Sects. 91 & 92, read together, empower the Dominion to dispose of provincial Crown lands, & therefore to acquire a provincial foreshore, for the purposes of resps. railway which is a trans-continental railway connecting several provinces:—*Held*: s. 18 (a) of resps. incorporating Dominion Act (44 Vict. c. 1) is not controlled by the Consolidated Railway Act

r. Fisheries—Regulation of mode of setting nets.]—Though the charter of the City of St. John grants the right of fishery in the harbour to the corp. for the benefit of the inhabitants, the Dominion Parliament has the right under the B. N. A. Act, 1867, s. 91, to regulate the times & manner of setting nets.—*Ex p. Wilson* (1885), 25 N. B. R. 209.—CAN.

s. — Cannot grant right of fishery over provincial property.]—Fisheries Act, R. S. C. (c. 95), so far as it empowered the granting of exclusive rights of fishery over provincial property is *ultra vires*.—*Young v. Harnish* (1904), 37 N. S. R. 213.—CAN.

t. — Exclusive right to legislate within three-mile limit.]—The Parliament of Canada under British North America Act, 1867 (c. 3), has exclusive jurisdiction to legislate with respect to fisheries within the three-mile limit off the coasts of Canada.—*The North v. R.* (1906), 37 S. C. R. 385.—CAN.

u. — — —.] — MACDONALD v. RICHMOND (1899), 30 S. C. R. 619.—CAN.

d. — — —.] — TORONTO CORPN. v. GRAND TRUNK RY. CO. (1906), 37 S. C. R. 232.—CAN.

e. — Limitation of actions.]—The Dominion Parliament having by a general railway Act, applicable to all railway cos. over which the Parliament had jurisdiction, limited to six months the time for bringing actions against railway cos. for any injury caused by reason of the railway:—*Held*: this enactment was valid.—*McArthur v. Northern & Pacific Junction Ry. Co.* (1888), 17 A. R. 86.—CAN.

f. — Crossing Crown lands — Without consent of Lieutenant-Governor — Valid.]—Booth v. McIntyre (1880), 31 C. P. 183.—CAN.

g. — Construction of crossing.] — CANADIAN PACIFIC RY. CO. v. NORTHERN PACIFIC & MANITOBA RY. CO. (1889), 5 M. N. R. 301.—CAN.

Act applies — Company incorporate by provincial statute.]—A.-G. FOR BRITISH COLUMBIA v. VANCOUVER VICTORIA, & EASTERN RY. & NAVIGATION CO. (1901), 9 B. C. R. 338.—CAN.

l. — Compensation for injuries—Whether Dominion statute intra vires.]—An Act of the Parliament of Canada providing that no railway co. within its jurisdiction shall be relieved from liability for damages for personal injury to any employee by reason of any notice issued by the co., or by an insurance or provident assoc. of railway employees is *intra vires* of said Parliament.—*Re Railway Act* (1904), 36 S. C. R. 136; [1907] A. C. 65.—CAN.

m. — — —.] — CURRAN v. GRAND TRUNK RY. CO. (1898), 2 A. R. 407.—CAN.

n. — “For general advantage of Canada.”]—The declaration by the Parliament of Canada that a work “for the general advantage of Canada” which is required by B. N. A. Act

879, & applies to provincial as well as Dominion Crown Lands. Power given thereunder to appropriate the foreshore in question includes a power to obstruct any rights of passage previously existing across it.—*A.-G. FOR BRITISH COLUMBIA v. CANADIAN PACIFIC RY. CO.*, [1906] A. C. 204; 75 L. J. P. C. 38; 94 L. T. 295; 22 T. L. R. 330, P. C.

123. — **Prohibition of contracting out of liability for personal injury to servant—Whether civil rights in province affected.**—*GRAND TRUNK RY. OF CANADA v. A.-G. OF CANADA*, No. 102, ante.

124. — **Apportionment of cost of protective works—Level crossing.**—By British North America Act, 1867 (c. 3), s. 91, railways extending from one province to another are placed exclusively under the jurisdiction of the Dominion Parliament. Municipal institutions, property, & civil rights in a province are placed under the jurisdiction of the Parliament of that province. A railway committee under Dominion Railway Act, 1888 (c. 20), ss. 187, 188, made an order that gates & watchmen should be provided by the Canadian Pacific Railway at certain level crossings in the City of Toronto, & the cost be borne in certain proportions by the co. & by the city:—*Held*: the above sects. under which the order was made were within the powers of the Dominion Parliament.—*TORONTO CORPN. v. CANADIAN PACIFIC RY. CO.*, [1908] A. C. 54; 77 L. J. P. C. 29; 97 L. T. 726; 24 T. L. R. 103, P. C.

Annotation:—*Apld. Toronto Ry. v. Toronto City*, [1920] A. C. 426.

125. — **Regulation of through traffic of provincial railway on federal line—Ultra vires.**—Upon the true construction of British North America Act, 1867 (c. 3), ss. 91, 92, a provincial railway is not subject to the jurisdiction of the Board of Railway Comrs. of Canada in respect of its through traffic with a federal railway; & Railway Act of Canada, 1906 (c. 37), s. 8, sub-sect. 6, purporting to deal with such through traffic, is *ultra vires*.—*MONTREAL CITY v. MONTREAL STREET RY.*, [1912] A. C. 333; 81 L. J. P. C. 145; 105 L. T. 970; 28 T. L. R. 220, P. C.

See Nos. 154, 156-158, post.

126. **Aliens—Power to impose extra-territorial constraint.**—Dominion statute 60 & 61 Vict. c. 11, s. 6, as amended by 1 Edw. 7, c. 13, s. 13, is *intra vires* of the Dominion Parliament. The Crown un-

doubtedly possesses the power to expel an alien from the Dominion of Canada, or to deport him to the country whence he entered it. The above Act, assented to by the Crown, delegated that power to the Dominion Govt., which includes & authorises them to impose such extra-territorial constraint as is necessary to execute the power.—*A.-G. FOR CANADA v. CAIN*, *A.-G. FOR CANADA v. GHILULA*, [1906] A. C. 542; 75 L. J. P. C. 81 95 L. T. 314; 22 T. L. R. 757, P. C.

Annotations:—*Refd. R. v. Home Secretary, Ex p. Chateau Thierry*, [1917] 1 K. B. 922; *Johnstone v. Pedlar*, [1922] 2 A. C. 262.

127. **Marriage—Validity notwithstanding differences in religious faith of parties.**—By British North America Act, 1867 (c. 3), s. 91, sub-sect. 26, the exclusive legislative authority of the Parliament of Canada includes marriage & divorce; & by s. 92, sub-sect. 12, of above Act the legislature of each province may exclusively make laws with relation to the solemnisation of marriage in the provinces.

Upon the true construction of these sections the jurisdiction of the Dominion Parliament does not cover the whole field of validity of marriage for s. 92, sub-sect. 12, operates by way of exception to the powers conferred as regards marriage by s. 91, sub-sect. 26, & enables provincial legislatures to enact conditions as to solemnisation of marriage which may affect the validity of the contract.

A bill by which it was proposed that every ceremony or form of marriage heretofore or hereafter performed by any person authorised thereto by the laws of the place where it is performed shall be valid everywhere in Canada notwithstanding any differences in the religious faith of the person married, & without regard to the religion of the celebrant, is *ultra vires* of the Dominion Parliament.—*Re MARRIAGE LEGISLATION IN CANADA*, [1912] A. C. 880; *sub nom. Re REFERENCE BY GOVERNOR GENERAL OF CANADA TO SUPREME COURT*, 8 L. J. P. C. 237; 107 L. T. 330; 28 T. L. R. 580 P. C.

Annotation:—*Refd. Great West Saddlery Co. v. R.*, [1922] 2 A. C. 91.

128. **Insurance—Provision for government licence—Whether “regulation of trade & commerce.”**—*A.-G. FOR CANADA v. A.-G. FOR ALBERTA*, No. 105, ante.

See No. 145, post.

QUEBEC RY. CO. v. JONES, [1921] 3 W. W. R. 327; 62 S. C. R. 92.—CAN.

o. Aliens—Coal Mines Regulation Act, 1903.]—Sect. 82, r. 34, of the above Act, which prohibits Chinamen from employment, below ground & also in certain other positions in & around coal mines, is in that respect *ultra vires*.—*Re COAL MINES REGULATION ACT* (1904), 24 C. L. T. 342.—CAN.

p. ——In all matters directly concerning aliens & naturalised persons resident in Canada the Dominion Parliament has, by virtue of B. N. A. Act, 1867, s. 91 (25), exclusive jurisdiction.—*Re JAPANESE TREATY ACT*, 1913 (1920), 3 W. W. R. 937.—CAN.

q. Marriage—& divorce.—*Marriage Act*, R. S. O. 1914 (c. 148), providing that the Supreme Court of

Act, 1867, s. 1, “marriage & divorce” are put within the exclusive legislative powers of the Canadian Parliament, with the exception “of the solemnisation of marriage in the Province,” which is placed under the exclusive power of the legislatures of the province.—*PEPPIATT v. PEPPIATT* (1915), 34 O. L. R. 121.—CAN.

r. ——*R. v. BRIERLY* (1887), 14 O. R. 525.—CAN.

s. Bigamy.—*Criminal Code*, 1892, ss. 275, 276, respecting the offence of bigamy, are *intra vires* of the Parliament of Canada.—*Re BIGAMY SECTIONS OF CODE* (1897), 27 S. C. R. 461.—CAN.

t. Insurance—Whether regulation of “trade & commerce.”—The power to legislate upon the subject of insurance is not vested in the Dominion

u. ——*PARSONS v. CITIZEN INSURANCE CO.*, [1880] 7 App. Cas. 96.—CAN.

y. — Dominion Insurance Act 1910, s. 4.]—*FARMERS’ MUTUAL FIRE INSURANCE ASSOCN. OF IOWA v. WHITAKER*, [1917] 3 W. W. R. 750.—CAN.

a. — Distribution of assets of insolvent company.—Canadian poll-tax holders petitioned for distribution of the deposit made by the co., a foreign corp., with the minister of finance under 31 Vict. c. 48 (D), & 34 Vic. c. 9 (D), the co. being insolvent:—*Held*: they were entitled to the relief asked, & the above Acts are not *ultra vires* of the Dominion Parliament.—*Re BRITON MEDICAL & GENERAL LIFE ASSOCN., LTD.* (1886), 12 O. R. 441.—CAN.

b. ——*R. v. FORD* (1900),

Sect. 3.—The legislature: Sub-sect. 4, A. (b) ii. & iii.]

129. Pilotage—Dominion law trenching on property & civil rights in province.]—The Dominion Legislature has power under British North America Act, 1867 (c. 3), s. 91, head 10, to enact laws which relate to pilotage, although they trench upon property & civil rights in a province.—*PAQUET v. PILOTS' CORPN. (QUEBEC)*, [1920] A. C. 1029; 89 L. J. P. C. 241; 124 L. T. 166; 15 Asp. M. L. C. 105, P. C.

130. Control of paper supply & prices—Dominion law trenching on property & civil rights in province.]—*FORT FRANCES PULP & PAPER CO., LTD. v. MANITOBA FREE PRESS CO., LTD.*, No. 108, ante.

iii. Powers of Provincial Legislature.

131. Insolvency—Relief of benefit society—

taxation—Upon income of person within territorial jurisdiction.]—R. v. CARON (1921), 68 D. L. R. 183.—CAN.

e. Exclusive power to make criminal laws.]—The power of making criminal laws is vested in the Dominion Parliament.—*A.-G. v. NIAGARA FALLS INTERNATIONAL BRIDGE CO.* (1873), 20 Gr. 34.—CAN.

f. —.]—Re BOUCHER (1865), Cass. Dig. 325.—CAN.

g. —.]—R. v. BRADSHAW (1875), 38 U. C. R. 564.—CAN.

h. —.]—WARD v. REED (1882), 22 N. B. R. 279.—CAN.

k. —.]—Re WETHERELL v. JONES (1884), 4 O. R. 713.—CAN.

l. —.]—R. v. RIEL (1885), 1 Torr. L. R. 23.—CAN.

m. —.]—Though the organisation of cts. of criminal jurisdiction is within the exclusive powers of the legislature, the Parliament of Canada may impose upon existing cts. or individuals the duty of administering the criminal law, & their action to that end need not be supplemented by provincial legislation.—*Re VANCINI (1904)*, 34 S. C. R. 621.—CAN.

n. —.]—The administration of justice in each province having been assigned exclusively to it the power of Parliament in regard to the same is limited to creating a ct. of appeal & cts. for the administration of the laws of Canada.—*Re REFERENCE BY GOVERNOR-GENERAL IN COUNCIL (1910)*, 43 S. C. R. 536; [1912] A. C. 571.—CAN.

o. —.]—R. v. JONES (1911), 16 W. L. R. 429; 16 B. C. R. 117.—CAN.

p. —.]—Sunday observance.]—Provisions in the interest of public morals for the observance of Sunday as distinguished from regulations as to the days & hours of carrying on trade in various commodities, form a branch of criminal law, & as such can be made only by the Parliament of Canada, & not by a provincial legislature.—*R. v. WALDON (1914)*, 23 W. L. R. 46.—CAN.

q. —.]—Re SUNDAY LAWS (1905), 35 S. C. R. 381.—CAN.

r. Power to legislate for handling & marketing of grain.]—*NORTH WEST GRAIN DEALERS ASSOC. v. HYNDMAN, UNITED GRAIN GROWERS, LTD. v. HYNDMAN (1911)* 3 W. W. R. 51.—

commission or receive or solicit consignments of grain on commission, in the Western Inspection Division, without first obtaining a licence from the Board of Grain Comrs., is *ultra vires* of the Dominion Parliament.—*R. v. MANITOBA GRAIN CO., LTD.*, [1922] 3 W. W. R. 560.—CAN.

t. Examination of witnesses.]—Ex p. SMITH (1872), 2 Cart. 330.—CAN.

w. Power to legislate for Indian lands.]—“Lands reserved for the Indians,” which by B. N. A. Act, 1867 (c. 3), s. 91 (24), are placed under the exclusive legislative jurisdiction of the Parliament of Canada, are those Indian lands only which have not been surrendered by the Indians, & have been reserved for their use, & do not include lands to which the Indian title has been extinguished.—*CHURCH v. FENTON (1878)*, 5 S. C. R. 239.—CAN.

a. —.]—R. v. ONTARIO & MINNECOTA POWER CO., LTD. (1920), 20 Exch. C. R. 279.—CAN.

b. Patents.]—Patent Act, 35 Vict. c. 20, s. 24, is not *ultra vires* the Dominion Parliament.—*AITCHESON v. MANN (1883)*, 9 P. R. 473.—CAN.

c. —.]—Re BELL TELEPHONE CO. & TELEPHONE MANUFACTURING CO. & MINISTER OF AGRICULTURE (1885), 7 O. R. 605.—CAN.

d. Abdication of sovereignty.]—It would be unconstitutional for the Parliament of Canada to pass an Act rendering Canadian subjects & Canadian corps. subject to such laws as might be passed by the Congress of the United States, in fact an abdication of sovereignty inconsistent with the relations of Canada to the Empire of which it forms a part.—*INTERNATIONAL BRIDGE CO. v. CANADA SOUTHERN RY. CO. (1880)*, 28 Gr. 114.—CAN.

aa. Negligence.]—The legislation of the Dominion Parliament forbidding defts. contracting against liability for their own negligence is *ultra vires*.—*VOGEL v. GRAND TRUNK RY. CO. (1886)*, 10 A. R. 162.—CAN.

bb. Dominion Winding-up Act.]—Winding-up Act, 45 Vict. c. 23 (D), is *ultra vires* the Dominion Parliament, & is in the nature of an insolvency law, & applies to all corporate bodies of the nature mentioned in it all over the Dominion, & a co. in this, though incorporated under a provincial charter, is subject to its provisions.—*SHOOL-*

Matter of local or private nature.]—33 Vict. c. of the Provincial Legislature of Quebec, wh purported to relieve by legislation the ap society, appearing on the face of the Act to h been in a state of extreme financial embarrassme is within the legislative capacity of that legislat The Act related expressly to “a matter merely a local or private nature in the province,” wh by the British North America Act, 1867 (c. s. 92, is assigned to the exclusive competency the provincial legislature; & does not fall wit the category of bkpcy. & insolvency, or any ot class of subjects by sect. 91 of the last-mentor Act reserved for the exclusive legislative author of the Parliament of Canada.—*L'UNION JACQUES DE MONTREAL v. BÉLISLE (1874)*, L. 6 P. C. 31; 31 L. T. 111; 22 W. R. 933, P. C.

Annotations:—Apprvd. Dow v. Black (1875), L. R. 6 P 272. Mentd. Citizens Insee. of Canada v. Parsons, Ql Insee. v. Parsons (1881), 7 App. Cas. 96.

to enact that all actions & suits civil nature, at common law or eq in which the Crown in right of Dominion, is ptf. or petitioner, ma brought in the exchequer ct.—*WELL v. R. (1894)*, 22 S. C. R. 55 CAN.

dd. Power to constitute Court of Ap.—Not restricted to the administra of the laws of Canada.—The po of the Parliament of Canada u B. N. A. Act, 1867, s. 101, resing a general Ct. of Appeal Canada is not restricted to the es lishment of a ct. for the administra of laws of Canada, & there is sitional authority to enact 54 & Vict. c. 25, s. 3, authorising app from the Superior Ct. sitting in rev in the Province of Quebec.—*St. J. BAPTISTE DE MONTREAL ASSOC BRAULT (1901)*, 31 S. C. R. 172.—C

ee. Power over foreigners—Naviga Canadian waters.]—Re THE AUR (1860), 10 L. C. R. 445.—CAN.

ff. The War Measures Act, 19. *Extent & validity of authorisation STARR v. BANNER COAL CO., L CHICK v. ALBERTA COAL MINING LTD., (1919)* 3 W. W. R. 259.—CA

gg. —.]—Re GREY, [1 3 W. W. R. 111; 42 D. L. R. 1.—C

PART II. SECT. 3, SUB-SECT. A. (b) iii.

hh. Insolvency—No powers of l lation.]—Local legislatures have jurisdiction in matters of bkpcy insolvency.—*Re IRON CLAY B MANUFACTURING CO., TURNER'S C (1889)*, 19 O. R. 113.—CAN.

kk. —.]—Insolvency b one of the subjects upon which exclusive right to legislate is veste the Parliament of Canada, the Leg ture of New Brunswick has no r to pass an Act relating thereto, s B. N. A. Act came into force.—*CHANDLER (1869)*, 1 Han. 548.—C

ll. —.]—So much of Pr Edward Island Insolvent Debtors. 1879, as empowers a judge to discn an insolvent debtor from custod *ultra vires* of the provincial legislat —*McKINNON v. McDougall (1907)* E. L. R. 573.—CAN.

mm. —.]—Punishment of fr on creditors.]—Assignments R. S. M., 1913 (c. 12), s. 52, in s

132. — Voluntary assignment by insolvents—Ancillary to bankruptcy legislation.]—The provisions of sect. 9 of the revised Statutes of Ontario, c. 124, which relate to assignments purely voluntary, & postpone thereto judgments & executions not completely executed by payment, are merely ancillary to bkpcy. law, & as such are within the competence of the provincial legislature so long as they do not conflict with any existing bkpcy. legislation of the Dominion Parliament.—A.-G. OF ONTARIO v. A.-G. FOR DOMINION OF CANADA, [1894] A. C. 189; 63 L. J. P. C. 59; 70 L. T. 538; 10 T. L. R. 305; 6 R. 409, P. C.

*Annotation:—*Consd. Grand Trunk Ry. of Canada v. A.-G. of Canada, [1907] A. C. 65.

See No. 91, ante.

133. Taxation—For construction of railway extending beyond province.]—The Act of the provincial Legislature of New Brunswick (33 Vict. c. 17), intitled "An Act to authorise the issuing of debentures on the credit of the lower district of the parish of St. Stephen, in the county of Charlotte," which empowered the majority of the inhabitants of that parish to raise by local taxation a subsidy, designed to promote the construction of a railway extending beyond the limits of the province, but already authorised by statute, is within the legislative capacity of that legislature.—DOW v. BLACK (1875), L. R. 6 P. C. 272; 44 L. J. P. C. 52; 32 L. T. 274; 23 W. R. 637, P. C.

134. — Insurance policies & receipts for renewals—Licence Act equivalent to Stamp Act—Whether direct taxation.]—The clauses of the Quebec Act, 30 Vict. c. 7, which impose a tax upon certain policies of assurance & certain receipts or renewals, are not authorised by the British North America Act, 1867 (c. 3), s. 92, sub-ss. 2, 9. A Licence Act by which a licensee is compelled neither to take out nor to pay for a licence, but which merely provides that the price of a licence shall consist of an adhesive stamp, to be paid in respect of each transaction, not by the licensee but by the person who deals with him, is virtually a Stamp Act & not a Licence Act. The im-

position of a stamp duty on policies, renewals, receipts, with provisions for avoiding the policy renewal, or receipt in a ct. of law, if the stamp is not affixed, is not warranted by the terms of an Act which authorises the imposition of direct taxation.—A.-G. FOR QUEBEC v. QUEEN INSURANCE CO. (1878), 3 App. Cas. 1090; 38 L. T. 897, P. C.

*Annotation:—*Consd. Bank of Toronto v. Lambe (1887), 1 App. Cas. 575.

135. — Duty on exhibits filed in court.]—Quebec Act, 1880 (c. 9), which imposed a duty of ten cents upon every exhibit filed in ct. in an action depending therein, is *ultra vires* the provincial legislature.—A.-G. FOR QUEBEC v. REE (1884), 10 App. Cas. 141; 54 L. J. P. C. 12; 55 L. T. 393; 33 W. R. 618, P. C.

*Annotations:—*Consd. Cotton v. R., [1914] A. C. 176. Ref. Bank of Toronto v. Lambe (1887), 12 App. Cas. 575. Burland v. R., Allyn v. Barthe, [1922] 1 A. C. 215.

136. — Direct taxation of commercial under takings in province—Banks.]—Quebec Act, 45 Vict. c. 22, which imposes direct taxes on certain commercial corps. carrying on business in the province, is *intra vires* the provincial legislature. A tax imposed upon banks which carry on business within the province varying in amount with the paid-up capital & with the number of its offices is direct taxation within British North America Act 1867 (c. 3), clause 2, sect. 92. Similarly with regard to insurance cos. taxed in a sum specified by the Act.—BANK OF TORONTO v. LAMBE (1887), 12 App. Cas. 575; 56 L. J. P. C. 87; 57 L. T. 377; 3 T. L. R. 742, P. C.

*Annotations:—*Fold. Brewers & Maltsters' Assocn. v. Ontario v. A.-G. for Ontario, [1897] A. C. 231. Consd. Cotton v. R., [1914] A. C. 176. Refd. John Deere Plow Co. v. Wharton, [1915] A. C. 330; Workmen's Compensation Board v. Canadian Pacific Ry., [1920] A. C. 184. Great West Saddlery Co. v. R., [1921] 2 A. C. 91; Burland v. R., Allyn v. Barthe, [1922] 1 A. C. 215.

137. — Insurance companies.]—BANK OF TORONTO v. LAMBE, No. 136, ante.

138. — Imposition of licence on brewer & distillers.]—The Liquor Licence Act (Revised Statutes of Ontario, c. 194), s. 51 (2), which requires every brewer & distiller to obtain a licence

Code, s. 417.—*Re* CHURCHILL, [1919] 2 W. S. R. 541.—CAN.

r. — Act abolishing imprisonment for debt—Party not subject to Dominion Insolvent Act, 1869.]—An Act of the legislature of New Brunswick, abolishing imprisonment for debt, is not *ultra vires* as respects a party not shown to be a trader or subject to Dominion Insolvent Act, 1869.—ARMSTRONG v. MCCUTCHIN (1874), 2 Pug. 381.—CAN.

s. — Bills of Sale.]—Bills of Sale Act is not beyond the power of the local legislature under British N. A. Act, 1867, as dealing with matters relating to insolvency.—*Re* DEVEBER (1882), 21 N. B. R. 397.—CAN.

t. —]—MCLEOD (PETTICODIAO LUMBER CO. ASSIGNEE) v. VROOM, N. B. Dig. 315 (43).—CAN.

w. — Voluntary assignments by insolvents.]—49 Vict. c. 45 (Man.), enacted that certain conveyances should be fraudulent against creditors, provided for voluntary assignments for the benefit of creditors, & declared that the assignee should have the exclusive right to sue for the rescission of such conveyances: & by sect. 9

ence over his other creditors, or which has such effect, shall as against them be utterly void":—*Held*: the statute was *intra vires* of the legislature.—STEPHENS v. MCARTHUR (1890), 6 Man. L. R. 496; 19 S. C. R. 446.—CAN.

a. Taxation—Direct—Power to impose.]—Pltfs. sued defts. for the portion of fees received by defts. as registrar, to which they were entitled under R. S. O., 1877, c. 111, ss. 98 to 103:—*Held*: if a tax at all, it was clearly a direct tax, & *intra vires*.—HASTINGS COUNTY v. PONTON (1881), 5 A. R. 543.—CAN.

b. —]—Assessment Act (C. S. B. C., 1888, c. 111, s. 3), imposes a provincial revenue tax upon all personal property including by the interpretation clause "mitges":—*Held*: the tax was direct & *intra vires* of the provincial legislature.—*Re* YORKSHIRE GUARANTEE & SECURITIES CORPN., LTD., & ASSESSMENT ACT (1895), 4 B. C. R. 268.—CAN.

c. —]—Rural Municipality Act (Sask.), (s. 323 b), providing for a "surtax" on lands, imposes

d. — Imposition of fees by la stamps—Whether direct.]—The imposition of fees by law stamps is undoubtedly an indirect tax. Und B. N. A. Act, 1867, s. 92 (2), the provincial legislature has not the power to impose such tax in order to raise revenue for general purposes of the province.—DULMAGE v. DOWD (1886), 3 Man. L. R. 562; *reversd*, 4 Man. L. R. 495.—CAN.

e. —]—CRAWFORD v. DUFFIELD (1888), 5 Man. L. R. 12.—CAN.

f. — Direct taxation of commercial undertakings in province—Ferries.]—By 39 Vict. c. 52, s. 1 (3) (Q), Montreal is authorised to impose an annual tax on "ferry-men or steamboat ferries." Under the authority of the statute the corps. of Montreal passed a bye-law imposing an annual tax of \$200 on the proprietor or proprietors of each steamboat ferry conveying to Montreal for hire travellers from any place not more than nine miles distant from the same, & obtained from the recorder's ct. for the city of Montreal a warrant of distress to levy upon applt. co. the tax of \$200 for each steamboat employed by them

Sect. 3.—The legislature: Sub-sect. 4, A. (b) iii.]

thereunder to sell wholesale within the province, is *intra vires* the provincial legislature.—**BREWERS & MALTSTERS' ASSOCN. OF ONTARIO v. A.-G. FOR ONTARIO**, [1897] A. C. 231; 66 L. J. P. C. 34; 76 L. T. 61; 13 T. L. R. 197, P. C.

Annotations :—**Reid**, *Cotton v. R.*, [1914] A. C. 176; *Great West Saddlery Co. v. R.*, [1921] 2 A. C. 91; *Burland v. R.*, *Alleyn v. Barthe*, [1922] 1 A. C. 215.

139. — Property outside province.—It is *ultra vires* the Legislature of Ontario to tax property not within the province.—**WOODRUFF v. A.-G. FOR ONTARIO**, [1908] A. C. 508; *sub nom.* **WOODRUFF v. A.-G. FOR ONTARIO**, *A.-G. FOR ONTARIO v. WOODRUFF*, 78 L. J. P. C. 10; 99 L. T. 750; 24 T. L. R. 912, P. C.

Annotation :—**Dbt.** *Cotton v. R.*, [1914] A. C. 176.

140. — Succession duty—Property within province devolving under law of another domicile.—A colonial legislature may impose as succession duty on property within the province, though such property devolves under the law of another domicile.—*R. v. LOVITT*, [1912] A. C. 212; 81 L. J. P. C. 140; 105 L. T. 650; 28 T. L. R. 41, P. C.

Annotations :—**Dist.** *Royal Bank of Canada v. R.*, [1913] A. C. 283. **Dbt.** *Cotton v. R.*, [1914] A. C. 176. **Ment.** *Velazquez v. I. R. Comrs.*, [1914] 2 K. B. 404.

141. — Whether direct taxation.—The taxation imposed by the Quebec Succession Duties Act, 1906, is not "direct taxation" within the meaning of the British North America Act, 1867 (c. 3), s. 92, & is consequently *ultra vires* the legislature of the province.—*COTTON v. R.*, [1914] A. C. 176; 83 L. J. P. C. 105; 110 L. T. 276; *sub nom.* *COTTON v. R.*, *R. v. COTTON*, 30 T. L. R. 71, P. C.

Annotation :—**Folld.** *Burland v. R.*, *Alleyn v. Barthe*, [1922] 1 A. C. 215.

142. — — — — ——Quebec Succession Duty Act (6 Edw. 7, c. 11), as amended by 7 Edw. 7, c. 14, which imposes succession duty in respect of property outside the Province upon the death of the owner domiciled within it, is *ultra vires* the

legislative power of the Province under Br North America Act, 1867 (c. 3), s. 92 (2), since duty imposed is not "direct taxation" having regard to the provisions for its collection. *BURLAND v. R.*, *ALLEYN v. BARTHE*, [1922] A. C. 215; 91 L. J. P. C. 81; 126 L. T. 584; *nom.* *BURLAND v. R.*, *SHARPEL v. BARTHE* T. L. R. 131, P. C.

143. — Crown lands—Taxation of tenancy interest.—By the British North America Act, 1867 (c. 3), s. 125, "No lands or property belong to Canada or any province shall be liable to taxation," therefore the provincial authorities have power to tax Crown lands, but they have power to impose a tax on the interest of a tenant in Crown lands in the lands held by him, excluding any interest which still remains in the Crown. *SMITH v. VERMILLION HILLS RURAL COUNCIL*, [1916] 2 A. C. 569; 86 L. J. P. C. 36; 115 L. T. 464; 32 T. L. R. 684, P. C.

Annotation :—**Consd.** *Montreal City v. A.-G. for Can.*, [1923] A. C. 136.

144. — — — — ——The statutory charter of the City of Montreal, as enacted by the Legislature of Quebec, provides, in effect, that persons occupying, for commercial or industrial purposes, lands belonging to the Crown shall be subject to the ordinary municipal taxes. The Dominion Govt., in a suit brought at Montreal by the City to recover such taxes, contended that as the enactment conflicted with British North America Act, 1867 (c. 3), s. 125, it was *ultra vires*. The Recorder of Montreal held that debt was liable to pay the taxes in question. The Ct. of K. B. Quebec (Appeal Side) reversed that decision, declaring that the City's charter was without effect to empower the City to impose these taxes. The judgment of the Ct. of K. B. would be set aside & the Recorder's decision restored.—*MONTREAL CITY v. A.-G. FOR CANADA*, [1923] A. C. 136; 86 L. J. P. C. 10; 128 L. T. 295; 39 T. L. R. 13, P. C.

145. Insurance — Regulation of fire insurance policies—Whether affecting "civil rights."—The British North America Act, 1867 (c. 3), s. 91, provides that the Dominion legislature may

141 i. — Succession duty—Whether direct taxation.—That portion of the Succession Duties Ordinance relating to property situated within the province, being a direct taxation is *intra vires* of the Alberta legislature.—*RE CUST* (1915), 30 W. L. R. 671; *reversd.* 8 Alta L. R. 308.—CAN.

141 ii. — — — — ——By "Succession Duties Act" of British Columbia (s. 5), on the death of any person his property in the province & any interest therein or income therefrom passing by will or intestacy is subject to succession duty whether such person was domiciled in the province or elsewhere at the time of his death.—**Held**: the imposition of the duty, if taxation, was "direct taxation within the province," & within the competence of the legislature of British Columbia.—*BOYD v. A.-G. FOR BRITISH COLUMBIA & A.-G. FOR ONTARIO* (1916), 34 S. C. R. 532.—CAN.

g. — Salary of Dominion official—Whether liable.—The imposition of a tax upon the income of a Dominion official is *ultra vires* of the provincial legislature.—*R. v. BOWELL* (1896), 4

pallies.—*Ex p. BURKE* (1897), 34 N. B. R. 200.—CAN.

j. — — — — ——British North America Act, 1867 (c. 3), s. 92 (2), giving a provincial legislature exclusive powers of legislation in respect to "direct taxation within the province," etc., is not in conflict with sect. 91, sub-sect. 8, which provides that Parliament shall have exclusive legislative authority over "the fixing of & providing for the salaries & allowances of civil & other officers of the govt. of Canada." Therefore.—**Held**: a civil or other officer of the govt. of Canada may be lawfully taxed in respect to his income as such by the municipality in which he resides.—*ABBOTT v. ST. JOHN CITY* (1908), 40 S. C. R. 597.—CAN.

k. — Imposition of licence tax on non-resident traders.—The imposition of a licence tax on non-resident traders is within the powers delegated to provincial control by B. N. A. Act, 1867, s. 92.—*POOLS v. VICTORIA CITY* (1892), 2 B. C. R. 271.—CAN.

l. — — — — ——The

on interprovincial trade, or as traversing the power of the Dominion to regulate trade & commerce, as Act binds all persons whether residing in the province or not, & all whether provincial or federal, & does not attempt to prohibit any one from carrying on business, simply imposes a general licence for the purpose of raising a revenue.—*R. v. HOWARTH* (1920), 2 W. W. 1003; 53 D. L. R. 329.—CAN.

m. — Dominion lands—Taxation of tenant's interest.—Taxation under Alberta Rural Municipality Act of the occupier of lands under leases or licences from the Minister of the Interior, is not in contravention of B. N. A. Act, 1867, s. 125.—*MARC v. HARDWICK* (1916), 34 W. L. R. 8 10 W. W. R. 1226.—CAN.

n. — For provincial purposes.—The authorisation of a grant to Mercantile Sailors' Relief Fund is *ultra vires* of the provincial legislature as being contrary to B. N. A. Act, 1867, s. 92 (3 or 7). Such expenditure is in the interests of the province & is levied for provincial purposes.

clusively make laws in respect to "the regulation of trade & commerce." Sect. 92 provides that the provincial legislature may exclusively make laws in relation to "property & civil rights":—*Held*: an Act of a provincial legislature dealing with fire insurance contracts was not a matter relating to "trade or commerce," but was a matter affecting "civil rights," & was within the power of a provincial legislature.—*CITIZENS INSURANCE CO. OF CANADA v. PARSONS, QUEEN INSURANCE CO. v. PARSONS* (1881), 7 App. Cas. 96; 51 L. J. P. C. 11; 45 L. T. 721, P. C.

Annotations:—*Consd. Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; *John Deere Plow Co. v. Wharton*, [1915] A. C. 330. *Refd. Dobie v. Temporalities Board* (1882), 7 App. Cas. 136; *Hodge v. R.* (1883), 9 App. Cas. 117; *A.-G. for Ontario v. A.-G. for the Dominion*, [1896] A. C. 348; *Great West Saddlery Co. v. R.*, [1921] 2 A. C. 91. *Mentd. Russell v. R.* (1882), 7 App. Cas. 829; *Colonial Building & Investment Assocn. v. A.-G. of Quebec* (1883), 9 App. Cas. 157; *A.-G. for Manitoba v. Manitoba Licence Holders' Assocn.* (1901), 71 L. J. P. C. 28; *Re Coleman's Depositories & Life & Health Assce. Assocn.* (1907), 76 L. J. K. B. 865.

See No. 105, *ante*.

146. Intoxicating liquors—Local regulation—Authority conferred on licensing board.—*HODGE v. R.*, No. 90, *ante*.

147. — Local option—Whether operation in districts adopting local option clauses of dominion Act.—*A.-G. FOR ONTARIO v. A.-G. FOR THE DOMINION*, No. 106, *ante*.

ment by virtue of its power to pass laws for the regulation of trade & commerce, but belongs to the local legislature.—*ULRICH v. NATIONAL INSURANCE CO.* (1877), 42 U. C. R. 141.—*CAN.*

p. —.]—38 Vict. c. 65 (D), to amend the law relating to fire insurances, is not *ultra vires*, so far as it affects cos. incorporated by Acts of the Legislature of Canada.—*BILLINGTON v. PROVINCIAL INSURANCE CO.* (1877), 24 Gr. 299; 3 S. C. R. 182.—*CAN.*

q. —.]—*PARSONS v. QUEEN INSURANCE CO.* (1880), 4 A. R. 103; *reced.* (1880), 7 App. Cas. 96.—*CAN.*

146 i. Intoxicating liquors—Local regulation.—] Provincial legislatures may make reasonable regulations for the preservation of good order in the municipalities under their control, & may, for this purpose, restrict the sale of spirituous liquors.—*BLOUIN v. QUEBEC CORPN.* (1881), 7 Q. L. R. 18; 2 Cart. 368.—*CAN.*

146 ii. —.]—Although the Parliament of Canada, under power given to it, to regulate trade & commerce alone has the power to prohibit the trade in intoxicating liquors, yet the provincial legislatures, under the power given to them, may for the preservation of good order, in the municipalities which they are empowered to establish, & which are under their control, make reasonable police regulations, although such regulations may, to some extent interfere with the sale of spirituous liquors.—*POULIN v. QUEBEC CORPN.* (1881), 7 Q. L. R. 337.—*CAN.*

146 iii. —.]—Provincial legislatures can make laws regulating the sale of liquors in taverns & public places, in order the better to maintain peace & good order, but they cannot directly or indirectly prohibit the manu-

with regard to which the Legislature is competent to enact a law or laws.—*R. v. CARLISLE* (1903), 6 O. L. R. 718.—*CAN.*

146 v. —.]—The provisions of Liquor Licence Act prohibiting the sale within specified distances of churches & schools or within proclaimed gold districts are within legislative authority of provincial legislature.—*R. v. BIGELOW* (1907), 3 E. L. R. 101.—*CAN.*

146 vi. —.]—The taking or receipt of an order by a resident of a province from another person within such province for the supplying of liquor for beverage purposes within the same province is a transaction that has its beginning & end within the province, & constitutes a subject upon which a provincial legislature has power to legislate by way of restriction or prohibition, since it is a matter of a purely local or private nature within the province.—*R. v. SHAW*, [1917] 3 W. W. R. 798.—*CAN.*

146 vii. —.]—"Anti-treating law" is *intra vires* of the legislature of Quebec.—*GODBOUT v. CHOQUET* (1918), Q. R. 56 S. C. 62.—*CAN.*

146 viii. —.]—*RE THE SENATE* (1918), Q. R. 56 S. C. 387.—*CAN.*

146 ix. —.]—Br. Col. Prohibition Act, 1916, s. 52 (A. B.), as amended by c. 69 of 1919, must be read with the recital with which the Act begins & with sect. 57 of the Act, & thus covers only cases of persons canvassing for orders for liquor to be sold within the province or distributing or displaying circulars or advertisements for sales of the same nature; and is *intra vires* of the provincial legislature.—*R. v. WESTERN CANADA LIQUOR CO.* (1920), 3 W. W. R. 352.—*CAN.*

146 x. —.]—Legislation re-

148. — Prohibition.—]—The Manitoba Liquor Act, 1900 (c. 22), for the suppression of the liquor traffic in that province is within the powers of the provincial legislature.—*A.-G. OF MANITOBA v. MANITOBA LICENCE HOLDERS' ASSOCN.*, [1902] A. C. 73; 71 L. J. P. C. 28; 85 L. T. 591; 50 W. R. 431; 18 T. L. R. 94, P. C.

Annotations:—*Refd. Canadian Pacific Wine Co. v. Tuley*, [1921] 2 A. C. 417; *Great West Saddlery Co. v. R.*, [1921] 2 A. C. 91.

149. — —.]—The British Columbia Prohibition Act, 1916 (c. 49, B. C.), & amending Acts, consolidated for convenience in 1920, prohibited within the Province the keeping for sale or sale of "liquor" as therein defined. Penalties were thereby imposed which were to be recovered or enforced under the Summary Convictions Act, 1915 (c. 59, B. C.).

Applts. had in their warehouse on July 15, 1920, a large stock of liquor. On a previous date a police officer had gone to the warehouse & purchased liquor, giving in payment marked money. On the date above named resp. police officers entered the warehouse & seized & removed the whole stock of liquor, together with books & papers & the marked money. A magistrate subsequently convicted applts. under the Summary Conviction Act, 1915, of an offence under the Prohibition Act, finding that the whole stock of liquor in the warehouse was unlawfully kept there:—*Held*: the

TENAC COUNTY (1887), 14 O. R. 741.—*CAN.*

146 xi. —.]—*Denial of right of appeal.*—]—Prohibition Act, 1900, s. 16, subs. 2, enacts that "no appeal shall be allowed from any conviction, judgment or order in respect to any offence against this Act to any Ct. whatsoever":—*Held*: the Act was within competency of provincial legislature as a matter of local & private nature from a provincial point of view & as the measure itself was not repugnant to any Act of Parliament of Canada dealing with the subject of temperance.—*McMURRER v. JENKINS* (1907), 3 E. L. R. 149.—*CAN.*

147 i. —.]—*Local option.*—]—Saskatchewan Liquor License Act, 1908, & Acts in amendment thereto, being statutes derogatory of the common law, should be construed strictly:—*Qu.*: whether the provisions of the Act giving to municipalities the right to pass a local option bye-law were within the powers of the Saskatchewan legislature.—*Re MEAD & MOORE JAW CITY* (1911), 17 W. L. R. 14.—*CAN.*

148 i. —.]—*Prohibition.*—]—Provincial legislatures have the power for the purposes of municipal institutions to pass a prohibitory liquor law, or a liquor law which is prohibitory except under certain conditions. This power is not incompatible with the right of the Dominion Parliament to pass a prohibitory liquor law for the whole Dominion.—*THREE RIVERS CORPN. v. SULTE* (1883), 11 S. C. R. 25.—*CAN.*

148 ii. —.]—It is not incompetent for a provincial legislature to pass an Act for the repression or even the total abolition of the traffic in intoxicating liquors within the province, provided the subject is dealt with as a matter of "a merely local nature" in the province.—*R. v. THORNBURN* (1903), 4 C. T. R. 20.—*CAN.*

Sect. 3.—The legislature: Sub-sect. 4, A. (b) iii.]

thereunder to sell wholesale within the province, is *intra vires* the provincial legislature.—**BREWERS & MALTSTERS' ASSOCN. OF ONTARIO v. A.-G. FOR ONTARIO**, [1897] A. C. 231; 66 L. J. P. C. 34; 76 L. T. 61; 13 T. L. R. 197, P. C.

Annotations:—**Reid**, *Cotton v. R.*, [1914] A. C. 176; *Great West Saddlery Co. v. R.*, [1921] 2 A. C. 91; *Burland v. R.*, *Alleyn v. Barthe*, [1922] 1 A. C. 215.

139. — Property outside province.—It is *ultra vires* the Legislature of Ontario to tax property not within the province.—**WOODRUFF v. A.-G. FOR ONTARIO**, [1908] A. C. 508; *sub nom.* **WOODRUFF v. A.-G. FOR ONTARIO**, *A.-G. FOR ONTARIO v. WOODRUFF*, 78 L. J. P. C. 10; 99 L. T. 750; 24 T. L. R. 912, P. C.

Annotation:—**Dttd.** *Cotton v. R.*, [1914] A. C. 176.

140. — Succession duty—Property within province devolving under law of another domicile.—A colonial legislature may impose as succession duty on property within the province, though such property devolves under the law of another domicile.—*R. v. LOVITT*, [1912] A. C. 212; 81 L. J. P. C. 140; 105 L. T. 650; 28 T. L. R. 41, P. C.

Annotations:—**Distd.** *Royal Bank of Canada v. R.*, [1913] A. C. 283. **Dttd.** *Cotton v. R.*, [1914] A. C. 176. **Mentd.** *Velazquez v. I. R. Comrs.*, [1914] 2 K. B. 404.

141. — Whether direct taxation.—The taxation imposed by the Quebec Succession Duties Act, 1906, is not "direct taxation" within the meaning of the British North America Act, 1867 (c. 3), s. 92, & is consequently *ultra vires* the legislature of the provin c.—*COTTON v. R.*, [1914] A. C. 176; 83 L. J. P. C. 105; 110 L. T. 276; *sub nom.* *COTTON v. R.*, *R. v. COTTON*, 30 T. L. R. 71, P. C.

Annotation:—**Foldd.** *Burland v. R.*, *Alleyn v. Barthe*, [1922] 1 A. C. 215.

142. — — — — —.—Quebec Succession Duty Act (6 Edw. 7, c. 11), as amended by 7 Edw. 7, c. 14, which imposes succession duty in respect of property outside the Province upon the death of the owner domiciled within it, is *ultra vires* the

legislative power of the Province under British North America Act, 1867 (c. 3), s. 92 (2), since the duty imposed is not "direct taxation" having regard to the provisions for its collection.—*BURLAND v. R.*, *ALLEYN v. BARTHE*, [1922] 1 A. C. 215; 91 L. J. P. C. 81; 126 L. T. 584; *sub nom.* *BURLAND v. R.*, *SHARPEL v. BARTHE*, 38 T. L. R. 131, P. C.

143. — Crown lands—Taxation of tenant's interest.—By the British North America Act, 1867 (c. 3), s. 125, "No lands or property belonging to Canada or any province shall be liable to taxation," therefore the provincial authorities have no power to tax Crown lands, but they have power to impose a tax on the interest of a tenant of Crown lands in the lands held by him, excluding any interest which still remains in the Crown.—*SMITH v. VERMILLION HILLS RURAL COUNCIL*, [1916] 2 A. C. 569; 86 L. J. P. C. 36; 115 L. T. 464; 32 T. L. R. 684, P. C.

Annotation:—**Consd.** *Montreal City v. A.-G. for Canada*, [1923] A. C. 136.

144. — — — — —.—The statutory charter of the City of Montreal, as enacted by the Legislature of Quebec, provides, in effect, that persons occupying, for commercial or industrial purposes, lands belonging to the Crown shall be subject to the ordinary municipal taxes. The Dominion Govt., in a suit brought at Montreal by the City to recover such taxes, contended that as that enactment conflicted with British North America Act, 1867 (c. 3), s. 125, it was *ultra vires*. The Recorder of Montreal held that debt. was liable to pay the taxes in question. The Ct. of K. B. for Quebec (Appeal Side) reversed that decision & declared that the City's charter was without effect to empower the City to impose these taxes:—**Held**: the judgment of the Ct. of K. B. would be set aside & the Recorder's decision restored.—**MONTREAL CITY v. A.-G. FOR CANADA**, [1923] A. C. 136; 92 L. J. P. C. 10; 128 L. T. 295; 30 T. L. R. 17, P. C.

145. Insurance — Regulation of fire insurance policies—Whether affecting "civil rights."—The British North America Act, 1867 (c. 3), s. 91, provides that the Dominion legislature may ex-

141 i. — Succession duty—Whether direct taxation.—That portion of the Succession Duties Ordinance relating to property situated within the province, being a direct taxation is *intra vires* of the Alberta legislature.—*It. Cusr* (1915), 30 W. L. R. 671; *reisd.* 8 Alta L. R. 308.—**CAN.**

141 ii. — — — — —.—By "Succession Duties Act" of British Columbia (s. 5), on the death of any person his property in the province & any interest therein or income therefrom passing by will or intestacy "is subject to succession duty whether such person was domiciled in the province or elsewhere at the time of his death:—**Held**: the imposition of the duty, if taxation, was "direct taxation within the province," & within the competence of the legislature of British Columbia.—**BOYD v. A.-G. FOR BRITISH COLUMBIA & A.-G. FOR ONTARIO** (1916), 54 S. C. R. 532.—**CAN.**

g. — Salary of Dominion official—Whether liable.—The imposition of a tax upon the income of a Dominion official is *ultra vires* of the provincial legislature.—*R. v. BOWELL* (1896), 4 B. C. R. 498.—**CAN.**

h. — — — — —.—A provincial legislature has no power to impose a tax upon the official income of an employee of the Dominion Govt., nor to confer such power on the municipal-

palities.—*Ex p. BURKE* (1897), 34 N. B. R. 200.—**CAN.**

j. — — — — —.—British North America Act, 1867 (c. 3), s. 92 (2), giving a provincial legislature exclusive powers of legislation in respect to "direct taxation within the province," etc., is not in conflict with sect. 91, sub-sect. 8, which provides that Parliament shall have exclusive legislative authority over "the fixing of & providing for the salaries & allowances of civil & other officer of the govt. of Canada. Therefore:—**Held**: a civil or other officer of the govt. of Canada may be lawfully taxed in respect to his income as such by the municipality in which he resides.—**ABBOTT v. ST. JOHN CITY** (1908), 40 S. C. R. 597.—**CAN.**

k. — Imposition of licence tax on non-resident traders.—The imposition of a licence tax on non-resident traders is within the powers relegated to provincial control by B. N. A. Act, 1867, s. 92.—**POOLE v. VICTORIA CITY** (1892), 2 B. C. R. 271.—**CAN.**

l. — — — — —.—The Act respecting hawkers & pedlars is not *ultra vires* as being an indirect tax or a restraint on interprovincial commerce, or as contravening the power of the Dominion to incorporate cos. to do business in Saskatchewan or to carry

on interprovincial trade, or as contravening the power of the Dominion to regulate trade & commerce, as the Act binds all persons whether resident in the province or not, & all cos. whether provincial or federal, & does not attempt to prohibit any one or any co. from carrying on business, but simply imposes a general licence fee for the purpose of raising a revenue.—*R. v. HOWARTH* (1920), 2 W. W. R. 1003; 53 D. L. R. 329.—**CAN.**

m. — Dominion lands—Taxation of tenant's interest.—Taxation, under Alberta Rural Municipality Act of the occupier of lands under grazing leases or licences from the Minister of the Interior, is not in contravention of B. N. A. Act, 1867, s. 125.—**MARQUIS v. HARDWICK** (1916), 34 W. L. R. 852; 10 W. W. R. 1226.—**CAN.**

n. — For provincial purposes.—The authorisation of a grant to the Mercantile Sailors' Relief Fund is not *ultra vires* of the provincial legislature as being contrary to B. N. A. Act, 1867, s. 92 (2 or 7). Such expenditure is in the interests of the province & is a tax levied for provincial purposes.—**McMILLAN v. WINNIPEG CITY**, [1919] 1 W. W. R. 591.—**CAN.**

o. Insurance.—The power to legislate upon the subject of insurance is not vested in the Dominion Parlia-

clusively make laws in respect to "the regulation of trade & commerce." Sect. 92 provides that the provincial legislature may exclusively make laws in relation to "property & civil rights":—*Held*: an Act of a provincial legislature dealing with fire insurance contracts was not a matter relating to "trade or commerce," but was a matter affecting "civil rights," & was within the power of a provincial legislature.—*CITIZENS INSURANCE CO. OF CANADA v. PARSONS, QUEEN INSURANCE CO. v. PARSONS* (1881), 7 App. Cas. 96; 51 L. J. P. C. 11; 45 L. T. 721, P. C.

Annotations:—*Consd. Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; *John Deere Plow Co. v. Wharton*, [1915] A. C. 330. *Refd. Dobie v. Temporalities Board* (1882), 7 App. Cas. 136; *Hodge v. R.* (1883), 9 App. Cas. 117; *A.-G. for Ontario v. A.-G. for the Dominion*, [1896] A. C. 348; *Great West Saddlery Co. v. R.*, [1921] 2 A. C. 91. *Mentd. Russell v. R.* (1882), 7 App. Cas. 829; *Colonial Building & Investment Assn. v. A.-G. of Quebec* (1883), 9 App. Cas. 157; *A.-G. for Manitoba v. Manitoba License Holders' Assn.* (1901), 71 L. J. P. C. 28; *Re Coleman's Depositories & Life & Health Assce. Assn.* (1907), 76 L. J. K. B. 865.

See No. 105, *ante*.

146. Intoxicating liquors—Local regulation—Authority conferred on licensing board.—*HODGE v. R.*, No. 90, *ante*.

147. —Local option—Whether operation in districts adopting local option clauses of dominion Act.—*A.-G. FOR ONTARIO v. A.-G. FOR THE DOMINION*, No. 106, *ante*.

ment by virtue of its power to pass laws for the regulation of trade & commerce, but belongs to the local legislature.—*ULRICH v. NATIONAL INSURANCE CO.* (1877), 42 U. C. R. 141.—*CAN.*

p. —.]—38 Vict. c. 65 (D), to amend the law relating to fire insurances, is not *ultra vires*, so far as it affects cos. incorporated by Acts of the Legislature of Canada.—*BILLINGTON v. PROVINCIAL INSURANCE CO.* (1877), 24 Gr. 299; 3 S. C. R. 182.—*CAN.*

q. —.]—*PARSONS v. QUEEN INSURANCE CO.* (1880), 4 A. R. 103; *revid.* (1880), 7 App. Cas. 96.—*CAN.*

146 i. Intoxicating liquors—Local regulation.—Provincial legislatures may make reasonable regulations for the preservation of good order in the municipalities under their control, & may, for this purpose, restrict the sale of spirituous liquors.—*BLOUIN v. QUEBEC CORPN.* (1881), 7 Q. L. R. 18; 2 Cart. 368.—*CAN.*

146 ii. ——Although the Parliament of Canada, under power given to it, to regulate trade & commerce alone has the power to prohibit the trade in intoxicating liquors, yet the provincial legislatures, under the power given to them, may for the preservation of good order, in the municipalities which they are empowered to establish, & which are under their control, make reasonable police regulations, although such regulations may, to some extent interfere with the sale of spirituous liquors.—*POULIN v. QUEBEC CORPN.* (1881), 7 Q. L. R. 337.—*CAN.*

146 iii. ——Provincial legislatures can make laws regulating the sale of liquors in taverns & public places, in order the better to maintain peace & good order, but they cannot directly or indirectly prohibit the manufacture or sale of spirituous liquors, or other articles of commerce, or confer authority for that purpose on municipal councils.—*DE ST. AUBYN v. LAFRANCE* (1882), 8 Q. L. R. 190.—*CAN.*

146 iv. ——The subject matter of Ontario Liquor Act, 1902, is one

146. —Prohibition.—The Manitoba Liquor Act, 1900 (c. 22), for the suppression of the liquor traffic in that province is within the powers of the provincial legislature.—*A.-G. OF MANITOBA v. MANITOBA LICENSE HOLDERS' ASSOCN.*, [1902] A. C. 73; 71 L. J. P. C. 28; 85 L. T. 591; 50 W. R. 431; 18 T. L. R. 94, P. C.

Annotations:—*Refd. Canadian Pacific Wine Co. v. Tuley*, [1921] 2 A. C. 417; *Great West Saddlery Co. v. R.*, [1921] 2 A. C. 91.

149. ——The British Columbia Prohibition Act, 1910 (c. 49, B. C.), & amending Acts, consolidated for convenience in 1920, prohibited within the Province the keeping for sale or sale of "liquor" as therein defined. Penalties were thereby imposed which were to be recovered or enforced under the Summary Convictions Act, 1915 (c. 59, B. C.).

Appls. had in their warehouse on July 15, 1920, a large stock of liquor. On a previous date a police officer had gone to the warehouse & purchased liquor, giving in payment marked money. On the date above named resp. police officers entered the warehouse & seized & removed the whole stock of liquor, together with books & papers & the marked money. A magistrate subsequently convicted appls. under the Summary Conviction Act, 1915, of an offence under the Prohibition Act, finding that the whole stock of liquor in the warehouse was unlawfully kept there:—*Held*: the

with regard to which the Legislature is competent to enact a law or laws.—*R. v. CARLISLE* (1903), 6 O. L. R. 718.—*CAN.*

146 v. ——The provisions of Liquor Licence Act prohibiting the sale within specified distances of churches & schools or within proclaimed gold districts are within legislative authority of provincial legislature.—*R. v. BIGELOW* (1907), 3 E. L. R. 101.—*CAN.*

146 vi. ——The taking or receipt of an order by a resident of a province from another person within such province for the supplying of liquor for beverage purposes within the same province is a transaction that has its beginning & end within the province, & constitutes a subject upon which a provincial legislature has power to legislate by way of restriction or prohibition, since it is a matter of a purely local or private nature within the province.—*R. v. SHAW*, [1917] 3 W. W. R. 798.—*CAN.*

146 vii. ——"Anti-treating law" is *intra vires* of the legislature of Quebec.—*GODBOUT v. CHOQUET* (1918), Q. R. 56 S. C. 62.—*CAN.*

146 viii. ——*THE SENATE* (1918), Q. R. 56 S. C. 387.—*CAN.*

146 ix. ——Br. Col. Prohibition Act, 1916, s. 52 (A. B.), as amended by c. 69 of 1919, must be read with the recital with which the Act begins & with sect. 57 of the Act, & thus covers only cases of persons canvassing for orders for liquor to be sold within the province or distributing or displaying circulars or advertisements for sales of the same nature; and is *intra vires* of the provincial legislature.—*R. v. WESTERN CANADA LIQUOR CO.* (1920), 3 W. W. R. 352.—*CAN.*

146 x. ——Legislation relating to municipalities brought under Canada Temperance Act, by which ways & means are provided for the enforcement of the Act by the application of local funds raised by local taxation or otherwise in the county, are not *ultra vires* the local legislature.—*FRONTENAC LICENSE COMRS. v. FRON-*

TENAC COUNTY (1887), 14 O. R. 741.—*CAN.*

146 xi. ——*Denial of right of appeal.*—Prohibition Act, 1900, s. 16, subs. 2, enacts that "no appeal shall be allowed from any conviction, judgment or order in respect to any offence against this Act to any court whatsoever":—*Held*: the Act was within competency of provincial legislature as a matter of local & private nature from a provincial point of view & as the measure itself was not repugnant to any Act of Parliament of Canada dealing with the subject of temperance.—*McMURKIN v. JENKINS* (1907), 3 E. L. R. 149.—*CAN.*

147 i. —Local option.—Saskatchewan Liquor License Act, 1908, & Acts in amendment thereto, being statutes derogatory of the common law, should be construed strictly:—*Qu.*: whether the provisions of the Act giving to municipalities the right to pass a local option bye-law were within the powers of the Saskatchewan legislature.—*Re MEAD & MOORE JAW CITY* (1911), 17 W. L. R. 14.—*CAN.*

148 i. —Prohibition.—Provincial legislatures have the power for the purposes of municipal institutions to pass a prohibitory liquor law, or a liquor law which is prohibitory except under certain conditions. This power is not incompatible with the right of the Dominion Parliament to pass a prohibitory liquor law for the whole Dominion.—*THREE RIVERS CORPN. v. SULTE* (1883), 11 S. C. R. 25.—*CAN.*

148 ii. ——It is not incompetent for a provincial legislature to pass an Act for the repression or even the total abolition of the traffic in intoxicating liquors within the province, provided the subject is dealt with as a matter of "a merely local nature" in the province.—*R. v. THORBURN* (1918), 41 O. L. R. 39.—*CAN.*

r. — *Acts requiring licences to sell—Whether valid.*—*Exp. LEVEILLE* (1873), 2 Cart. 349.—*CAN.*

s. — *Liquor License Act, R. S. O. 1887 (c. 194), s. 51 (2),*

Sect. 3.—The legislature: Sub-sect. 4, A. (b) iii.]

two provincial statutes above mentioned were *intra vires* under the British North America Act, 1867 (c. 3).—**CANADIAN PACIFIC WINE CO., LTD. v. TULEY**, [1921] 2 A. C. 417; 90 L. J. P. C. 233; 126 L. T. 78; 37 T. L. R. 944, P. C.

150. — Act passed pursuant to popular vote—Whether intra vires.—The Liquor Act (6 Geo. 5, c. 4 Alb.), as amended in 1917 & 1918, is *intra vires* the legislative power of the Province under the British North America Act, 1867 (c. 3), when read in conjunction with the Liquor Export Act (8 Geo. 5, c. 8, Alb.), whereby rights within the exclusive power of the Dominion are preserved; & it is not *ultra vires* by reason of being passed pursuant to a popular vote under the Direct Legislation Act (4 Geo. 5, c. 3, Alb.).—**R. v. NAT BELL LIQUORS, LTD.**, [1922] 2 A. C. 128; 91 L. J. P. C. 146; 127 L. T. 437; 38 T. L. R. 541; 27 Cox, C. C. 253, P. C.

See No. 101, *ante*.

151. Barristers—Regulation of appointment of King's counsel—Patents of precedence of members of bar.—According to the true construction of the British North America Act, 1867 (c. 3), s. 92 (1, 4, 14), Revised Statutes of Ontario, 1877, c. 139, which empowers the Lieutenant-Governor of the province to confer precedence by patents upon such members of the bar of the province as he may think fit to select, is *intra vires* the provincial legislature.—**A.-G. FOR DOMINION OF CANADA v. A.-G. FOR PROVINCE OF ONTARIO**, [1898] A. C. 247; 67 L. J. P. C. 17; 77 L. T. 539; 14 T. L. R. 100, P. C.

152. Fisheries—Powers of provincial legislature.—**A.-G. FOR DOMINION OF CANADA v. A.-G. FOR PROVINCES OF ONTARIO, QUEBEC & NOVA SCOTIA, A.-G. FOR PROVINCE OF ONTARIO v. A.-G. FOR DOMINION OF CANADA, A.-G. FOR PROVINCES OF QUEBEC & NOVA SCOTIA v. A.-G. FOR DOMINION OF CANADA**, No. 119, *ante*.

153. — Grant of exclusive rights—Tidal waters.—In pursuance of the Terms of Union under which British Columbia was admitted into the Union of Provinces constituted by the British North America Act, 1867 (c. 3), the legislature of

that province by two statutes granted to the Govt. of the Dominion a strip of public land extending to twenty miles on each side of the railway to be constructed under those terms. This strip of land is known as the railway belt. By the British North America Act, 1867 (c. 3), s. 91, the legislative authority of the Parliament of Canada extends to "sea coast & inland fisheries" & by s. 92 the provincial legislature may exclusively make laws in relation to property & civil rights in the Province." In answer to questions submitted to the Supreme Ct. under the Supreme Ct. Act (R. S. C., 1906, c. 139), s. 60:—**Held**: it was not competent to the legislature of British Columbia to authorise the Govt. of that Province to grant the exclusive right of fishing in either the tidal or the navigable non-tidal waters within the railway belt.—**A.-G. FOR BRITISH COLUMBIA v. A.-G. FOR CANADA**, [1914] A. C. 153; 83 L. J. P. C. 169; 110 L. T. 484; 30 T. L. R. 144, P. C.

Annotation:—**Consd.** **A.-G. for Canada v. A.-G. for Quebec**, [1921] 1 A. C. 413.

See No. 120, *ante*.

154. Railways—Compulsory construction work—Cattle protection.—A provincial legislature has no power to order work to be done on a railway which has been declared by the Dominion Parliament to be "for the general advantage of Canada."

The provision in the British Columbian Cattle Protection Act, 1891, as amended in 1895, to the effect that a Dominion railway co., unless they erect proper fences on their railway, shall be responsible for cattle injured or killed thereon, is *ultra vires* the provincial parliament.—**MADDEN v. NELSON & FORT SHEPPARD RY.**, [1899] A. C. 626; 68 L. J. P. C. 148; 81 L. T. 276; 15 T. L. R. 484, P. C.

Annotations:—**Refd.** **A.-G. for Alberta v. A.-G. for Canada**, [1915] A. C. 363. **Mentd.** **Great West Saddlery Co. v. R.**, [1921] 2 A. C. 91.

155. — Provision for cleansing ditch adjoining railway.—**CANADIAN PACIFIC RY. CO. v. NOTRE DAME DE BONSECOURS CORPN.**, No. 121, *ante*.

156. — Power to authorise occupation of land of dominion railway by provincial railway.—The Alberta Railway Act, 1907 (c. 8), s. 82 (1, 2),

which requires brewers licensed by the Govt. of Canada to take out licences under that Act, is *intra vires* provincial legislation.—**R. v. HALLIDAY** (1895), 21 A. R. 42.—**CAN.**

t. — — — — ——Provincial legislature has power to enact laws requiring dealers in intoxicating liquors, whether wholesale or retail, to take out licences.—**BROWN v. MOORE** (1901), 33 N. S. R. 381.—**CAN.**

a. — — — — ——Power to annul licences.]—So much of Provincial Act, 1916, c. 22, s. 3, as purports to annul liquor licences is *intra vires*.—**Re NOVA SCOTIA TEMPERANCE ACT** (1918), 51 B. C. R. 405.—**CAN.**

b. — — — — ——Liquor Licence Regulation Act.]—Liquor Licence Regulation Act, 1891, s. 4, is *intra vires* of the provincial legislature, & is consistent with sub-sections 73, 78, 92, of Municipal Act, 1891, s. 96 (73, 78, 92).—**SAUER v. WALKER** (1892), 2 B. C. R. 93.—**CAN.**

c. — — — — ——Prohibition Act—Confiscatory provisions.]—The confiscatory provisions of Prince Edward Island Prohibition Act are not *ultra vires* of the Legislature.—**MATTHEWS v. JENKINS** (1907), 3 E. L. R. 577.—**CAN.**

d. — — — — ——**Alberta Liquor Act.**—**Alberta Liquor Act** is *intra vires* of the pro-

vincial legislature.—**R. v. BELL** (1920), 15 Alta. L. R. 531.—**CAN.**

e. — — — — ——Prohibition of export.]—A provincial legislature has not the power to prohibit the keeping of liquor within the province for export to other provinces or foreign countries.—**Re HUDSON'S BAY CO. & HEFFERMAN**, [1917] 3 W. W. R. 167; 10 Sask. L. R. 322.—**CAN.**

f. — — — — ——The Liquor Act & Liquor Export Act, in so far as they prohibit export or keeping for export from the province except under the conditions imposed by c. 7 of 1920 (amending the Liquor Export Act), are *ultra vires* of the provincial Legislature.—**GOLD SEAL, LTD. v. DOMINION EXPRESS CO.** (1920), 2 W. W. R. 761; 53 D. L. R. 547.—**CAN.**

g. — — — — ——Provincial Act—How far effective.]—**R. v. LAKE** (1877), 43 U. C. R. 515.—**CAN.**

h. — — — — ——Conflict with Dominion statute.]—The Prince Edward Island Act (42 Vict. c. 6) so far as it conflicts with the Proclamation of the Governor-General is *ultra vires*, because the Canada Temperance Act, was passed before the Island Act, & when the Governor-General in pursuance of the power given him by the Act, issued his proclamation, it must be read as if the proclamation was

incorporated in the Act.—**STONE v. NASH** (1881), 2 P. E. I. 415.—**CAN.**

k. — — — — ——Effect of introduction of Dominion statute.]—The putting into force of Canada Temperance Act in a locality has the effect of suspending Quebec Licence Act. Provincial legislation has effect only in the absence of Dominion legislation upon the same subject-matter.—**REVENUE COLLECTOR v. GOSSELIN** (1918), Q. R. 55 S. C. 224.—**CAN.**

l. Railways—Under Dominion legislature—No power to legislate as to.]—The province of Ontario passed an Act to make provision for the safety of railway employees & the public, such provision having reference to the construction & maintenance of railway frogs, etc.:—**Held**: a provincial legislature has no power to pass such law with reference to a Dominion railway situate locally within the province.—**MONKHOUSE v. GRAND TRUNK RY. CO.** (1883), 8 A. R. 637.—**CAN.**

m. — — — — ——A provincial Act empowered an inspector finding liquor in transit or in course of delivery upon the premises of any carrier & reasonably believing that it is to be sold in contravention of the Act, to seize or remove it:—**Held**: it would be *ultra vires* of a provincial legislature to authorise such interference with the undertaking of a

provided that a railway co. authorised by that Act might, subject to the approval, order, or direction of the Lieut.-Governor take possession of, use, or occupy the lands belonging to any other railway co. Sect. 7 of c. 15 of the Acts of the Legislature of Alberta for 1912 amended s. 82 above mentioned by adding sub s. 3, which purported to apply its provisions to the lands of every railway co. authorised otherwise than under the legislative authority of the Province, "in so far as the taking of such land does not unreasonably interfere with the construction & operation" of the railway whose lands are taken:—*Held*: (1) s. 7 was *ultra vires* a provincial legislature under the British North America Act, 1867 (c. 3); (2) in a suitable case, having regard to the interests of the public, the Board of Railway Comrs., acting under s. 8 of the Railway Act, might grant permission for a provincial railway to cross a Dominion railway, the crossing being regulated in accordance with those interests.—A.-G. FOR ALBERTA v. A.-G. FOR CANADA, [1915] A. C. 363; 84 L. J. P. C. 58; 112 L. T. 177; 31 T. L. R. 32, P. C.

157. — Regulation of provincial railway crossing dominion railway.—The Canadian statute 3 Edw. 7 (Dom.), c. 58, provided by sect. 7 that "Every railway, the construction or operation of which is authorised by a special Act passed by the legislature of any province now or heretofore connecting, with or crossing a railway which at the time of such connection or crossing is subject to the legislative authority of the Parliament of Canada is hereby declared to be a work for the general advantage of Canada in respect only to such connection or crossing or to through traffic thereon, or anything appertaining thereto." Therefore a provincial railway board has jurisdiction to make orders with references to a provincial railway which crosses a Dominion railway.—HAMILTON, GRIMSBY & BEAMSVILLE RY. v. A.-G. FOR ONTARIO, [1916] 2 A. C. 583; 86 L. J. P. C. 13; 115 L. T. 356, P. C.

158. — Provision of penalties for non-compliance with order of railway board.—Provincial railways.—Appls., who operated a street railway in Toronto under an agreement with the resp. corpn., were required by an order made by the Railway & Municipal Board of Ontario on Feb. 27, 1917, to place an additional 100 cars in operation by Jan. 1, 1918. Sect. 260a, added to the Ontario Rly. Act (R. S. Ont., 1914, c. 185) by an Act passed on Mar. 26, 1918, provided that the above-mentioned Board, for the purpose of enforcing compliance with any order of the above character made by them upon a railway co., might order the co. to pay to the corpn. of the municipality in which it operated a penalty not exceeding 1,000 dollars a day for non-compliance. On Apr. 19, 1918, applts., having supplied no additional cars, the Board, acting under s. 260a, order them to pay to the respondent corpn. 1,000 dollars per day from Mar. 27 to the date of the order:—*Held*: sect. 260a, was *intra vires* the provincial legis-

lature.—TORONTO RY. CO. v. TORONTO CITY, [1920] A. C. 446; 89 L. J. P. C. 90; 122 L. T. 641, P. C.

See Nos. 102, 122, 124, 125, *ante*.

159. Aliens—Prohibition of employment of Chinese in underground coal working.—*Held*: sect. 4 of British Columbian "Coal Mines Regulation Act, 1890," which prohibits Chinamen of full age from employment in underground coal workings is in that respect *ultra vires* the provincial legislature.—UNION COLLIERY CO. OF BRITISH COLUMBIA, LTD. v. BRYDEN, [1909] A. C. 580; 68 L. J. P. C. 118; 81 L. T. 277; 15 T. L. R. 508, P. C.

Annotations:—*Distd.* Cunningham v. Tomey Homma, [1903] A. C. 161; *Ex p.* Brooks-Bidlake & Whittall v. A.-G. for British Columbia, [1923] A. C. 450. *Refd.* John Deere Plow Co. v. Wharton, [1915] A. C. 330; A.-G. for British Columbia v. A.-G. for Canada (1923), 40 T. L. R. 7. *Mentd.* Great West Saddlery Co. v. R., [1921] 2 A. C. 91.

160. — Prohibition of employment of Chinese or Japanese—Under licence to fell timber.—Appls. were holders of licences granted in 1912 enabling them to cut timber on certain lands of the Province of British Columbia, & containing a provision that no Chinese or Japanese labour was to be employed in connection therewith. The licences were for a year, but were renewable from year to year if the terms had been complied with. The provision above-mentioned was declared to be invalid by the Ct. of Appeal of the Province in 1920, but the Legislature of the Province in 1921 passed an Act (11 Geo. 5, c. 49) declaring that the provision had force of law, & that a violation of it should be a sufficient ground for cancelling a licence. Appls. who employed both Chinese & Japanese, sued for a declaration that they were entitled so to do, & that the Act above referred to was beyond the powers of the Provincial Legislature:—*Held*: the Act was not *ultra vires* the Provincial Legislature under British North America Act, 1867 (c. 3), since although by s. 91, head 25, the Dominion Legislature had exclusive legislative authority as to "naturalisation & aliens," the functions of regulating the management of the property of a Province, & of determining whether a grantee or licensee of that property should or should not employ persons of a certain race, were assigned by s. 92, head 5, & s. 109 to the Legislature of the Province, & there was nothing in s. 91 conflicting with that view.—BROOKS-BIDLAK & WHITTALL, LTD. v. A.-G. FOR BRITISH COLUMBIA, [1923] A. C. 450; 92 L. J. P. C. 124; 128 L. T. 801; 39 T. L. R. 220; 67 Sol. Jo. 333, P. C.

Annotation:—*Consd.* A.-G. for British Columbia v. A.-G. for Canada (1923), 40 T. L. R. 7.

161. — Japanese Treaty Act, 1913.—Oriental Orders in Council Validation Act, 1921 (British Columbia statute), which purported to validate Orders in Council of British Columbia restricting the employment of Chinese or Japanese, is *ultra vires* the Legislature of British Columbia,

Dominion Govt. railway.—MARTINELLO & Co. v. McCORMICK (1920), 59 S. C. R. 394.—CAN.

n. — — — — —.]—The provincial legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the road-bed of railways subject to the provisions of Railway Act of Canada.—GRAND TRUNK RY. CO. OF CANADA v. THERRIEN (1900), 30 S. C. R. 485.—CAN.

o. — — — — —.]—Con. Ord.

N. W. T., 1898 (c. 87), s. 2 (2), as amended by the N. W. T. Ordinances, c. 25, 1st sess., & c. 30, 2nd sess., of 1903, in so far as they relate to fires caused by the escape of sparks, etc., from railway locomotives, constitute "railway legislation," strictly so-called, & as such, are beyond the competence of the Legislature of the North West Territories.—CANADIAN PACIFIC RY. CO. v. R. (1907), 39 S. C. R. 476.—CAN.

160 i. Aliens—Prohibition of employment of Chinese & Japanese.—

Statutes of British Columbia, 1921 (c. 49), purporting to validate certain Orders in Council which made it a condition of certain contracts, leases or concessions entered into, issued or made by, or on behalf of, the govt. that no Chinese or Japanese should be employed thereunder are *ultra vires*.—*Re* ORIENTAL ORDERS IN COUNCIL VALIDATION ACT, [1922] 2 W. W. R. 429.—CAN.

p. — Chinese Tax Act.—Chinese Tax Act, 1878, is *ultra vires* of the provincial legislature.—TAI SING v.

Sect. 3.—The legislature: Sub-sect. 4, A. (b) iii.]

inasmuch as it violates the principle laid down in Japanese Treaty Act, 1913 (Dominion statute), that the subjects of the Emperor of Japan are to be, in all that relates to their industries & callings, in all respects on the same footing as the subjects or citizens of the most favoured nation, the Act of 1913 having declared, in accordance with British North America Act, 1867 (c. 3), s. 132 that the treaty made to that effect in 1913 between the King & the Emperor of Japan should have the force of law in Canada.—A.-G. FOR BRITISH COLUMBIA *v.* A.-G. FOR CANADA (1923), 40 T. L. R. 7; 68 Sol. Jo. 79, P. C.

162. — Naturalisation—Exclusion of Japanese from franchise.]—British North America Act, 1867 (c. 3), sect. 91 (25), reserves to the exclusive jurisdiction of the Dominion Parliament the subject of naturalisation, that is, the right to determine how it shall be constituted.

The provincial legislature has the right to determine under s. 92 (1) what privileges as distinguished from necessary consequences, shall be attached to it.

Accordingly, the British Columbia Provincial Elections Act (1897, c. 67), s. 8, which provides that no Japanese, whether naturalised or not, shall be entitled to vote, is not *ultra vires*.—CUNNINGHAM *v.* TOMMY HOMMA, [1903] A. C. 151; 87 L. T. 572; *sub nom.* VANCOUVER CITY (COLLECTOR OF VOTERS) & A.-G. FOR BRITISH COLUMBIA *v.* TOMMY HOMMA & A.-G. FOR THE DOMINION OF CANADA, 72 L. J. P. C. 23; 19 T. L. R. 126, P. C.

Annotations:—*Reid*, Great West Saddlery Co. *v.* R., [1921] 2 A. C. 91; A.-G. for British Columbia *v.* A.-G. for Canada (1923), 40 T. L. R. 7; *Birks-Bidlake & Whittall v. A.-G. for British Columbia*, [1923], A. C. 450.

163. Act in favour of local undertaking—Grant of exclusive right to establish electric lighting system.]—A corpn. granted a permission to certain persons to erect poles for the establishment of

a system of electric light under certain specified conditions. Subsequently, by a bye-law, confirmed by an Act of Parliament, the corpn. granted to another person an exclusive privilege to construct an electric railway, & also for thirty-five years to establish a system of lighting & heating by electricity or otherwise; & the exclusive rights thus given were to be such as the city "possesses & as it has the right to grant this day." In an action by the latter person to obtain the revocation of the previous licence:—*Held*: the two concessions were not necessarily incompatible.—HULL ELECTRIC CO. *v.* OTTAWA ELECTRIC CO., [1902] A. C. 237; 71 L. J. P. C. 58; 86 L. T. 208; 18 T. L. R. 344, P. C.

164. Sunday observance.]—A Lord's Day Observance Act, which imposes penalties for the infringement of its provisions, is a matter of criminal law reserved by British North America Act, 1867 (c. 3), s. 91 (27), for the exclusive legislative authority of the Parliament of Canada, & it is therefore *ultra vires* a provincial legislature to pass such an Act.

It is not the practice of their Lordships to give speculative opinions on hypothetical questions submitted. The questions must arise in concrete cases & involve private rights.—A.-G. FOR ONTARIO *v.* HAMILTON STREET RY., [1903] A. C. 524; 72 L. J. P. C. 105; 89 L. T. 107; 19 T. L. R. 612, P. C.

165. Company incorporated by Dominion statute—Restriction of powers by provincial legislature.]—TORONTO CORPN. *v.* BELL TELEPHONE CO. OF CANADA, No. 116, *ante*.

166. — — — — —.]—COMPAGNIE HYDRAULIQUE DE ST. FRANÇOIS *v.* CONTINENTAL HEAT & LIGHT CO., No. 104, *ante*.

167. — — — — —.]—Licence to carry on business.]—JOHN DEERE PLOW CO., LTD. *v.* WHARTON, No. 117, *ante*.

168. — — — — —.]—A co. incorporated by

McGUIRE (1878), 1 B. C. R., pt. I, 101.—CAN.

g. — — — — —.]—R. *v.* WING CHONG (1885), 1 B. C. R., pt. II, 150.—CAN.

r. — No power to deny trade licences to.]—It is not competent to a provincial legislature of to a municipality, to deny certain nationalities or individuals the right to take out municipal trade licences, e.g., to a Chinaman the right to a pawnbroker's licence.—R. *v.* VICTORIA CORPN., *Re* MOCK FEE ET AL (1888), 1 B. C. R. pt. II, 331.—CAN.

s. — No power to legislate as to immigration.]—British Columbia Immigration Act, 1908, is inoperative. In so far as the subjects of the Japanese Empire are concerned, the field being occupied by Dominion legislation.—*Re* NAKANE & OKAZAKI (1908), 8 W. L. R. 19; 13 B. C. R. 370.—CAN.

t. — — — — —.]—Parliament, by Immigration Act, R.S.C., 1906, c. 93, having provided a complete code dealing with immigration, British Columbia Immigration Act, 1908, is inoperative.—*Re* NARIAN SINGH (1908), 13 B. C. R. 477.—CAN.

164 i. Sunday observance.]—Van-couver Incorporation Act, 1886, as amended, gave the municipal council of the city power to pass bye-laws: "For the prevention of sales of any personal property whatsoever, except milk, drugs or medicine on Sundays." The city passed a bye-law prohibiting the sale on Sundays in the city of any personal property with the exceptions mentioned in the statute:—*Held*: the

provincial legislature, having power to deal with the subject, it was no objection that the provision was inconsistent with the Lord's Day Act, 29 Car. II, c. 7.—*Re* PETERSKY (1895), 4 B. C. R. 385.—CAN.

164 ii. — — — — —.]—62 Vict. c. 11, s. 1, whereby the sale of real or personal property or the exercise of any wordly business or work on Sunday is prohibited, is within the authority of the legislature of New Brunswick.—*Ex p.* GREEN (1901), 35 N. B. R. 137; 4 Can. Crim. Cas. 182.—CAN.

164 iii. — — — — —.]—7 Ed. VII, cap. 42, (Q.), "respecting the observance of Sunday" is not a law in a criminal matter, but is within the legislative powers of provincial legislatures & is constitutional.—*Couture v. PANOS* (1908), Q. R. 17 K. B. 560.—CAN.

164 iv. — — — — —.]—Lord's Day Act, N. B., being C. S. (1903), c. 107, is *ultra vires* of the provincial legislature.—*R. v. MARSH*, *Ex p.* WASHINGTON (1912), 41 N. B. R. 419.—CAN.

165 i. Company incorporated by Dominion statute—Restriction of powers by provincial legislature.]—Foreign Companies Act (s. 10), inasmuch as it has the effect of depriving an extra-provincial co. of the status, capacities & powers which are the natural & logical consequences of its incorporation by the Dominion Govt., is *ultra vires* of the provincial legislature & inoperative for the purpose of depriving a co. of its right to maintain an action in the provincial cts.—*LINDE CANADIAN REFRIGERATION CO. v. SASK CREAMERY CO.* (1916), 51 S. C. R. 400.—CAN.

165 ii. — — — — —.]—A province has the right to pass legislation prescribing the conditions upon which any corpn. not incorporated under the laws of the province may acquire or hold real estate in the province or prohibiting it from doing so.—*CAMPBELL v. MORGAN ET AL.*, [1919] 1 W. W. R. 268.—CAN.

165 iii. — — — — —.]—Provincial legislation requiring a Dominion co. to become registered in the province & imposing a penalty for carrying on business while unregistered is *ultra vires*, as the effect thereof is to make it impossible for the co. to enter into or enforce its ordinary business engagements & contracts until registration is effected, & so to destroy for the time being the status & powers conferred upon it by the Dominion.—A.-G. FOR ONTARIO *v.* HARRIS LITHOGRAPHING CO., LTD. & A.-G. FOR CANADA, [1921] 1 W. W. R. 1034.—CAN.

165 iv. — — — — —.]—By Act relating to matters within scope of authority.]—Ontario Extra-Provincial Corporations Act, R. S. O., 1914, c. 179, as a whole, is not in its "pith & substance" an Act designed to restrict Dominion cos. in the exercise of the powers conferred upon them by Dominion authority, but an act lawfully passed for purposes as to which the Ontario Legislature has power to legislate.—*CURRIE v. HARRIS LITHOGRAPHING CO., LTD.* (1918), 41 O. L. R. 475; 13 O. W. N. 326; 41 D. L. R. 227.—CAN.

165 v. — — — — —.]—*R. v. JOHN DEERE PLOW CO.*, [1919] 59 S. C. R. 19, 45; *revid.*, [1921] 3 A. C. 91.—CAN.

the Dominion under Companies Act of Canada (R. S. Can., 1906, c. 79), with power to trade in any Province, may, consistently with British North America Act, 1867 (c. 3), ss. 91, 92, be subject to provincial laws of general appln., such as laws imposing taxes, or relating to mortmain or requiring licences for certain purposes, or as to the form of contracts; but a provincial legislature cannot validly enact, for the enforcement of such laws, sanctions which if applied would sterilise or destroy the capacities & powers which the Dominion has validly conferred. Accordingly, Extra-Provincial Corporations Act (R. S. Ont., 1914, c. 179), Companies Act (R. S. Man., 1913, c. 35), & Companies Act (Stat. Sask., 1915, c. 14), so far as they purport to preclude Dominion trading cos. from carrying on their business in the Province unless registered or licensed thereunder, or subject such cos. to penalties for so carrying on business, are *ultra vires*. The Companies Act of Canada (R. S. Can., 1906, c. 79), s. 29, which purports to enable a Dominion co. to acquire & hold real estate requisite for the carrying on of its undertaking, does not prevail against a severable provision of a provincial legislature restricting the power of corps. generally to acquire & hold land in the Province. Accordingly, the Mortmain & Charitable Uses Act (R. S. Ont., 1914, c. 103) is valid; but the provisions of R. S. Man., 1913, c. 35, & R. S. Sask., 1915, c. 14, as to the holding of land by Dominion cos., are invalid, since the provisions are not severable from the invalid provisions referred to above.—*GREAT WEST SADDLERY Co. v. R.*, [1921] 2 A. C. 91; 90 L. J. P. C. 102; 125 L. T. 130; 37 T. L. R. 430, P. C.

169. ———]—Questions referred to the Supreme Ct. of Canada as to the power & capacity of cos. incorporated under provincial legislative authority as to the power of the provincial legislatures to restrict the operations of cos. incorporated under Dominion legislature authority answered by reference to the judgments of the Board in *Deere (John) Plow Co. v. Wharton*, No. 117, *ante*, *Bonanza Creek Gold Mining Co., Ltd. v. R.*, No. 171, *post*, & *A.-G. for Canada v. A.-G. for Alberta*, No. 105, *ante*. The judicial Committee will abstain as far as possible from deciding questions of an abstract & general character on the interpretation of the British North America Act until they come before it in actual litigations about concrete disputes.—*A.-G. FOR ONTARIO v. A.-G. FOR CANADA*, [1916] 1 A. C. 598; 85 L. J. P. C. 127; 114, L. T. 774, P. C.

170. ——— Limitation of power to hold land.]—*GREAT WEST SADDLERY Co. v. R.*, No. 168, *ante*.

See No. 115, *ante*.

171. Company incorporated by charter—Letters patent of Provincial Governor—Capacity to accept rights & powers outside province.]—British North America Act, 1867 (c. 3), s. 92, confines the actual powers & rights which a provincial govt. can bestow upon a co., either by legislation or through the executive, to powers & right exercisable within the province, but does not preclude a province either from keeping alive the then existing power of the executive to incorporate by charter so as to confer a general capacity analogous to that of a natural person, or to legislate so as to create, by or by virtue of a statute, a corp. with this general capacity. The power of incorporation by charter

transferred to the Lieutenant-Governor of the province of Ontario by s. 65 of the above-mentioned Act has not been abrogated or interfered with by the Ontario Cos. Act (R. S. Ont. c. 191).

A co. incorporated by letters patent issued by the Lieutenant-Governor of Ontario under the Ontario Cos. Act (R. S. Ont., 1897, c. 191), s. 9, with the object of carrying on the business of mining, has a status & capacity which enable it to accept & exercise mining leases & rights in the Yukon Territory conferred by the authorities of the Dominion & the Yukon Territory.—*BONANZA CREEK GOLD MINING Co., LTD. v. R.*, [1916] 1 A. C. 566; 85 L. J. P. C. 114; 114 L. T. 765; 32 T. L. R. 333, P. C.

Annotations:—*Feld*. A.-G. for Ontario v. A.-G. for Canada, [1916] 1 A. C. 598. *Ridd*. A.-G. for Canada v. A.-G. for Alberta, [1916] 1 A. C. 588.

172. Grant of land with mines & minerals—Previous grant superseded.]—British Columbia Vancouver Island Settlers' Rights Act, 1904, directed that a grant in fee simple without any reservations as to mines & minerals should be issued to settlers therein defined, & thereunder a grant was made to applt. of the lot in suit.

By an Act of the same legislature in 1883, land which included the lot had been granted with its mines & minerals to the Dominion Govt. in aid of the construction of resps.' railway, & in 1887 had been by it granted to resps. under the provisions of a Dominion Act passed in 1884:—*Held*: (1) the Act of 1904 on its true construction legalised the grant thereunder to applt., & superseded resps.' title; (2) the Act of 1904 was *intra vires* of the local legislature. It had the exclusive power of amending or repealing its own Act of 1883. The Act, moreover, related to land which had become the property of resps., & affected a work & undertaking purely local within the meaning of British North America Act, 1867 (c. 3), s. 92, sub-sect. 10.—*MCGREGOR v. ESQUIMALT & NANAIMO RY.*, [1907] A. C. 462; 76 L. J. P. C. 85; 97 L. T. 223, P. C.

Annotation:—*As to* (1) *Ridd*. *Wilson v. Esquimalt & Nanaimo Ry.*, [1922] 1 A. C. 202.

173. Restriction of right of appeal from provincial court—When matter within exclusive jurisdiction of provincial legislation.]—A provincial legislature has no power to limit the right of appeal from the provincial cts. to the Supreme Ct. of Canada, which is conferred by Revised Statutes of Canada, 1906 (c. 130), s. 36, even in matters which are, by British North America Act, 1867 (c. 3), s. 92, within the exclusive jurisdiction of the provincial legislature.

Where the subject-matter is open to both legislative bodies, the enactment of the Dominion Parliament must prevail.—*CROWN GRAIN CO., LTD. v. DAY*, [1908] A. C. 504; 78 L. J. P. C. 19; 99 L. T. 746; 24 T. L. R. 913, P. C.

See No. 91, *ante*.

174. Water rights—Public lands granted by Provincial Government to Dominion Government.]—A grant by a Provincial Govt. to the Dominion Govt. of Canada of public lands in the Province passes the water rights incidental to such lands, so that it is not competent for the provincial legislature to deal with them by subsequent legislation.—*BURRARD POWER Co., LTD. v. R.*, [1911] A. C. 87; 80 L. J. P. C. 69; 103 L. T. 404; 27 T. L. R. 57, P. C.

Annotation:—*Ridd*. A.-G. for British Columbia v. A.-G. for Canada, [1914] A. C. 153.

a. Education—No power to prejudice existing privileges of separate schools.]—Under B. N. A. Act, 1867, provincial legislatures may legislate

in regard to separate schools, provided that the legislation is not such as prejudicially affects the rights or privileges theretofore possessed by such

schools.—*BELLEVILLE ROMAN CATHOLIC SEPARATE SCHOOLS TRUSTEES v. GRAINGER* (1878), 25 Gr. 570.—CAN.

Sect. 3.—The legislature: Sub-sect. 4, A. (b) iii.]

175. Appropriation of money subscribed by bondholders outside province—Right of bondholders to recover.]—Under British North American Act, 1867 (c. 3), s. 92, a provincial legislature has the exclusive power of legislating as to property & civil rights in the province.

A sum of money was subscribed by bondholders resident outside the province for the construction of a railway in a province of Canada, under a scheme which afterwards proved abortive. The money was lying at a bank in the province. The provincial legislature passed an Act providing that the money should form part of the general revenue fund of the province free from all claims of the railway co. or their assigns, & should be paid over to the treasurer of the province:—*Held*: as the bondholders had a right to recover back their

money as having been paid for a consideration which had failed, the legislation was not restricted to dealing with property & civil rights in the province, & was *ultra vires*.—*ROYAL BANK OF CANADA v. R.*, [1913] A. C. 283; 82 L. J. P. C. 33; 108 L. T. 129; 29 T. L. R. 239, P. C.

Annotations:—*Ridd*, *Sinclair v. Brougham*, [1914] A. C. 398; *Workmen's Compensation Board v. Canadian Pacific Ry.*, [1920] A. C. 184.

176. Education—Suspension of powers of board of management.]—By British North America Act, 1867 (c. 3), s. 93, exclusive power is given to the provincial legislature of each province to make laws in relation to education, provided that nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union:—*Held*: an act passed by the

b. ———.]—*MACKELL v. OTTAWA SEPARATE SCHOOL TRUSTEES* (1915), 8 O. W. N. 696; 34 O. L. R. 335; 24 D. L. R. 475; [1917] A. C. 62.—CAN.

c. ———.]—*Unless privileges exceptional or accidental.*—*Ex p. RENAUD* (1873), 1 Pug. 273.—CAN.

d. ———.]—*No power to repeal all previous statutes.*—Public Schools Act, 53 Vict. c. 38 (M.), by which all previous statutes relating to education were repealed & a system of non-sectarian schools was established, for the support of which all ratepayers alike were taxed, is *ultra vires*.—*LOGAN v. WINNIPEG CITY* (1891), 8 Man. L. R. 3; *revid.*, [1892] A. C. 445.—CAN.

e. ———.]—*Assessment of taxes—Apportionment between schools.*—Saskatchewan legislature had no jurisdiction to enact School Assessment Act, R. S. S. (1909), c. 101, s. 93a, & the taxes payable by cos. which neglect to give notices requiring a portion of the school taxes payable by the co. to be applied to the purpose of separate schools should not be apportioned between the public & separate school boards.—*LEGUNA PUBLIC SCHOOL DISTRICT v. GRATTAN SEPARATE SCHOOL DISTRICT* (1915), 50 S. C. R. 589.—CAN.

f. ———.]—*Power to legislate as to school attendance.*—School Attendance Act, 1916 (c. 97) (Man.), was *intra vires* & is binding on a Monnonite who came to Manitoba in or about 1874 with his parents, who were members of the community of Monnonites referred to in the Order in Council (Dom.) of Aug. 13, 1873. In so far as the Order in Council may purport to bind the province in educational matters it is ineffective owing to sect. 22 of the Manitoba Act, which gives jurisdiction therein to the provincial legislature alone.—*R. v. HILDEBRAND*, [1919] 3 W. W. R. 286.—CAN.

g. ———.]—*Provision as to payment of salaries by municipality.*—A provincial enactment providing that a certain proportion of the salaries of public school teachers employed in a municipality shall be paid by the municipality, is *intra vires*.—*A.-G. OF BRITISH COLUMBIA v. VICTORIA CORPN.* (1890), 2 B. C. R. 1.—CAN.

h. *Administration of justice—Appointment of magistrates.*—The right of the provincial legislatures to legislate in relation to the administration of justice, includes a right to make provision for the appointment of police magistrates & justices of the peace by the Lieutenant-Governor.—*R. v. BENNETT* (1882), 1 O. R. 445.—CAN.

k. ———.]—*B. N. A. Act, 1867, conferred upon either the Parliament of Canada or the legislatures of the provinces the power to pass laws providing for the appointment of*

justices of the peace. Such laws are in relation to the administration of justice, & upon the proper construction of sects. 91 & 92 of the Act are exclusively within the power of the provincial legislatures under sect. 92 (14).—*R. v. BUSH* (1888), 15 O. R. 398.—CAN.

l. ———.]—*The appointment of police magistrates is not ultra vires the Legislature of Ontario.*—*R. v. LEE* (1888), 15 O. R. 353.—CAN.

m. ———.]—*Legislation respecting the appointment of stipendiary magistrates is within the jurisdiction of a provincial legislature.*—*R. v. SWENEY* (1912), 45 N. S. R. 494.—CAN.

n. ———.]—*Grant of special jurisdiction.*—53 Vict. c. 18, s. 2, so far as it provides that the cts. of general sessions of the peace shall have jurisdiction to try any person for any offence under R. S. C. c. 165, ss. 28, 31, an Act respecting forgery, is within the powers of the legislature of Ontario, as being in relation to the constitution of a provincial ct. of criminal jurisdiction.—*R. v. LEVINGER* (1892), 22 O. R. 690.—CAN.

o. ———.]—*A provincial statute providing that stipendiary magistrates & police magistrates shall have jurisdiction to hear & determine actions of any kind of debt where the sum demanded does not exceed \$100.00, is intra vires.*—*Re SMALL DEBTS ACT* (1896), 5 B. C. R. 246.—CAN.

p. ———.]—*Organisation of special court.*—*GOWER v. JOYNER* (1896), 2 Terr. L. R. 387.—CAN.

q. ———.]—*Acts relating to attendance of juries.*—Acts relating to attendance of grand & petit jurors in criminal matters at county cts. are within the powers of local legislature.—*MULLIGAN v. RAINSFORD* (1870), 13 N. B. R. (2 Han.) 1.—CAN.

r. ———.]—*R. v. FOLEY* (1873), (1825-1897) N. B. Dig. 218.—CAN.

s. ———.]—*SPOULE v. R.* (1886), 1 B. C. R., pt. II., 219.—CAN.

t. ———.]—*Regulation of giving of evidence.*—Notwithstanding the reservation of criminal procedure to the Dominion Parliament in B. N. A. Act, 1867, s. 91 (27), a provincial legislature has power to regulate & provide for the course of trial & adjudication of offences against its lawful enactments, in this case a breach of the Liquor Licence Act, even though such offences may be termed crimes; & therefore to regulate the giving of evidence by defts. in such cases.—*R. v. BITTLE* (1892), 21 O. R. 605.—CAN.

u. ———.]—*The provisions of the Enquiries Act, giving comrs. the same powers to enforce the attendance of witnesses as is vested in a ct. of law in civil cases, which comprises the power*

to commit, is *intra vires* the legislature of Manitoba, as being within the provisions of B. N. A. Act, 1867, s. 92 (16).—*KELLY v. MATHERS* (1915), 32 W. L. R. 331; 25 Man. L. R. 580.—CAN.

aa. *Power to regulate procedure—As to laws within scope of authority.*—*PAGE v. GRIFFITH* (1872), 17 L. C. J. 302.—CAN.

bb. ———.]—*Ex p. DUNCAN* (1872), 18 L. C. J. 188.—CAN.

cc. ———.]—*POPE v. GRIFFITH* (1872), 16 L. C. J. 169.—CAN.

dd. ———.]—*COTE v. CHAUVEAU* (1881), 7 Q. L. R. 258.—CAN.

ee. ———.]—*R. v. COVERT*, [1917] 10 Alta. L. R. 349.—CAN.

ff. ———.]—*Fine & imprisonment.*—The local legislatures have the right & power to impose punishment by fine & imprisonment as sanction for laws which they have power to enact.—*A.-G. OF CANADA v. A.-G. OF ONTARIO* (1894), 23 S. C. R. 458.—CAN.

gg. ———.]—*Notwithstanding the wording of B. N. A. Act, 1867, s. 92 (15), empowering a provincial legislature to impose punishment "by fine, penalty or imprisonment" for enforcing its laws it has power to impose a penalty by fine coupled with imprisonment.*—*Re KENNEDY*, [1919] 3 W. W. R. 777.—CAN.

hh. ———.]—*Hard labour.*—A provincial legislature has power to enforce any of its laws by imposing hard labour as a punishment for the violation of them.—*R. v. FRAWLEY* (1882), 7 A. R. 246.—CAN.

kk. ———.]—*Includes right to summon witnesses.*—*Ex p. DANSEREAU* (1875), 2 Cart. 165.—CAN.

ll. ———.]—*Includes right to practice of process.*—*MCCARTHY v. BRENER* (1896), 2 Terr. L. R. 230.—CAN.

mm. *Matters of merely local nature—Tolls.*—An Act of the legislature of Quebec authorised the Lieutenant-Governor to revoke the right of certain municipalities to exact tolls on a toll bridge, for default in making repairs, & to transfer the property to others.—*Held*: the Act was valid, as the matter related to property & civil rights & was of a merely local nature.—*CLEVELAND MUNICIPALITY v. MELBOURNE MUNICIPALITY & BROMPTON GORE* (1881), 2 Cart. 241.—CAN.

nn. ———.]—*Power to authorise local corporations to borrow—At legal rate of interest.*—*ROYAL CANADIAN INSURANCE CO. v. MONTREAL WAREHOUSING CO.* (1880), 2 Cart. 361.—CAN.

oo. ———.]—*Bills of lading.*—A provincial Act enacted that all rights of suit should pass to the consignee of goods named in any bill of lading, on

legislature of the province of Ontario in 1915, which conferred on the Minister of Education, with the approval of the Lieutenant-Governor in Council, the power to suspend or withdraw all or any part of the rights, powers & privileges of the board of management of certain denominational schools for an indefinite time, at his discretion, & to confer them upon a nominated Commission, in the event of the board failing to comply with the provisions of the Act, was *ultra vires*.—**OTTAWA SEPARATE SCHOOLS TRUSTEES v. OTTAWA CORPN.**, [1917] A. C. 76; 86 L. J. P. C. 73; 115 L. T. 797; 33 T. L. R. 41, P. C.

177. — **Legislation making valid payments during suspension.**—The legislature of Ontario passed an Act superseding the Board of Trustees of the Roman Catholic Schools in Ottawa & appointing a commission to take over the schools.

to the indorsee thereof, to whom the property in the goods should be transferred by such consignment or indorsement, & that every such instrument representing goods to have been shipped should, in the hands of a consignee or indorsee for value, be conclusive evidence of shipment as against the person signing the instrument:—*Held*: the act was not beyond the powers of the provincial legislature as being an interference with trade & commerce.—**BEARD v. STEELE** (1872), 34 U. C. R. 43.—CAN.

g. — **Internal trade.**—**MACDOUGALL v. UNION NAVIGATION CO.** (1872), 2 Cart. 228.—CAN.

r. — **Prevention of peddling.**—By Municipal Act, R. S. O. (c. 17), s. 466 (6), city councils may pass bye-laws "for preventing criers & vendors of small ware from practising their calling in the market, public streets, & vacant lots, adjacent thereto":—*Held*: this enactment was not *ultra vires* of the provincial legislature, as being a regulation of trade or commerce, but it was authorised as a provision of municipal govt.—**HE HARRIS & HAMILTON CORPN.** (1879), 44 U. C. R. 641.—CAN.

s. — **Imposition of licence tax on traders.**—**ANGERS v. MONTREAL CITY** (1880), 2 Cart. 335.—CAN.

t. — **MALLETTE v. MONTREAL CORPN.** (1880), 2 Cart. 340.—CAN.

u. — **PIGEON v. RECORDER'S COURT & MONTREAL CITY** (1891), 17 S. C. R. 495.—CAN.

b. — **Authorisation of contraction of debts—Subsequent powers as to.**—The local legislatures are not restricted by the words "Property & Civil Rights in the Province" to legislation respecting bonds held therein: & where debts or other obligations are authorised to be contracted under a local Act passed in relation to a matter within the power of the legislature, such debts may be dealt with by subsequent Acts of the same legislature, notwithstanding that by a fiction of law they may be domiciled out of the province.—**JONES v. CANADA CENTRAL RY. CO.** (1881), 46 U. C. R. 250.—CAN.

c. — **Local administration—Ferries.**—The authority given to the legislative assembly of the North-West Territories, by R. S. C. c. 50 & Orders in Council thereunder, to legislate as to "municipal institutions" & "Matters of a local & private nature," & perhaps as to licence for revenue, within the Territories, includes the right to legislate as to ferries.—**DINNER v. HUMBERTSTONE** (1896), 26 S. C. R. 252.—CAN.

d. — **The legislatures of the province have sovereign powers within the range of subjects falling**

within the scope of provincial jurisdiction, including the governance of municipal institutions, & the cts. cannot set aside legislation relating to such matters upon the ground that constitutional principles have been violated.—**BELL v. WESTMOUNT TOWN** (1899), Q. R. 15 S. C. 580.—CAN.

e. — **Preservation of game—Prohibition of export.**—As the preservation of game within the province is within the competence of the provincial legislature, a prohibition against export does not render the enactment *ultra vires* as interference with trade & commerce, such provision being subsidiary & incidental to the general purpose of the statute.—**R. v. HOSCOWITZ** (1895), 4 B. C. R. 132.—CAN.

f. — **Extra-territorial carriage.**—A province may create a co. with power to undertake extra-territorial contracts of carriage, & so it is not *ultra vires* of a co. incorporated in British Columbia to contract to carry goods from British Columbia to a point in the Yukon territory.—**BOYLE v. VICTORIA YUKON TRADING CO.** (1902), 9 B. C. R. 213; 22 C. L. T. 377.—CAN.

g. — **Shops regulation.**—The provisions of Shops Regulation Act are *intra vires* of the provincial legislature, under British North America Act, 1867 (c. 3), s. 92, as dealing with a matter of a merely local & private nature in the Province, & not interfering with the regulation of trade & commerce, assigned to the Dominion Parliament by section 91.—**STARK v. SCHUSTER** (1902), 14 Man. L. R. 672.—CAN.

h. — **Trading stamps—Authorisation of issue.**—The Act of the legislature of Quebec, 3 Edw. VII. c. 39, authorising municipal councils of cities, towns, villages & parishes, to pass bye-laws prohibiting the use of "trading stamps" unless redeemable by the manufacturer or trader who issues them, does not infringe upon the exclusive power of the Parliament of Canada to make laws for the regulation of trade & commerce, nor upon the exclusive power of Parliament over criminal law, & is not unconstitutional, illegal, or *ultra vires*.—**WILDER v. MONTREAL CORPN.** (1904), Q. R. 26 S. C. 504.—CAN.

k. — **Regulation of exhibition entries.**—An Act to prevent the fraudulent entry of horses at exhibitions, R. S. O., 1897, c. 254, is within the powers of the Ontario legislature.—**R. v. HORNING** (1904), 8 O. L. R. 215.—CAN.

l. — **Companies Act, 1897 (s. 123), is not in conflict with Dominion Companies Act.** The latter gives a co. the capacity of status to carry on business in the various provinces of the Dominion, consistently with the laws thereof, & in British Columbia a

The commission took over the schools & to meet the expenses they levied a half-year's rate, took money standing to the credit of appts. with a bank, & transferred a portion of it to another bank. The Act superseding appts. was then held by the Privy Council to be *ultra vires*, & thereupon the commission gave up possession of the schools to appts. Actions were then brought by appts. against the banks to recover the moneys & against the comrs. to recover the produce of the rate. Pending these actions the Ontario legislature passed the Act 7 Geo. 5, c. 50, declaring that the payments made while the schools were being carried on by others than appts. were good payments against the funds which were raised & available for the conduct of the schools only:—*Held*: as appts., if they had been left in management, would necessarily have spent the money for

pre-requisite to doing business is the securing of a licence.—**WATERLOO ENGINE WORKS CO. v. OKANAGAN LUMBER CO.** (1908), 8 W. L. R. 378.—CAN.

m. — **Employment of women by Chinamen.**—An Act to Prevent the Employment of Female Labour in Certain Capacities & prohibiting the employment of white women in places of business or amusement owned, kept, or managed by Chinamen, is within the power of the legislature.—**R. v. QUONG WING** (1913), 24 W. L. R. 913.—CAN.

n. — **Master & Servant Amendment Act, 1899 (s. 3), as applicable to clerks in a bank, may be said to deal with civil rights, & is intra vires of the provincial legislature.**—**ASHMORE v. BANK OF BRITISH NORTH AMERICA** (1913), 24 W. L. R. 840; 4 W. W. R. 1014.—CAN.

o. — **Companies—Power to operate in another province.**—A provincial legislature may legislate so as to create by statute a corp. with the general capacity to avail itself of or acquire in another province power to operate in that province with respect to the carrying out of its corporate powers granted by the province incorporating the co.—**WEYBURN TOWNSHIP CO. v. HONENBERGER**, [1919] 3 W. W. R. 733.—CAN.

p. **Must not be repugnant to Dominion legislation.**—North-West Territories Ordinance (c. 2 of 1896), vesting titles of lands sold for taxes in the purchaser forthwith upon the execution of the transfer thereof, free of all charges & incumbrances other than liens for existing taxes & Crown dues, is inconsistent with Land Titles Act, 1894 (ss. 54, 69, 97), & *pro tanto*, *ultra vires* of the legislature of the North-West Territories.—**NORTH BRITISH CANADIAN INVESTMENT CO. v. ST. JOHN SCHOOL TRUSTEES, DISTRICT NO. 16, N. W. T.** (1904), 35 S. C. R. 461.—CAN.

q. — **SAWYER-MASSEY CO. v. DENNIS** (1907), 1 Alta. L. R. 126.—CAN.

bb. — **R. v. GARVIN** (1907), 13 B. C. R. 331.—CAN.

cc. — **Legislation of this character being within the exclusive jurisdiction of the Parliament of Canada, British Columbia Consolidation Act, 1888, limiting the application of the Imperial Acts to the old colony of British Columbia, was ultra vires.**—**TURNER v. LAITY** (1913), 25 W. L. R. 363.—CAN.

dd. — **Regulating trade & commerce.**—The sole jurisdiction to regulate trade & commerce being vested in the Dominion Parliament, it is not competent for a provincial legislature to prohibit the sale of that which the Dominion Parliament has given licence

Sect. 3.—The legislature: Sub-sect. 4, A. (b) iii. & (c).]

the same purposes, the Act 7 Geo. 5, c. 50, did not prejudicially affect their rights, & was, therefore, not *ultra vires* the legislature of Ontario under British North America Act, 1867 (c. 3), s. 93 (1), & the actions failed.—**OTTAWA ROMAN CATHOLIC SEPARATE SCHOOLS TRUSTEES v. QUEBEC BANK**, [1920] A. C. 230; 80 L. J. P. C. 9; 122 L. T. 211; 36 T. L. R. 23, P. C.

178. Amendment of constitution—Abrogation of powers of Lieutenant-Governor.]—By the Initiative & Referendum Act, 1916 (c. 59) (Man.), the legislature of Manitoba purported to enact elaborate provisions by which in effect laws might be made & repealed by the direct votes of the electors of the Province:—**Held**: (1) the language of the Act could not be construed otherwise than as intended

to affect seriously the position of the Lieutenant-Governor as an integral part of the legislature under the British North America Act, 1867 (c. 3), & there was consequently no jurisdiction to enact either the provincial Act as a whole or certain specified sections of it; (2) it was doubtful whether under the 1867 Act, s. 92, a provincial legislature could create & endow with its own capacity a new legislative power not created by the Act.—**RE INITIATIVE & REFERENDUM ACT**, [1919] A. C. 935; 88 L. J. P. C. 143; *sub nom. Re MANITOBA INITIATIVE & REFERENDUM ACT*, 121 L. T. 651; 35 T. L. R. 630, P. C.

179. Workmen's Compensation—Accident when employed outside province.]—Resp. co. was incorporated by a Dominion statute & owned a steamship which plied between ports in British Columbia & ports in the United States. The steamship sank with all hands in waters outside British

to sell.—**R. v. FERRIES** (1910), 15 W. L. R. 331.—**CAN.**

a. — Promissory notes.]—Promissory notes are not within the purposes or objects to which the legislative authority of the legislature of British Columbia extends.—**JOHN DEERE PLOW CO. v. MEHRITT** (1913), 24 W. L. R. 221.—**CAN.**

b. — Interest.]—A provincial statute provided that all parties paying taxes prior to a certain date should be entitled to a reduction of ten per cent., & that there should be added to all taxes unpaid upon a certain later date a sum of ten per cent.:—**Held**: viewing the whole statute the amount to be added was in reality interest, & as the provision was *ultra vires* interest at 10 per cent. could not be charged.—**MORDEN v. SOUTH DUFFERIN** (1890), 6 Man. L. R. 515.—**CAN.**

c. — —.]—SCHULTZ v. WINNIPEG CITY (1889), 6 Man. L. R. 35.—**CAN.**

d. — —.]—K. B. Act, R. S. M. (1913), c. 46, s. 714, providing for interest *qua* interest upon the amount of judgment, is *ultra vires* of the provincial legislature since the subject of interest is one within the exclusive jurisdiction of the Dominion Parliament.—CARE v. GODIN** (1911), 24 Man. L. R. 788; 20 D. L. R. 19.—**CAN.****

e. Whether power to give right of action against department of Imperial Government.]—Qu.: whether the provincial parliament can constitutionally give a right of action against the board of ordinance, a military department of the Imperial Government.—**TULLY v. ORDINANCE PRINCIPAL OFFICERS** (1848), 5 U. C. R. 6.—**CAN.**

f. Revenue laws.]—Provincial legislature has power to impose additional grounds of forfeiture for breach of the revenue laws, on goods subject to forfeiture under an Act of Parliament.—**A. G. v. FOUR HUNDRED KEGS OF GUNPOWDER** (1852), 2 All. 493.—**CAN.**

g. Power to authorise municipal corporations to legislate as to nuisances.]—Ex p. PILLOW (1872), 3 Cart. 357.—**CAN.**

h. Power to divide property of deceased forthwith.]—Re GOODHUE (1873), 19 Gr. 366.—**CAN.**

i. Power to authorise appointment of commissioners.]—39 Vict. c. 5, s. 1, which provides that comrs. shall be appointed by the Lieutenant-Governor in Council is not *ultra vires* of the local legislature.—**GANONG v. BAYLEY** (1877), 1 P. & B. 324.—**CAN.**

l. Salaries of Dominion servants—No power to seize.]—EVANS v. HUDON

(1878), 2 Cart. 346.—**CAN.**

m. — Judgment as to — Ultra vires.]—59 Vict. c. 28, s. 53 (N. B.) authorising the judge or other officer before whom an examination is held, upon it being made to appear to him that the judgment debtor is unable to pay the whole of the debt in one sum, but is able to pay the same by instalments, to make an order that the debtor shall pay the amount of the judgment debt by instalments, in so far as it is sought to apply the same to salary or income derived from office or employment under the Govt. of Canada, is *ultra vires* of the provincial legislature.—**Ex p. KILLAM, Ex p. McLEOD, Ex p. WILKINS** (1897), 34 N. B. R. 530.—**CAN.**

n. Prisons—No power to interfere with Dominion legislation as to.]—The legislative jurisdiction of the Parliament of Canada in respect to the establishment, maintenance & management of penitentiaries, cannot be in any way limited, restricted or affected by any provincial legislation in the province of New Brunswick, either previous or subsequent to the confederation of the provinces under B. N. A. Act, 1867.—**Re NEW BRUNSWICK PENITENTIARY** (1880), Cout. 24.—**CAN.**

o. No jurisdiction as to provincial Supreme Court.]—The Supreme Ct. of British Columbia is not a provincial ct. within the meaning of the British North America Act, 1867 (c. 3), s. 92, sub-sect. 14, & the provincial legislature has not power to make laws regulating its procedure or any power to diminish or repeal its powers, authorities or jurisdiction, nor to allot any jurisdiction to any particular judge thereof, nor to alter or add to any of the existing terms & conditions of the tenure of office by the judges, whether as to residence or otherwise.—**SEWELL v. BRITISH COLUMBIA TOWING CO., THE THRASHER CASE** (1882), 1 B. C. R. Pt. I, 153.—**CAN.**

p. Complete jurisdiction over Divisional courts.]—Provincial legislature has complete jurisdiction over div. cts., including the appointment of officers to preside over them.—**Re WILSON v. MCGUIRE** (1883), 2 O. R. 118.—**CAN.**

q. Power to incorporate & empower company.]—By 45 Vict. c. 41, the B. C. co. was incorporated & empowered to build a bridge across the A. river.—**Held**: the Act authorising the building of the bridge was *ultra vires* of the local legislature.—**Re BRANDON BRIDGE** (1884), 2 Man. L. R. 14.—**CAN.**

r. — Not company to operate throughout Dominion.]—The objects of the Act to incorporate the "Canada Provident Association," 45 Vict. c. 107

(D), for carrying on business as a mutual benefit society throughout the Dominion of Canada do not fall within the class of subjects allotted to the provincial legislatures under B. N. A. Act, 1867, s. 92.—**Re CANADA PROVIDENT ASSOCN.** (1882), Cout. 48.—**CAN.**

s. Power to sell provincial land.]—29 & 30 Vict. c. 16, being an act to provide for the sale of the rectory lands of Ontario is *intra vires* & valid.—**LANGTRY v. DUMOULIN** (1885), 7 O. R. 499.—**CAN.**

t. Power to vary trusts as to municipal land.]—Land, then forming part of the Ordinance lands of the old Province of Canada, having been granted to the corps of Toronto in 1858, the power to vary the trusts contained in the grant is vested in the legislature of the province & not in the Parliament of the Dominion.—**KENNEDY v. TORONTO CITY** (1886), 12 O. R. 211.—**CAN.**

aa. No power to authorise erection of piers in tidal river.]—45 Vict. c. 100, passed since B. N. A. Act came into force, is *ultra vires* so far as it professes to authorise the erection of piers & booms in a tidal river.—**QUINCY RIVER BOOM CO. v. DAVIDSON** (1886), 25 N. B. R. 580.—**CAN.**

bb. No power to review—Where proceedings within Dominion authority.]—The provincial legislature cannot confer a jurisdiction to regulate procedure in *certiorari* in matters not coming within its legislative authority, *e.g.*, The Canada Temperance Act.—**It. v. DE COSTE** (1888), 21 N. S. R. 216.—**CAN.**

cc. Power to create mining courts & ministerial officers.]—It is competent for the province to create mining cts., & to fix their jurisdiction, but not to appoint any officers thereof, with other than ministerial powers.—**BURK v. TUNSTALL** (1890), 2 B. C. R. 12.—**CAN.**

dd. Power to allow appeals from county courts.]—Acts of 1889, c. 16, s. 15, allowing an appeal from the county ct. judge, is *intra vires* the local legislature.—**It. v. McDONALD** (1891), 24 N. S. R. 35.—**CAN.**

ee. No power as to divorce.]—Provincial legislatures have no power to confer divorce jurisdiction upon any ct.—**SCOTT v. SCOTT** (1891), 4 B. C. R. 316.—**CAN.**

ff. Election cases—Power to give master authority as to.]—Provincial legislature has power to invest the master in chambers with authority to try controverted municipal election cases.—**It. v. BIRRETT** (1891), 21 O. R. 162.—**CAN.**

gg. County court judges—Limitation of power as to.]—County Cts. Amendment Act, 1890, s. 9 (B. C.),

territory. Under Part I. of the Workmen's Compensation Act of British Columbia (R. S. B. C., 1916, c. 77) compensation was payable by the applt. Board out of an accident fund thereby established to the dependants, whether resident in the Province or not, of drowned seamen who had been engaged while resident in the Province. Resps. by the Act were contributors to the fund on the basis of the pay roll of their employees who were within the scope of the Act:—*Held*: (1) the provisions of the Workmen's Compensation Act whereby the compensation was payable were *intra vires* the Provincial Legislature; (2) they did not derogate from the resps.' right to limit their liability under s. 503 of the M. S. Act, 1894; & were not inconsistent with the provisions of s. 215 of the Canada Shipping Act (R. S. Can., 1906, c. 113) with regard to the duty of the owner of a Canadian foreign sea-going ship towards injured

seamen.—**WORKMEN'S COMPENSATION BOARD v. CANADIAN PACIFIC RY. CO.**, [1920] A. C. 184; 88 L. J. P. C. 169; 121 L. T. 662; 36 T. L. R. 3, P. C.

Annotation:—*Generally*, *Mentd.* Walpole v. Canadian Northern Ry., [1923] A. C. 113.

180. Quebec legislature—Power to appoint court of Fire Marshal—With powers to take evidence on oath & commit witnesses.—*R. v. COOTE* (1873), L. R. 4 P. C. 599; 9 Moo. P. C. C. N. S. 463; 42 L. J. P. C. 45; 29 L. T. 111; 37 J. P. 708; 21 W. R. 553; 12 Cox, C. C. 557; 17 E. R. 587, P. C.

Legislation authorising putting of questions to courts.—*See* No. 96, *ante*.

(c) *Special Powers of Ontario and Quebec Legislatures.*

181. Power to repeal & alter statutes of old Parliament of Canada—Extent of power—British

so far as it purports to appoint the county ct. judge of Yale to act as & perform the duties of the county ct. judge of Kootenay, is *ultra vires* of the provincial legislature.—*PELKE-ARKAN v. R.* (1891), 2 B. C. R. 53.—**CAN.**

h. Criminal matters—Exclusive to Dominion.—*R. v. LAWRENCE* (1877), 43 U. C. R. 164.—**CAN.**

k. —————*R. v. LAKE* (1878), 43 U. C. R. 515.—**CAN.**

l. ———— *No power to give magistrates authority as to.*—*Procedure in criminal matters*, which by B. N. A. Act, 1867, s. 91 (27), is assigned exclusively to the Parliament of Canada, includes the trial & punishment of the offender, & therefore 53 Vict. c. 18 (O), s. 2, which authorises police magistrates to try & convict persons charged with forgery is *ultra vires* the provincial legislature.—*R. v. TOLAND* (1892), 22 O. R. 505.—**CAN.**

m. ———— *No power to alter procedure.*—*Provincial legislature has no jurisdiction to make laws altering the practice in criminal procedure.*—*R. v. CROTHELS* (1899), 11 Man. L. R. 567.—**CAN.**

n. Power to authorise construction of drain—Unless amounting to nuisance.—*While the legislature of New Brunswick could not, at the time of the passing of Act of Assembly, 40 Vict. c. 58, legalise such interference with or injury to the right of navigation or fishery as would amount to a nuisance, they could authorise the construction of a drain to carry the refuse water from depts.' works to the harbour, & so long as the discharge of such refuse water through the drain did not amount to a nuisance there was no ground upon which to enjoin deft. co. to remove their sewer or to abandon the use of it.*—*R. v. ST. JOHN GAS LIGHT CO.* (1895), 4 Exch. C. R. 326.—**CAN.**

o. Lotteries—No power to authorise.—*The provincial legislatures have no jurisdiction to permit the operation of lotteries forbidden by the criminal statutes of Canada.*—*ST. JEAN-BAPTISTE DE MONTREAL ASSOC. v. BRAULT* (1900), 30 S. C. R. 598.—**CAN.**

p. Licences—Timber—Application of conditions to.—61 Vict. c. 19 (O), making applicable to timber licences the condition approved by Order in Council of Feb. 17, 1897, that all pine timber cut under such licences shall be manufactured into sawn lumber in Canada, is *intra vires*, & applies to licences issued after the passing of the Act in renewal of licences in force at the time of its passage.—*STYLIE v. R.* (1900), 27 A. R. 172.—**CAN.**

q. Criminal justice—Expenses—Power to charge to municipal authorities.—*Act of Assembly, 57 Vict. c. 19, s. 1, whereby certain expenses in criminal prosecutions are made charge-*

able upon the municipalities, is not *ultra vires* of the provincial legislature.

—*MCLEOD v. KINGS, MORISON v. KINGS* (1901), 35 N. B. R. 163.—**CAN.**

r. Power to prevent destruction of property by fire.—48 Vict. c. 11 & 60 Vict. c. 9, to prevent the destruction of forests & other property by fire, are not *ultra vires* of the local legislature.—*GRANT v. CANADIAN PACIFIC RY. CO.* (1904), 36 N. B. R. 528.—**CAN.**

s. No power to alter law—As to liability of Dominion Government—Common employment.—*With respect to the liability of the Dominion Govt. in cases involving the doctrine of common employment, nothing short of an Act of the Parliament of Canada can alter the law of Manitoba as it stood on that subject on July 15, 1870.*—*HYDE v. R.* (1905), 36 S. C. R. 462.—**CAN.**

t. Power to authorise appointment of judge of another district to fill temporary vacancy.—*Provincial Acts, 1901, c. 22, s. 12, amended County Court Act by providing that "in case of a vacancy in the office of judge for any district, the Governor in Council may designate & appoint the judge of any other district to act during the whole or any part of such vacancy":—Held: the Act was intra vires of the provincial legislature.*—*R. v. BROWN* (1906), 41 N. S. R. 293.—**CAN.**

u. Medical profession—Power to regulate.—*Medical Profession Act, 6 Edw. VII. c. 28, is intra vires of the legislature of Alberta, & a member of the College of Physicians & Surgeons of the North-West Territories may be validly convicted thereunder for the offence of practising medicine, surgery, etc., for gain & reward, in the province of Alberta, without complying with its requirements as to registration & licence, notwithstanding that the College of Physicians & Surgeons of the North-West Territories had not been previously dissolved & abolished by order of the Governor in Council, in conformity with above Act, s. 16 (3).*—*LAFFERTY v. LINCOLN* (1907), 38 S. C. R. 620.—**CAN.**

b. Sale of food—Power to regulate.—*A local legislature has jurisdiction to give authority to city councils to make bye-laws requiring bread to be stamped with baker's initials & weight.*—*R. v. KAY* (1909), 7 E. L. R. 209.—**CAN.**

c. Highways.—*Re ROGERS* (1909), 7 E. L. R. 212.—**CAN.**

d. Solicitor's remuneration.—*Law Society Act, 1902, s. 25, which permits a solr. to contract with any person as to the remuneration to be paid him for services, & to receive a portion of the proceeds of the subject-matter of the action in which he is employed, & to receive remuneration by way of commission on the amount*

recovered, etc., is *intra vires* of the Manitoba legislature.—*THOMSON v. WINHART* (1910), 13 W. L. R. 445.—**CAN.**

e. Power to order examination of witnesses—For purposes of courts outside province.—*Re ALBERTA & GREAT WATERWAY RY. CO.* (1910), 18 W. L. R. 15.—**CAN.**

f. Validity of statute—How questioned.—*The validity of a provincial statute is not open to attack in an action, until notice has been given to the Minister of Justice, as required by Judicature Act, s. 33.*—*ELECTRIC, ETC. CO., LTD. v. A.-G. & HYDRO COMMISSION* (1917), 38 O. L. R. 383.—**CAN.**

g. Power to incorporate banking company.—*A provincial legislature has power to incorporate a co. with the object of carrying on that branch of banking which consists of accepting money on deposit, paying interest thereon, & allowing the customer to issue cheques against such deposit.*—*Re DOMINION TRUST CO., U. S. FIDELITY'S CASE, REID'S CASE, RAMSAY'S CASE*, [1918] 3 W. W. R. 1023.—**CAN.**

aa. Dangerous property—Power to confiscate.—*Whatever may be the extent of the general power of the legislature to confiscate property, there is no doubt that it has power to confiscate or otherwise deal with any property which is or may be a menace to the public health & to delegate that power to municipalities.*—*R. v. CHADERTON*, [1918] 3 W. W. R. 209.—**CAN.**

bb. Public inquiries—Power to legislate as to.—*Re PUBLIC INQUIRIES ACT, Re CLEMENT*, [1919] 3 W. W. R. 115.—**CAN.**

cc. No power to appoint & pay Workmen's Compensation Board.—*Workmen's Compensation Act, 1916, respecting the appointment & payment of salary of the Workmen's Compensation Board are ultra vires of the provincial legislature as being in conflict with the powers reserved to the Dominion by B. N. A. Act, 1867, ss. 96, 99, 100.*—*KOWHANKO v. TREMBLAY* (1920), 1 W. W. R. 481; 50 D. L. R. 578; 30 Man. L. R. 198.—**CAN.**

dd. Power to alter laws of descent.—*It is competent for the provincial legislature to amend the law of descent or distribution so as to decrease the occasions of coheir or bona vacantia which otherwise would have arisen under the law as it stood at the date of the establishment of the province.*—*Re STONE'S ESTATE* (1920), 13 Sask. L. R. 159.—**CAN.**

PART II. SECT. 3, SUB-SECT. 4.—A. (6).

ee. Power to repeal & alter statutes of old Parliament of Canada—Extent of.

Sect. 3.—The legislature: Sub-sect. 4, A. (c) & B. (a).]

North America Act, 1867 (c. 3), s. 129.]—The powers conferred by the above sect. upon the Provincial Legislatures of Ontario & Quebec, to repeal & alter the statutes of the old Parliament of Canada, are precisely co-extensive with the powers of direct legislation with which those bodies are invested by the other clauses of the above Act.—**DOBIE v. TEMPORALITIES BOARD (1882)**, 7 App. Cas. 136; 51 L. J. P. C. 26; 46 L. T. 1, P. C.

Annotations:—Apld. A.-G. for Ontario v. A.-G. for the Dominion, [1896] A. C. 348. **Reid Crown Grain Co. v. Day**, [1908] A. C. 504. **Mentid. McSwaine v. Lascelles**, [1895] A. C. 618.

—An Act of the old Province of Canada authorised the Governor to appoint police magistrates; the Act was temporary:—**Held: an Act of Ontario Legislature, continuing the same in force, was valid.**—**R. v. RENO (1868)**, 4 P. R. 281.—**CAN.**

o. ———.]—38 Vict. c. 65, to amend the law relating to fire insurances, is not *ultra vires*, so far as it affects cos. incorporated by Acts of the Legislature of Canada. As to any such co. transacting business in Ontario, on any subject within the powers of the Provincial Legislature, that body may impose what condition it pleases on the operations of the co.—**DEAR v. WESTERN ASSURANCE CO. (1877)**, 41 U. C. R. 553.—**CAN.**

p. ———.]—WILLET v. DE-GROSBOIS (1873), 2 Cart. 332.—**CAN.**

q. Exposing game for sale—56 Vict. c. 58, s. 6 (2)—Whether ultra vires.]—R. v. CLEGHORN, 13 C. L. T. Occ. N. 11.—**CAN.**

r. Ontario—Licence Acts—Whether ultra vires.]—Ontario Liquor Licence Act, R. S. O., 1887, s. 84, is ultra vires the Ontario Legislature.—**R. v. HOLLAND**, 14 C. L. T. Occ. N. 294.—**CAN.**

s. ———.]—Semble: it is ultra vires of the legislature of Ontario to enact that the provisions of the Licensing Acts of Ontario shall have full force & effect in a municipality where the Temperance Act is in force, so as to make the offence against the one an offence against the other.—**R. v. PRITTEE (1878)**, 42 U. C. R. 612.—**CAN.**

t. ———.]—Intoxicating liquor—Intended consumption by members of club—Penalty.]—R. v. LIGHTBURNE, 21 C. L. T. 241.—**CAN.**

a. ———.]—Regulation of tavern & shop licences—Whether ultra vires.]—The Legislature of Ontario having passed an Act to regulate tavern & shop licences, 32 Vict. c. 32, under the power given to them by B. N. A. Act, 1867, s. 92 (9), (16):—Held: they had power, under sub-sect 15, to enact that any person who, having violated any provisions of the Act, should compromise the offence, & any person who should be a party to such compromise, should on conviction be imprisoned in the common gaol for three months, & such enactment was not opposed to sect. 91 (27), by which the criminal law is assigned exclusively to the Dominion Parliament.**—**R. v. BOARDMAN (1871)**, 30 U. C. R. 553.—**CAN.****

b. ———.]—County Court Judge.]—An Act of the Ontario Legislature provided that the county judge of one county might preside at the sessions in a county other than that of which he was judge:—Held: this enactment was not within the competence of the Legislature.**—**GIBSON v. McDONALD (1885)**, 7 O. R. 401; 3 Cart. 319.—**CAN.****

c. ———.]—41 Vict. c. 40, s. 28 (D)—Subject-matter within exclusive jurisdiction provincial legislature.]—The matters provided for by 41 Vict. c. 40, s. 28 (D), were subject-matters of the Fire Insurance Policy Act of Ontario, over which the province has exclusive jurisdiction; & although they might be proper subjects of legal contract, they would have no force or vitality through the Dominion Act *per se*, but only by being used as required or modified by Ontario Act, namely, in the manner provided for variations to the conditions therein contained.—GORING v. LONDON MUTUAL FIRE INSURANCE CO. (1886)**, 11 O. R. 82.—**CAN.****

d. ———.]—Power to change ownership of land—Compensation.]—So far as abstract competence is concerned the Ontario Legislature has power to change the ownership of land within the province with or without compensation.—**Re McDOWELL & PALMERSTON TOWN (1892)**, 22 O. R. 563.—**CAN.**

e. Ontario Assignments Act—Whether ultra vires.]—There being no statute of the Dominion on bkpcy. & insolvency, an Act was passed by the Ontario Legislature for the purpose of enabling debtors to place their creditors on an equal footing, but not relieving the debtor from arrest or interfering with his after-acquired property:—Held: the Act was intra vires.**—**CLARKSON v. ONTARIO BANK, EDGAR v. CENTRAL BANK (1899)**, 15 A. R. 166.—**CAN.****

f. Mechanics & Wage Earners Lien Act, 1914 (c. 140), R. S. O.]—Sect. 33 of the above Act as enacted by amending Act, 6 Geo. V. c. 30, s. 1, are intra vires of the Ontario Legislature, so far as it is thereby directed that an action brought under the Act shall be tried, outside of the County of York, before a judge of the county or district ct. of the county or district in which the land is situate.—JOHNSON & CAREY CO. v. CANADIAN NORTHERN RY. CO. (1918)**, 43 O. L. R. 10.—**CAN.****

g. Quebec—Taxation—Absolute power of legislature—Within limits of Constitution.]—Within the limits prescribed by the Constitution, the authority of the parliament & of the legislatures is absolute & their power to impose taxation is not restricted by the rules & the mode & the procedure to which municipal corpora. are subjected.

Therefore, the legislature had the right to impose taxation upon all callings exercised in the city of Quebec, without naming & specifying them, & also had the power by statute to cover the insufficiency of the bye-law in that respect & to give it the same effect as a statute would have.—**QUEBEC CORPN. v. GRAND TRUNK RY. CO. (1898)**, Q. R. 8 Q. B. 246.—**CAN.**

h. ———.]—Pltfs. sued defts. to recover the sum of \$150, being the amount of two business taxes, one of

B. Australia.

(a) Commonwealth Legislature.

182. Taxation—Power to impose penalty for breaking seals on ship stores—Outside jurisdiction.]

—Under Australian Customs Act, 1901, s. 127, a penalty is incurred for using ship stores while the ship is within the territorial waters or in the port of Melbourne, unless the duty thereon has been paid. Under sect. 192, a penalty is incurred for the act of breaking the seals whether on the high seas or elsewhere, which had been lawfully imposed on ship goods in lieu of enacting payment of duties & entering an Australian port with the seals broken, & the sect. is not *ultra vires* the Australian Commonwealth in respect of the seals

\$100 as compounders & the other of \$50 as wholesale dealers, under the authority of a municipal bye-law. Defts. pleaded that the bye-law was illegal & *ultra vires* of the municipal council, & also that 47 Vict. c. 84 (Q.) was *ultra vires* of the legislature of the Province of Quebec. The superior ct. held that both the statute & bye-law were *intra vires*, & condemned defts. to pay the amount claimed. On an appeal to the Ct. of Q. B. by defts., that ct. confirmed the judgment of the superior ct. as regards the validity of the statute, but set aside the tax of \$100 as not being authorised. Pltfs. thereupon appealed to the supreme ct. complaining of that part of the judgment which declared the business tax of \$100 invalid. There was no cross-appeal. On motion to quash for want of jurisdiction:—**Held: the appeal would not lie**, Supreme & Exchequer Cts. Act, s. 24 (g), not being applicable & the case not coming within sect. 29 of the Act, the amount being under \$2,000, no future rights within the meaning of sect. 29 being in controversy, nor any question as to the constitutionality of the Act of the legislature being raised.—**SHERBROOKE CITY v. MOMANANY (1891)**, 18 S. C. R. 594.—**CAN.**

k. ———.]—Water lot.]—The govt. of the Province of Quebec having by letters patent granted a water lot extending into deep water at the mouth of the river St. Maurice, the letters patent were held to be valid, subject to an implied restriction that the requirements of navigation & commerce were not to be interfered with or injured thereby.—NORMAND v. ST. LAWRENCE NAVIGATION CO. (1878)**, 5 Q. L. R. 215.—**CAN.****

l. ———.]—Fishing—Whether Province or Executive Council has exclusive right to grant.]—A.-G. FOR CANADA v. A.-G. FOR QUEBEC, Re QUEBEC FISHERIES, [1920] 56 D. L. R. 358; [1921] 1 A. C. 413.—CAN.****

PART II. SECT. 3, SUB-SECT. 4.—B. (a).

m. Commonwealth Acts must be considered substantially rather than literally.]—In determining whether a particular law is or is not within the power of the Commonwealth Parliament to enact, regard must be had to its substance rather than to its literal form. The circumstances that an indirect effect may be produced by the exercise of an admitted power of legislation is irrelevant to the question whether the legislature is competent to prescribe the same effect by direct law. So are the motives which actuated the legislature & the ultimate end desired to be attained.—R. v. BARGER (1908)**, 6 C. L. R. 41.—**AUS.****

n. Taxation—General rule.]—In the exercise of the power of taxation conferred by Constitution, s. 51 (ii), the Parliament of the Commonwealth in selecting subjects of taxation is entitled to take things as it finds them *in rerum natura*, irrespective of any

being broken outside its jurisdiction.—**PENINSULAR & ORIENTAL STRAM NAVIGATION Co. v. KINGSTON**, [1903] A. C. 471; 72 L. J. P. C. 123; 89 L. T. 222; 19 T. L. R. 617; 9 Asp. M. L. C. 433, P. C.

183. — **Discrimination between States—Excise Tariff, 1902—Exemption of goods on which customs or excise paid before date named.**—On July 26, 1902, Excise Tariff, 1902 (No. 11), was passed by the Commonwealth Parliament, imposing certain uniform duties of excise, including a duty on manufactured sugar, the produce of Australia, as from Oct. 8, 1901, the day on which the Minister had moved a resolution to that effect in Committee of Ways & Means of the House of Representatives. On Oct. 16, 1902, the Customs Tariff, 1902 (No. 14), was passed, which imposed uniform duties of customs as from the same date. In a suit by applt. to recover back excise duties on manufactured sugar collected from them between Oct. 8, 1901, & July 26, 1902, on the grounds that it was *ultra vires* the Commonwealth Parliament to

impose them until the actual imposition of uniform custom duties, & the duties were imposed in a manner which discriminated between States:—**Held**: (1) the 1902 Tariff was *intra vires* the Commonwealth Parliament under the true constitution of the material sects. of Constitution Act, 1900 (c. 12). Neither sect. 90 of that Act nor any other sect. expressly or implied prohibited the imposition of uniform excise duties previously to that of uniform customs duties. After that event the power to impose excise duties was exclusively vested in the Commonwealth, & the power of the States in that respect ceased; (2) the 1902 Tariff, s. 5, which allowed an exemption in the case of goods on which customs or excise duties had been paid under State legislation before Oct. 8, 1901, is not a discrimination between States within the meaning of 1900 Act, s. 51, but is applicable to all the States alike, for a purpose which was temporary & necessary.—**COLONIAL SUGAR REFINING Co., LTD. v. IRVING**, [1906] A. C. 360; 75 L. J. P. C. 54; 94 L. T. 387; 22 T. L. R. 405, P. C.

positive laws of the States prescribing rules to be observed with regard to the acquisition or devolution of formal title to property, or the institution of judicial proceedings with regard to it.—**MORGAN v. LAND TAX DEPUTY FEDERAL COMR.** (1912), 15 C. L. R. 661.—**AUS.**

o. — **Commonwealth Customs Act, 1901, Part VIII., is not a "law imposing taxation" within the meaning of sect. 55 of the Constitution.**—**STEPHENS v. ABRAHAMS** (No. 2) (1903), 29 V. L. R. 229.—**AUS.**

p. — **Authority to States to impose—On salaries of Commonwealth officers.**—Commonwealth Services Act, 1907, is an effective grant to the states of authority to impose upon Commonwealth officers taxation in respect of their salaries, subject to the conditions stated in that Act.—**CHARLIN v. TAXES COMR.** (1911), 12 C. L. R. 375.—**AUS.**

q. — **Power to legislate for territory acquired by Commonwealth.**—The limitations imposed by Constitution, s. 55, upon the making of laws imposing taxation apply only to such laws as are made under the power conferred by sect. 51 (ii), & do not apply to laws made under the power to make laws for the government of any territory acquired by the Commonwealth conferred by sect. 122, the two powers being independent of one another.—**BUCHANAN v. COMMONWEALTH** (1913), 16 C. L. R. 315.—**AUS.**

r. — **Power to impose penalty for transfer of land from husband to wife.**—Land Tax Assessment Act, 1910-11, s. 36 (2), which in effect attempts to impose a pecuniary liability as a consequence of a transfer of land by a husband to his wife or *vice versa*, is invalid as being beyond the power of the Parliament of the Commonwealth to enact.—**WATERHOUSE v. SOUTH AUSTRALIA LAND TAX DEPUTY FEDERAL COMR.**, [1914] 17 C. L. R. 665.—**AUS.**

s. **Inter-State Commission Act to constitute into court—*Ultra vires*.**—Constitution, s. 101, does not authorise the Parliament of the Commonwealth to constitute the Inter-State Commission ct., & therefore Inter-State Commission Act, 1912, Part V., is *ultra vires* the Parliament of the Commonwealth.—**NEW SOUTH WALES (STATE OF) v. COMMONWEALTH, ETC.** (1915), 20 C. L. R. 54.—**AUS.**

t. **Defence—Powers to fix food prices.**—Legislative powers of the Commonwealth Parliament conferred

by Constitution, s. 51 (vi) & (xxxix), include a power during a state of war to fix within limits of locality the highest price which during the continuance of the war may be charged for bread.—**FAREY v. BURVETT** (1916), 21 C. L. R. 433.—**AUS.**

a. — **Powers to forbid encouragement of injury to property.**—Unlawful Associations Act, 1916-17, s. 4, so far as it makes it an offence during the war to encourage the destruction or injury of property, is a valid exercise of the defence power of the Commonwealth Parliament conferred by Constitution, s. 51 (vi) & (xxxix).—**PANKHURST v. KIERNAN**, [1917] 24 C. L. R. 120.—**AUS.**

b. — **Recruiting for service outside Commonwealth.**—The power to make laws with respect to defence conferred by Constitution, s. 51 (vi), is not limited to the making of laws with respect to measures of defence to be taken within the territorial limits of the Commonwealth & therefore, War Precautions Act, 1914-16, so far as it deals with the recruiting of forces for service outside Australia, is within that power.—**SICKERDICK v. ASHTON** (1918), 25 C. L. R. 506.—**AUS.**

c. — **Powers to legislate as to soldiers' repatriation claims.**—Australian Soldiers' Repatriation Act, 1917-18 (s. 19), provides that, "Claims in respect of moneys advanced by the trustees of the Australian Soldiers' Repatriation Fund or by the Minister or a State Repatriation Board or a Local Committee shall have the same priority with respect to the payment of debts as if the money had been advanced by the Crown."—**Held**: the sect. is a valid exercise of the power conferred on the Commonwealth Parliament by Constitution, s. 51 (vi), to legislate with regard to defence.—**A-G v. BALDING** (1920), 27 C. L. R. 395.—**AUS.**

d. **Shipping—Foreign & Inter-State traffic.**—Constitution, ss. 51 (i) & 98, confer upon the Commonwealth Parliament power to legislate as to navigation & shipping so far as concerns foreign & inter-State traffic, & in particular to regulate the reciprocal rights & obligations of those engaged in carrying on that traffic by means of ships. Therefore:—**Held**: the Seamen's Compensation Act, 1911, is a valid exercise of the legislative power of the Commonwealth Parliament.—**AUSTRALIAN STEAMSHIPS, LTD. v. MALCOLM**, [1914] 19 C. L. R. 298.—**AUS.**

e. — **Ships engaged solely on**

commerce of State.—Navigation Act, 1912-20, & the schedules thereto & the regulations made thereunder as to the manning of & accommodation on ships, to the extent that they may purport to prescribe rules of conduct to be observed in respect of ships engaged solely in the domestic trade & commerce of a State, are beyond the power of the Commonwealth Parliament, & are to that extent invalid.—**NEWCASTLE & HUNTER RIVER S.S. Co. v. A-G. FOR COMMONWEALTH** (1921), 29 C. L. R. 357.—**AUS.**

f. **Commonwealth laws not under Constitution—Not binding on States.**—Laws made by the Commonwealth Legislature, but not made under the Constitution of the Commonwealth, are not binding upon the cts., judges, or people of any State, & should be rejected by the cts. & judges of every State as invalid whenever any question arises as to their validity.—**KINGSTON v. GADD** (1901), 27 V. L. R. 417.—**AUS.**

g. **Act conferring federal appellate jurisdiction on States.**—Where a ct. of a State declines jurisdiction of a matter as to which it is invested with federal jurisdiction the remedy is by recourse to the appellate jurisdiction of the High Ct. The federal jurisdiction which Parliament is by sect. 77 of the Constitution authorised to confer upon the cts. of the several States, & upon federal cts. other than the High Ct., includes both original & appellate jurisdiction. Judiciary Act, 1903 (s. 39), is a valid exercise of the authority so conferred, & under it the cts. of the several States have federal appellate jurisdiction, as regards the matters enumerated in sects. 75 & 76 of the Constitution, to the same extent that, & subject to the same conditions as, under the State laws they have appellate jurisdiction in matters to which the State laws apply.—**AH YICK v. LEHMERT** (1905), 2 C. L. R. 593.—**AUS.**

h. **Power to take away right of appeal.**—The Commonwealth Parliament has no power to take away either by express enactment or by implication the right of appeal given by the Order in Council of June 9, 1860.—**RE INCOME TAX ACTS, OUTTRIM'S CASE** (1905), 30 V. L. R. 463.—**AUS.**

k. **Crime—Appeals.**—Judiciary Act, 1903-20 (s. 39), is a valid exercise of the powers conferred upon the Commonwealth Parliament, & therefore an appeal will lie under it to the High Ct. from the decision of a police magistrate of a State upon an information charging an offence against

Sect. 3.—The legislature: Sub-sect. 4, B. (a) & (b).]

184. — **Power to impose duty from date of Minister's proposal.**—**COLONIAL SUGAR REFINING CO., LTD. v. IRVING**, No. 183, *ante*.

185. **Royal Commission—Power to enforce compliance with requisitions—Royal Commissions Acts, 1902 (No. 12), & 1912 (No. 4).**—The above Acts are *ultra vires* the Commonwealth Parliament of Australia so far as they purport to enable a Royal Commission to enforce compliance with its requisitions.—**A.-G. FOR COMMONWEALTH OF AUS-**

TRALIA v. COLONIAL SUGAR REFINING CO., LTD., [1914] A. C. 237; 83 L. J. P. C. 154; 110 L. T. 707; 30 T. L. R. 203, P. C.

Annotations:—*Menid*, John Deere Plow Co. v. Wharton, [1915] A. C. 330; Bonanza Creek Gold Mining Co. v. R., [1916] 1 A. C. 566.

186. **Trading with enemy—Act restricting operations of company carried on for benefit of enemy.**—Under Trading with the Enemy Act of the Commonwealth of Australia the A.-G. for Australia made a declaration that the petitioning co. was carried on for the benefit of persons who were of

Crimes Act, 1914-15.—LORENZO v. CAREY (1921), 29 C. L. R. 243.—**AUS.**

l. Power to interfere with State legislature.—Unless authorised by Constitution.—The rule that when a State attempts to give to its legislature or executive authority & operation, which, if valid, would fetter, control, or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorised by the Constitution, is to that extent invalid & inoperative, is reciprocal. It is equally true of attempted interference by the Commonwealth with the State instrumentalities.—**FEDERATED AMALGAMATED GOVERNMENT RAILWAY & TRAMWAY SERVICE ASSOC. v. NEW SOUTH WALES RAILWAY TRAFFIC EMPLOYEES ASSOC.** (1906), 4 C. L. R. 488.—**AUS.**

m. Regulation of internal trade of States.—Commonwealth Trade Marks Act, 1905, Part VII., is in substance an attempt to regulate the internal trade of the States, not within or incidental to any of the express powers conferred on the Parliament to regulate the trade. That part of the Act is therefore *ultra vires*, & though its provisions, if limited to trade & commerce between the States, would be within the competency of the Commonwealth Parliament it is impossible to separate that which is within from that which is without the power, & the whole is invalid.—**A.-G. FOR NEW SOUTH WALES v. BREWERY EMPLOYEES UNION OF NEW SOUTH WALES** (1908), 6 C. L. R. 469.—**AUS.**

n. Powers as to corporations.—Constitution, s. 51 (xx), does not confer on the Commonwealth Parliament power to create corps., but the power is limited to legislation as to foreign corps. & trading & financial corps. created by State law; the Commonwealth Parliament may prohibit foreign corps., etc., from engaging in trade & commerce within a State, as distinguished from trade & commerce between States or with foreign countries, but does not have power to control the operations of such corps., which lawfully engage in such trade & commerce. **Australian Industries Preservation Act, 1906** (s. 15 B.), is *intra vires* the Commonwealth Parliament & valid; sects. 5 & 8, however, are *ultra vires* the Commonwealth Parliament & invalid; they are legislation not with respect to corps. such as those described above, but with respect to trade & commerce.—**HUDDART PARKER & CO. PROPRIETARY, LTD. v. MOOREHEAD, APPLETON v. MOOREHEAD** (1909), 8 C. L. R. 330.—**AUS.**

o. Elections—Federal—Powers to regulate.—The Commonwealth Parliament has power under the Constitution to make laws regulating federal parliamentary elections, & Commonwealth Electoral Act, 1902-11 (s. 181), is within the powers of the Commonwealth Parliament to enact.—**SMITH v. OLDHAM** (1912), 15 C. L. R. 355.—**AUS.**

p. Conspiracies to defraud Commonwealth—Power to constitute indict-

able offences.—Crimes Act, 1915, which, by sect. 2, adds conspiracies to defraud the Commonwealth to the conspiracies which by Crimes Act, 1914 (s. 86), are declared to be indictable offences, & by sect. 3, provides that the Act is to be deemed to have been in force from the date of the commencement of Crimes Act, 1914, is a valid exercise of the power of the Parliament of the Commonwealth.—**R. v. KIDMAN**, [1915] 20 C. L. R. 425.—**AUS.**

q. Power to legislate for territory acquired by Commonwealth.—The power of the Commonwealth Parliament conferred by sect. 122 of the Constitution to make laws for the government of a territory, whether that power is exercised directly or through a subordinate Legislature, is not restricted by the provision in Constitution, s. 80, that the trial on indictment of any offence against any law of the Commonwealth shall be by jury.—**R. v. BERNASCONI**, [1915] 19 C. L. R. 629.—**AUS.**

r. Customs.—Customs Act, 1901-1910 (s. 152), was a valid exercise of the power conferred by Constitution, s. 51 (ii) & (xxxix).—**CHESPIN v. COLAC CO-OPERATIVE FARMERS, LTD.** (1916), 21 C. L. R. 205.—**AUS.**

s. Conciliation & Arbitration Act, 1904—Whether ultra vires Constitution.—Commonwealth Conciliation & Arb. Act, 1904, in respect of the registration of assocns. as organisations particularly in so far as they permit the registration of an assocn. of employers or employees in an industry in one state only, & provide for the incorporation of organisations when registered are valid as being incidental to the power conferred on the Commonwealth Parliament by sect. 51 (xxxv) of the Constitution.—**JUMRUNNA COAL MINE v. VICTORIAN COAL MINER'S ASSOCN.** (1908), 6 C. L. R. 309.—**AUS.**

t. ——Commonwealth Conciliation & Arbitration Act, 1904-1915 (s. 21 aa), is a valid exercise of the legislative power of the Parliament of the Commonwealth.—**FEDERATED ENGINE DRIVERS & FIREMEN'S ASSOCN. OF AUSTRALASIA v. COLONIAL SUGAR REFINING CO., LTD.** (1916), 22 C. L. R. 103.—**AUS.**

u. ——**WATERSIDE WORKERS FEDERATION v. ALEXANDER** (1918), 25 C. L. R. 434.—**AUS.**

b. Land Assessment Act, 1910-14, s. 29—Whether repugnant to Colonial Laws Validity Act, 1865 (c. 63).—Land Assessment Act, 1910-14, s. 29, in so far as it purports to impose land tax upon leasehold estates in Crown lands, is not invalid (1) under the Colonial Laws Validity Act, 1865 (c. 63), as being repugnant to the Imperial Acts which confer upon the Legislatures of the several States powers of legislation with respect to waste lands of the Crown in those States respectively; (2) under sect. 114 of the Constitution, as imposing a tax upon State property; (3) as being not a law imposing taxation but a law as to the control & management of Crown lands in the several States.—**QUEENSLAND A.-G. v.**

COMMONWEALTH A.-G. (1915), 20 C. L. R. 148.—**AUS.**

c. Prohibition of strikes.—The prohibition in Commonwealth Conciliation & Arbitration Act, 1904-15 (s. 6 (1)), against doing anything in the nature of a "lock-out" or "strike" as those terms are defined in sect. 4, is within the legislative powers of the Parliament of the Commonwealth conferred by Constitution, s. 51 (xxxv) & (xxxix).—**STEMP v. AUSTRALIAN GLASS MANUFACTURERS CO., LTD.** (1917), 23 C. L. R. 226.—**AUS.**

d. Service & execution of writs.—The power conferred by Constitution, s. 51 (xxiv), on the Commonwealth Parliament to make laws with respect to the service & execution throughout the Commonwealth of the civil process & the judgments of the cts. of the States extends to the extra-territorial operation of writs of summons issued by such cts. when served. It is incidental to the execution of that power that a deft. should be enabled to seek for & obtain from pltf. security for the costs of an action instituted by a writ to which extra-territorial operation is so given. Parliament has power under Constitution, s. 76 (ii), to confer upon the High Ct. original jurisdiction to determine judicially the propriety of ordering such security to be given & under sect. 77 (iii) to invest the cts. of the States with similar Federal jurisdiction.—**MCGLEW v. NEW SOUTH WALES MALTING CO., LTD.** (1918), 25 C. L. R. 416.—**AUS.**

e. Municipal corporations—Maintenance, etc., of streets—Powers of Commonwealth to legislate as to.—Municipal corps. established under State laws are not, with regard to the making, maintenance, control, & lighting of public streets, instrumentalities of State government, & therefore, are not, in respect of such operations, exempt from Commonwealth legislation under Constitution, s. 51 (xxxv).—**FEDERATED MUNICIPAL & SHIRE COUNCIL'S EMPLOYEES UNION, ETC. v. MELBOURNE (LORD MAYOR, ETC.)** (1918-19), 26 C. L. R. 508.—**AUS.**

f. Protection of Commonwealth property.—By imposing criminal sanction.—The general power of the Federal Parliament includes a right to make laws with a criminal sanction for the protection of the property of the Commonwealth, even though that property might be more or less effectively protected by State law, & Federal Crimes Act, 1914 (s. 3), which makes it an offence against the Commonwealth to aid, abet, counsel, procure or be knowingly concerned in the commission of any offence, is a valid exercise of that power.—**R. v. DOLAN, R. v. SCHIFFMANN**, [1919] V. L. R. 55.—**AUS.**

g. Naturalisation.—Naturalisation Act, 1903-1917 (s. 11), is a law relating to naturalisation, & is therefore within the power conferred upon the Parliament of the Commonwealth by Constitution, s. 51 (xix).—**MAYER v. PORTNOR** (1920), 27 C. L. R. 436.—**AUS.**

h. Questions as to validity of Commonwealth legislation—No power to give

enemy nationality. Petitioners' affairs were thus brought to a standstill, & they brought an action against the Commonwealth & the A.-G. in the High Ct. of Australia alleging that the Act was *ultra vires* & denying that they were under enemy influence or control. Defts. demurred, & the High Ct. allowed the demurrer:—*Held*: leave to appeal to His Majesty in Council would not be granted.—*WELSBACH LIGHT CO. OF AUSTRALASIA, LTD. v. COMMONWEALTH OF AUSTRALIA & A.-G. FOR AUSTRALIA* (1917), 33 T. L. R. 382, P. C.

(b) *State Legislature.*

187. Banking companies—Personal liability of chairman.—By an Act of the colonial legislature of New South Wales, it was provided that a banking co. should sue & be sued in the name of its chairman, & that execution on any judgment against the co. might be issued against the property of any member for the time being, in like manner as if such judgment had been obtained against such member personally. In *assumpsit* against a member of the co. on a judgment obtained in the colony against the chairman:—*Held*: there was nothing repugnant to the Law of England, or to natural justice, in enacting that actions on contracts made by the co. in the colony, instead of being brought against the shareholders individually, should be brought against the chairman whom they had appointed to represent them.—*BANK OF AUSTRALASIA v. NIAS* (1851), 16 Q. B. 717; 20 L. J. Q. B. 284; 16 L. T. O. S. 483; 15 Jur. 967; 117 E. R. 1055.

Annotations.—*Mondt*, *Thompson v. Bell* (1854), 3 E. & B. 236; *Kelsall v. Marshall* (1856), 1 C. B. N. S. 241; *Reimers v. Druce* (1857), 23 Beav. 145; *Barber v. Lamb* (1860); 8 C. B. N. S. 95; *Castrique v. Behrens* (1861), 3 E. & E. 709; *Lang v. Purves* (1862), 15 Moo. P. C. 389; *Philpott v. Adams* (1862), 7 H. & N. 888; *Scott v. Pilkington* (1862), 2 B. & S. 11; *Simpson v. Fogo* (1863), 1 Hon. & M. 195; *Vauquelin v. Bouard* (1863), 15 C. B. N. S. 341; *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Ellie v. McHenry* (1871), L. R. 6 C. P. 228; *Ochsenbein v. Papellier* (1873).

High Court final jurisdiction as to.]—Judiciary Act, 1903–20, Part XII., which purports by sect. 88 to give the High Ct. jurisdiction to "hear & determine" any question referred to it by the Governor-General as to the validity of any enactment of the Commonwealth Parliament, & by sect. 93 to make the determination "final & conclusive & not subject to any appeal" is not a valid exercise of the legislative power conferred on the Parliament by the Constitution.—*RE JUDICIARY* (1921), 29 C. L. R. 257.—**AUS.**

k. Treaty of Peace Act, 1919.]—Treaty of Peace Act, 1919 is within the legislative power of the Commonwealth Parliament, & reg. 20 of the Treaty of Peace Regulations is authorised by sect. 2 of that Act, both so far as it purports to re-enact the provisions of Treaty of Peace, Part X., & so far as it purports to provide machinery for enforcing these provisions within the Commonwealth.—*ROCHE v. KRONHEIMER* (1921), 29 C. L. R. 329.—**AUS.**

PART II. SECT. 3, SUB-SECT. 4.—B. (b).

1. Power to decide qualification for membership of provincial legislature.]—Act No. 128 is an Act altering the qualification of members of the Victoria Legislative Assembly within Constitution Act, s. 61, & did not require the concurrence of an absolute majority of the Council & Assembly on its second & third readings nor require to be reserved for the signification of H.M.'s pleasure thereon.—*KENNY v. CHAPMAN* (1861), 1 W. & W. 93.—**AUS.**

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8 Ch. App. 695; *Copin v. Adamson*, *Copin v. Strachan* (1874), L. R. 9 Exch. 345; *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. 295; *Volinet v. Barrett* (1885), Cab. & El. 554; *Re Trufort*, *Trafford v. Blanco* (1887), 36 Ch. D. 600; *Vadala v. Lawes* (1890), 25 Q. B. D. 310; *Risdon Iron & Locomotive Works v. Furness*, [1906] 1 K. B. 49; *Robinson v. Fenner*, [1913] 3 K. B. 835.

188. Customs regulation—Powers of Governor.]—*POWELL v. APOLLO CANDLE CO.*, No. 64, *ante*.

189. Power to repeal English statutes—Slander—Statute of Limitations.]—The Legislature of New South Wales had power to repeal the above statute & had impliedly done so by 11 Vict. (No. 13), s. 1, which, according to its true construction, placed an action for words spoken upon the same footing as regards costs & other matters as an action for written slander.—*HARRIS v. DAVIES* (1885), 10 App. Cas. 279; 54 L. J. P. C. 15; 53 L. T. 601, P. C.

190. Insolvency—Priority of Crown debt—Whether prerogative ousted.]—*RE ORIENTAL BANK CORPN.* (No. 2), No. 19, *ante*.

191. Vacating of seats of legislative councillors—Failure to give attendance without permission for two successive seasons—Absence during three sessions—Permission obtained for a year.]—Where a statute provided that "if any legislative councillor shall for two successive sessions fail to give his attendance, without permission, his seat shall thereby become vacant"; & a councillor absented himself during the whole of three sessions, having previously obtained permission for a year, which period of time in the event covered the whole of the first & part of the second session:—*Held*: his seat was vacated; the permission did not cover two successive sessions.—*A.-G. OF QUEENSLAND v. GIBBON* (1887), 12 App. Cas. 442; 56 L. J. P. C. 64; 56 L. T. 239; 3 T. L. R. 391, P. C.

192. Provision of Act inconsistent with constitution—Not within express restriction imposed by Order in Council.]—The Legislature of Queensland has power to include in an Act a provision

m. Power to define parliamentary privilege.]—Act 20 Vict. No. 1 is an express exercise of the power given by Constitution Act, s. 35, as to parliamentary privilege, & is a due exercise of the power thereby given "to define" such privilege.—*DILL v. MURPHY* (1862), 1 W. & W. 342.—**AUS.**

n. Power to send criminals in custody to another colony.]—The Legislature of a colony may authorise the exclusion from its territory of a person charged with an offence in another colony, or his detention; or he may be punished unless he leaves the territory; but it cannot authorise the sending of him in custody out of its territory into another colony.—*RAY v. McMACKIN* (1875), 1 V. L. R. 274.—**AUS.**

o. Power to interfere with Commonwealth legislature.]—If a state attempts to give its legislative or executive authority an operation which, if valid, would interfere to any, the smallest, extent, with the free exercise of the legislative or executive power of the Commonwealth, the attempt unless expressly authorised by the Constitution is invalid & inoperative.—*D'EMDEN v. PEDDER* (1904), 1 C. L. R. 91.—**AUS.**

p. Aliens—Exclusion of.]—This is an attribute of sovereignty that every State is entitled to decide what aliens shall or shall not become members of its community. The right of a nation to expel or deport foreigners from the country is as unqualified & undeniable as the right to exclude them from entering the country, whether they are alien friends or enemies.—*ROTHLINGS*

J. BRENNEN (1906), 4 C. L. R. 395.—**AUS.**

q. Corporation lands—Dedication to church & schools.]—Church & School Lands Dedication Act, 1880, & the Act of 1887, at the dates of their respective enactment were *intra vires* of the Legislature of New South Wales, & are binding upon the Crown, & all beneficiaries under the letters patent or charter of incorporation dated Mar. 9, 1826, constituting the Trustees of the Clergy & School Lands in the Colony of New South Wales.—*A.-G. v. WILLIAMS* (1907), 7 S. R. N. S. W. 826.—**AUS.**

r. Taxation—Salaries of Judges.]—A State law imposing a tax generally upon the income of each citizen of the State to the extent of the general balance of his income, after allowing for all sources of revenue & all lawful deductions, is not inconsistent with the provision in the Queensland Constitution Act, 1867, that such salaries as are settled by law upon the Judges of the Supreme Ct. for the time being shall in all time coming be paid & payable to every Judge for the time being so long as the patents or commissions of any of them respectively shall continue in force.—*COOPER v. INCOME TAX COMR.* (1907), 4 C. L. R. 1304.—**AUS.**

s. Power to interfere with inter-State trade.]—The law of a State which, for a licence authorising the sale of wine manufactured from fruit grown in any other State, requires a greater fee to be paid than for a licence authorising the sale of wine manufactured from fruit grown in the first-mentioned State is contrary to the

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Sect. 3.—The legislature: Sub-sect. 4, B. (b), C., D. & E. Sect. 4: Sub-sect. 1, A. & B.]

not within the express restrictions contained in the Ord. in Council of June 6, 1859, but inconsistent with a term of the constitution of Queensland, contained in that Order & in the Constitution Act, 1916, without first amending the term in question under the powers of amendment given to it.

The Governor in Council, by a commission reciting Industrial Arbn. Act, 1916 (No. 16, Queensland), s. 6, ss. 6, appointed appt., who was a judge, & the president, of the Ct. of Industrial Arbn. to be a judge of the Supreme Ct. "during good behaviour." By the Ord. in Council of 1859, clause 22, & the Constitution Act of 1867 (No. 38, Queensland), s. 15, the period during which judges of the Supreme Ct. were to hold office was limited only by being during good behaviour:—*Held*: the Legislature of Queensland had power, both under the Colonial Laws Validity Act, 1865 (c. 63), s. 5, & apart therefrom, to authorise the appointment of a judge of the Supreme Ct. for a limited period.—*MCCAWLEY v. R.*, [1920] A. C. 691; 89 L. J. P. C. 130; 123 L. T. 177; 36 T. L. R. 387, P. C.

193. Power to authorise appointment of judge for limited period.]—MCCAWLEY v. R., No. 192, *ante*.

C. New Zealand.

194. Power to authorise proceedings against absentees.]—ASHBURY v. ELLIS, No. 69, *ante*.

D. South Africa.

195. Cape of Good Hope—Ordinances of Governor & Court of Policy.]—VAN BREDA v. SILBERBAUER, No. 274, *post*.

196. Transvaal—Levy of municipal rates—

provisions of sect. 92 of the Constitution, & is, to the extent of at least the difference between the fees so required to be paid, invalid.—*FOX v. ROBBINS* (1909), 8 C. L. R. 115.—**AUS.**

t. —.]—So far as Meat Supply for Imperial Uses Act, 1915 (s. 5) (1), purports to authorise the Govt. of New South Wales to prevent the export of stock by the owners thereof from that State to another State, it is an interference with inter-State trade & commerce, & is therefore invalid as being an infringement of Constitution, sect. 92.—*FOGGITT, JONES & CO., LTD. v. NEW SOUTH WALES STATE* (1916), 21 C. L. R. 357.—AUS.****

a. Regulation of sale of liquor.]—A State has full authority to make laws for the control of the sale of liquor whether to be supplied from outside that State or not, & such authority is not an interference with Constitution, s. 92.—*CONLAN v. WATTS* (1911), 7 Tas. L. R. 40.—AUS.****

b. Meat Supply for Imperial Uses Act, 1914—[Whether intra vires.]—Meat Supply for Imperial Uses Act, 1914, is intra vires the Parliament of Queensland, & authorises the Govt. of Queensland to prevent the owner of fat cattle from selling or dealing with them. The main object of the Act is to secure a certain food supply to the Imperial Govt. for its use in time of war, & the effect upon inter-State trade is incidental & does not render the legislation invalid.—*DUNCAN v. QUEENSLAND STATE* (1916), 22 C. L. R. 558.—AUS.****

c. No power to abolish Legislative Assembly.]—Power to abolish the Legislative Council can only come from the same source as the power to

create it, & it is not within the power of the Legislature of Queensland.—*TAYLOR v. A.-G.*, [1917] St. R. Qd. 208; Q. W. N. 34.—**AUS.**

PART II. SECT. 3, SUB-SECT. 4.—C.

d. Power to authorise detention on high seas.]—The Parliament of New Zealand can legislate only for the peace, order, & good government of the colony within the limits of the colony. The purpose of Foreign Offenders Apprehension Act, 1863, is to authorise the deportation of persons charged with indictable misdemeanours in other colonies. Such a deportation involves detention on the high seas, which the New Zealand Legislature cannot authorise.—*Re GLEICH* (1879), O. B. & F. 39.—N.Z.****

e. Power to deal with crime outside territory.]—Crimes Act, 1908, s. 224 (1) (a), which defines the offence of bigamy as "the act of a person, who being married, goes through a form of marriage with any other person in any part of the world," is beyond the power of the New Zealand Parliament in so far as it purports to deal with crime beyond the territorial limits of the Dominion.—*R. v. JACKSON*, [1919] N. Z. L. R. 607.—N.Z.****

1. Land & Income Assessment Amendment Act, 1912, s. 6—[Whether ultra vires.]—CHAMBERS & SON, LTD. v. TAXES COMR. (1916), 35 N. Z. L. R. 617.—N.Z.****

g. Defence—Power to provide for.]—The power conferred on the New Zealand Parliament by Constitution Act, s. 72, "to pass laws for the peace, order, & good government of New Zealand," includes the power to provide for the defence of New Zealand,

Provision against liability on lessee.]—Ordinance No. 1 of 1906 of the Transvaal Province by sect. 12 purports to invalidate any contract, existing or thereafter entered into, whereby the person primarily liable to pay a municipal rate made under that ordinance seeks to throw the liability for it on to a lessee, from or subsequently to himself, of the rated property:—*Held*: the power to make ordinances with regard to municipal institutions given to a Provincial Council by South Africa Act, 1909 (c. 9), s. 85, head (vi.), includes the power to make an ordinance for levying rates & for providing on whom the ultimate burden of them should fall, & in so doing to deal with existing contracts.—*MARSHALL'S TOWNSHIP SYNDICATE, LTD. v. JOHANNESBURG CONSOLIDATED INVESTMENT CO., LTD.*, [1920] A. C. 420; 89 L. J. P. C. 57; 122 L. T. 634, P. C.

E. India.

197. Act excluding jurisdiction of High Court—Whether inconsistent with Indian High Court Act, 1861 (c. 104).]—Act No. XXII. of 1869 of the Indian Legislature, which excludes the jurisdiction of the High Ct. within certain specified districts, is not inconsistent with the Indian High Cts. Act, 1861 (c. 104), or with the charter of the High Ct., & is in its general scope within the legislative power of the Governor-General in Council. Sect. 9 of that Act, which confers upon the Lieutenant-Governor of Bengal the power to determine whether the Act, or any part of it, shall be applied in a certain district, is conditional legislation, & not a delegation of legislative power. When plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a provincial legislature, they may be well exercised, either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time & manner of carrying its legislation into

& is not confined to maintaining a force within the territorial limits of New Zealand.—*SEMPLE v. O'DONOVAN*, [1917] N. Z. L. R. 273.—**N.Z.**

PART II. SECT. 3, SUB-SECT. 4.—D.

h. Transvaal—Direct tax on profits—Production of gold.]—The Transvaal Provincial Ordinance 14 of 1918 which imposes a direct tax upon the profits derived from the production of gold is intra vires of the Provincial Council under South Africa Act, s. 85 (1), & is not invalidated by the provisions of the Financial Relations Act (c. 10).—*NEW MODDERFONTEIN GOLD MINING CO. v. TRANSVAAL PROVINCIAL ADMINISTRATION* (1919), App. D., 367.—S. AF.****

k. Natal—Apprehension of offenders—Whether ultra vires Colonial Laws Validity Act, 1865 (c. 63).]—*PATEL v. A.-G.* (1917), 38 N. L. R. 1.—S. AF.****

PART II. SECT. 3, SUB-SECT. 4.—E.

1. Power to limit time for execution of decrees.]—The Legislature of this country has no power to pass any law limiting the period during which decrees of H.M. in Council may be executed.—*MUSSEI ANANDAMAYI DAS v. PURNA CHANDRA ROY* (1886), B. L. R. Sup. Vol. 506; 6 W. R. 69.—IND.****

m. Cession of territory.]—The power to cede territory was not one of the powers to which the Secretary of State for India in Council succeeded under 21 & 22 Vict. c. 106, when the Govt. of India was by that statute transferred to Her Majesty, inasmuch as such a power was not possessed by the East India Co. The Indian Legislature cannot make, & the Crown cannot sanction a law having for its

effect, as also the area over which it is to extend.—*R. v. BURAH* (1878), 3 App. Cas. 889, P. C.

Annotations.—*Reid. Russell v. R.* (1882), 7 App. Cas. 829; *Powell v. Apollo Candle Co.* (1885), 10 App. Cas. 282; *Bugra v. King-Emperor* (1920), 36 T. L. R. 340.

198. Power conferred on Lieutenant-Governor to determine application of Act to districts—Whether delegation of legislation.—*R. v. BURAH*, No. 197, *ante*.

199. Act debarring Civil Court from entertaining claim against government—Whether ultra vires.—The Govt. of India cannot by legislation take away the right to proceed against it in a Civil Ct. in respect of any right over land.—*SECRETARY OF STATE FOR INDIA IN COUNCIL v. MOMENT* (1912), 29 T. L. R. 140, P. C.

SECT. 4.—THE JUDICIAL POWER.

SUB-SECT. 1.—JUDICIAL OFFICERS.

A. Appointment.

See CONSTITUTIONAL LAW, Vol. XI., p. 515, Nos. 165–167; COURTS, Vol. XVI., p. 128, Nos. 257, 258.

Judicial Officers of Channel Islands.—See Part X., Sect. 4, *post*.

200. Appointment by Governor—Additional judges of Supreme Court of New Zealand—Limitation of power of appointment—Whether affected by 1882 Act.—Supreme Court Judges Act, 1858 (s. 2), provided that the Supreme Ct. of New Zealand should consist of one judge, to be appointed in the name & on behalf of Her Majesty, who should be called the Chief Justice, & of such other judges as His Excellency, in the name & on behalf of Her Majesty, should from time to time appoint:—*Held*: this section could only be construed consistently with other parts of the Act in particular sect. 6, as vesting in the Governor the appointment of judges to whom an ascertained salary was payable by law at the time of their appointment; & the Act of 1882 did not affect this limitation of the Governor's power of appointment.—*BUCKLEY v. EDWARDS*, [1892] A. C. 387; 61 L. J. P. C. 64; 66 L. T. 833; 8 T. L. R. 587, P. C.

201. Sierra Leone—Death of deputy judge appointed by Chief Justice—Further appointment in absence of Chief Justice.—The Chief Justice of the Vice-Admiralty Ct. of Sierra Leone went on leave, after duly appointing a deputy, who died. Thereupon her Majesty's advocate, being Chief Justice in the colony during the absence of the Chief Justice, with the concurrence of the acting governor, appointed N. to be deputy judge:—*Held*: N. was duly appointed.—*ROLET v. R.* (1866), L. R. 1 P. C. 198; 4 Moo. P. C. C. N. S. 41; 12 Jur. N. S. 715; 15 W. R. 233; 16 E. R. 232, P. C.

B. Removal.

202. Powers of Governor & Council—22 Geo. 3, c. 75—Neglect or misbehaviour.—22 Geo. 3, c. 75,

empowering the Governor & Council, of a colony or plantation, to remove persons holding patent offices, for neglect or misbehaviour, includes judicial offences. The Governor & Council of New South Wales, having removed a judge, without giving him notice, or affording him an opportunity of answering the charges brought against him, & upon which the order of removal was founded:—*Held*: such order was illegal, & would be reversed.—*WILLIS v. GIPPS* (1846), 5 Moo. P. C. C. 379; 6 State Tr. N. S. 311; 13 E. R. 536, P. C.

Annotation.—*Reid. Montagu v. Van Dieman's Land* (1849), 6 Moo. P. C. C. 488.

203. ————*]*—*MONTAGU v. VAN DIEMAN'S LAND* (LIEUT.-GOV. OF), No. 48, *ante*.

204. ————Right of judge to notice of a motion—& opportunity of defence.—*WILLIS v. GIPPS*, No. 202, *ante*.

205. ————Suspension of Recorder—Natal.—An order of suspension from the office of Recorder of the District of Natal, made by the Lieutenant-Governor & Executive Council of that district, under the powers of Ordinance, No. 14, of 1845, for alleged misconduct as a judge, founded upon charges of having permitted an affidavit reflecting upon the personal character of the Lieutenant-Governor of the Colony to be reformed, instead of rejecting it altogether, or treating it as a contempt of ct., & for allowing private feelings to interfere with the administration of justice, was held to be unfounded & frivolous, & ordered to be rescinded.

The Judicial Committee, in reversing such order, advised the Crown that the salary attached to applt.'s office of Recorder should be paid to him as if no order of suspension had been made.—*CLOETE v. R.* (1854), 8 Moo. P. C. C. 484; 8 State Tr. N. S. 1084; 14 E. R. 184, P. C.

206. Memorial to Crown in Council—By House of Assembly—Effect of delay in complaint.—On a memorial, presented to the Queen in Council, by the House of Assembly of the Island of Grenada, complaining of the judicial conduct of the Chief Justice of that island, as illegal & oppressive, it appeared from the evidence, that during the fourteen years in which the Chief Justice had held office, he had displayed on the Bench, several instances of intemperance, & in some cases illegal, conduct, but these acts were committed many years before the presentation of the memorial, without any complaint at the time of the Chief Justice's misconduct. In these circumstances, the Judicial Committee reported to the Crown, that, having regard to the length of time which had elapsed since all the acts complained of, they could not, sitting judicially, advise the Crown to remove the Chief Justice for misconduct.—*Re GRENADA* (REPRESENTATIVES, ETC.) & SANDERSON (1847), 6 Moo. P. C. C. 33; 6 State Tr. N. S. 1108; 8 L. T. O. S. 529; 13 E. R. 596, P. C.

See, also, CONSTITUTIONAL LAW, Vol. XI., p. 507, Nos. 91–93 *et seq*.

object the dismemberment of the State in times of peace, as such a law must of necessity affect the authority of Parliament & those unwritten laws & constitutions of the United States of Great Britain & Ireland, whereon depends the allegiance of persons to the Crown of the United Kingdom.—*DAMODAR GORDHAN v. GANESH DEVRAM* (1873), 10 Bom. 37.—IND.

n. Power to prohibit processions & assemblies.—The Indian Legislature is competent to make police regulations to prohibit processions or public

assemblies, in the interests of public peace & safety.—*LEAKAT HOSSAIN v. R.* (1913), 1 L. R. 40 Calc. 470.—IND.

PART II. SECT. 4, SUB-SECT. 1.—A.

a. Appointment by Governor-General—Under special Act—Industrial Arbitration Act, 1916 (Qd.).—Industrial Arbitration Act, 1916, s. 2, directs the Governor in Council by commission to appoint a Judge or Judges of that Ct., one of whom is to be designated the President, & notwithstanding the pro-

visions of any Act limiting the number of Judges of the Supreme Ct. the Governor in Council may appoint the President . . . to be a Judge of the Supreme Ct.—*McCawley v. R.* (1918), 26 C. L. R. 9.—AUS.

p. Appointment of additional puisne judge.—It is competent to the Crown to appoint by means of its Letters Patent a sixth puisne Judge to the High Ct. of the North Western Province.—*R. v. GHURE* (1914), 1 L. R. 36 All. 168.—IND.

Sect. 4.—The judicial power: Sub-sect. 1, C.; sub-sect. 2, A., B., C., D. & E.]

C. Powers and Responsibilities.

207. Power of Chief Justice to alter practice of court—Not without consent of Assistant Justices—Supreme Court of Grenada.]—The Chief Justice of the Supreme Ct. of Grenada has no power, alone, & without the consent of the Assistant Justices, to issue a rule whereby the practice of the ct. is altered. Two rules of ct. made by the Chief Justice prohibiting the Assistant Justices from doing any act in Chambers except in the absence from the Island or illness of the Chief Justice:—*Held*: to be illegal, & ordered to be rescinded.—*Re WELLS* (1840), 3 Moo. P. C. C. 216; 13 E. R. 92; *sub nom. Re WELLS' PETITION*, 4 Jur. 597, P. C.

208. No liability for acts done in judicial capacity—Unless done with knowledge of defect of jurisdiction—Onus of proof as to knowledge—Protection of provincial magistrates in India.]—East India Company Act, 1781 (c. 70), s. 24, protecting provincial magistrates in India from actions for any wrong or injury done by them in the exercise of their judicial offices, does not confer unlimited protection, but places them on the same footing as those of English cts. of a similar jurisdiction, & only gives them an exemption from liability when acting *bona fide* in cases in which they have mistakenly acted without jurisdiction. Trespass will not lie against a judge for acting judicially, but without jurisdiction, unless he knew, or had the means of knowing, of the defect of jurisdiction, & it lies upon pltf. in every such case, to prove that fact.—*CALDER v. FALKET* (1840), 3 Moo. P. C. C. 28; 2 Moo. Ind. App. 293; 4 State Tr. N. S. 481; 13 E. R. 12.

Annotations:—*Apld.* Pease v. Chaytor (1863), 3 B. & S. 620. *Reid.* Kemp v. Neville (1861), 10 C. B. N. S. 523. *R. v. Williams* (1866), 15 L. T. 290. *Mentd.* Ryalls v. R. (1849), 18 L. J. M. C. 69; *Sinclair v. Broughton & Indian Government* (1882), 47 L. T. 170.

209. — Dismissal of vexatious action without proof—Judge acting within jurisdiction—Consular Court of Madagascar.]—Under an Order in Council, dated Feb. 4, 1869, the Consular Ct. of Madagascar was vested with plenary civil jurisdiction over all British subjects within its limits, though it was not created in the sense of English law a Ct. of Record:—*Held*: *applt.* whilst sitting & acting as a judge of the Consular Ct., was entitled to the same degree of protection which is accorded by the law of England to the judge of a Ct. of Record; & an action for damages would not lie against him

for dismissing without proof, an action which he held to be vexatious, for however inadequate his reasons for such holding might be, such dismissal was within his jurisdiction.—*HAGGARD v. PELICIER FRÈRES*, [1892] A. C. 61; 61 L. J. P. C. 19; 65 L. T. 769; 8 T. L. R. 130, P. C.

Annotations:—*Reid.* Anderson v. Gorrie, [1895] 1 Q. B. 668; *Logan v. Bank of Scotland* (1905), 94 L. T. 153; *Everett v. Griffiths*, [1921] 1 A. C. 631.

As to Consular Cts. generally, see COURTS, Vol. XVI., p. 190, Nos. 950 *et seq.*

210. — Though acts malicious & oppressive—Judge of Supreme Court of colony.]—No action lies against a judge of the Supreme Ct. of a colony in respect of any act done by him in his judicial capacity, even though he acted oppressively & maliciously, to the prejudice of pltf. & to the perversion of justice.—*ANDERSON v. GORRIE*, [1895] 1 Q. B. 668; 71 L. T. 382; 10 T. L. R. 660; 14 R. 79, C. A.

Annotation:—*Reid.* Everett v. Griffiths, [1921] 1 A. C. 631.

211. Liability for acts done in assumed judicial capacity—Persons acting as judges under irregular commissions—Royal Court of St. Lucia.]—*GAHAN v. LAFFITE* (1842), 3 Moo. P. C. C. 382; 4 State Tr. N. S. 1380; 6 Jur. 841; 13 E. R. 155, P. C.

See, further, PUBLIC AUTHORITIES & PUBLIC OFFICERS.

SUB-SECT. 2.—JURISDICTION OF COLONIAL COURTS.

A. In General.

212. Power to deal with matters within jurisdiction.]—Pltf., a domiciled colonial subject, against whom judgment had been recovered in the colonial ct., took the benefit of the laws in force in the colony for the relief of insolvents. He subsequently desired to appeal to the Privy Council against the judgment, but his assignee refused to allow his name to be used for that purpose. The assignee having come over to this country, pltf. filed a bill against him, praying that the assignee might be ordered to allow his name to be used for the purpose of an appeal. On demurrer:—*Held*: the colonial ct. was the proper jurisdiction, & as pltf. had not shown that he was without remedy there, the demurrer must be allowed.—*SMITH v. MOFFATT* (1865), L. R. 1 Eq. 397; 35 L. J. Ch. 219; 14 L. T. 323; 12 Jur. N. S. 22; 14 W. R. 242.

213. Act of Governor—Determination whether within his power.]—*MUSGRAVE v. PULIDO*, No. 22, ante.

PART II. SECT. 4, SUB-SECT. 2.—A.

212 i. Power to deal with matters within jurisdiction.]—The supreme ct. of British Columbia is clothed with all the powers & jurisdiction, civil & criminal, necessary or essential to the full & perfect administration of justice, civil or criminal, in the province; powers as full & ample as those known to the common law & possessed by the superior cts. of England.—*Re SPROULE* (1886), 12 S. C. R. 140.—**CAN.**

212 ii. — Cannot be revoked by provincial legislature.]—An Ontario co. resisted the imposition of a licence fee for "doing business in the City of Halifax" & a case was stated & submitted to the Supreme Ct. of Nova Scotia for an opinion as to such liability. On appeal from the decision of the said ct. to the Supreme Ct. of Canada, counsel for the City of Halifax contended that the proceedings were really an appeal against an assessment under the city charter, that no appeal lay therefrom to the Supreme Ct. of

the Province, & therefore, & because the proceedings did not originate in a superior ct., the appeal to the Supreme Ct. of Canada did not lie:—*Held*: as the appeal was from the final judgment of the ct. of last resort in the province, this ct. had jurisdiction under the provisions of the Supreme Ct. Act & it could not be taken away by provincial legislation.—*HALIFAX CITY v. McLAUGHLIN CARRIAGE CO.* (1907), 39 S. C. R. 174.—**CAN.**

212 iii. —]—The Supreme Ct. of Canada primarily settles the law of Canada, being only subject to review by the Judicial Committee of the Privy Council.—*TRUMBELL v. TRUMBELL*, [1919] 2 W. W. R. 198.—**CAN.**

q. Power to determine validity—Act of Colonial legislature.]—The cts. of a Colony are empowered to, & must, decide whether an Act of the Colonial Legislature contravenes an Act of the Imperial Parliament.—*RUSDEN v. WEEKES* (1861), 2 Legge 1406.—**AUS.**

r. —]—The Supreme Ct. of this province has no power to declare an Act of the Provincial Legislature to be invalid either on the ground that it interferes with private rights, & is therefore unconstitutional, or, that under the royal instructions to the Governor, the Act ought not to have been passed without a suspending clause.—*R. v. KERR* (1838), Ber. 553.—**CAN.**

s. —]—The jurisdiction of the provincial legislatures over "property & civil rights" does not preclude the Parliament of Canada from giving to an informer the right to recover, by a civil action, a penalty imposed as a punishment for bribery at an election. The Dominion Election Act, 1874, s. 106, provides that all penalties & forfeitures, other than fines in cases of misdemeanour, imposed by the Act shall be recoverable, with full costs of suit, by any person who will sue for the same, by action of debt or information, in any of Her Majesty's

214. Construction of treaties.]—A naval officer, in the alleged performance of his duty, took forcible possession of a factory belonging to resp. in order to put in force & give effect to the provisions of a treaty entered into with a foreign state:—*Held*: the ct. of the colony was competent to inquire into matters involving the construction of treaties & other acts of state.—*WALKER v. BAIRD*, [1892] A. C. 491; 61 L. J. P. C. 92; 67 L. T. 513, P. C.

Annotations:—*Reid*, *Johnstone v. Pedlar*, [1921] 2 A. C. 262. *Mentd.* *Francis, Times v. Carr* (1900), 82 L. T. 698.

215. Matters before annexation of colony—Concessions granted before cession—Whether enforceable by municipal courts.]—Grantees of Pongoland cannot, after the annexation of Pongoland by Her Majesty, enforce against the Crown the privileges & rights conferred.

Annexation is an act of State, & any obligation assumed under a treaty to that effect, either to the ceding sovereign or to individuals, is not one which municipal cts. are authorised to enforce.

Crown Liabilities Act, 1888, permits such an action to be brought, but it does not empower the ct. to make a declaration of right.—*COOK v. SPRIGG*, [1899] A. C. 572; 68 L. J. P. C. 144; 81 L. T. 281; 15 T. L. R. 515, P. C.

Annotations:—*Reid*, *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391; *Salaman v. Secretary of State for India*, [1906] 1 K. B. 613; *Johnstone v. Pedlar*, [1921] 2 A. C. 262.

216. — Appeal from decision of court of territory pronounced before annexation—Supreme Court of Transvaal.]—The Supreme Ct. of the

Transvaal has no jurisdiction to entertain an appeal from a decision of the High Ct. of the Transvaal Republic pronounced before the annexation of that colony.—*AFRICAN GOLD RECOVERY Co. v. HAY*, [1904] A. C. 438; 73 L. J. P. C. 108; 91 L. T. 214; 20 T. L. R. 598, P. C.

See, also, No. 13, ante.

See, generally, *COURTS*, Vol. XVI., pp. 101 *et seq.*

B. Acts of Military Authorities during War.

See *CONSTITUTIONAL LAW*, Vol. XI., p. 535, Nos. 381, 382; *ROYAL FORCES*.

C. Admiralty.

See *ADMIRALTY*, Vol. I., p. 251, Nos. 1794 *et seq.*

D. Charities.

217. General jurisdiction—Courts of equitable jurisdiction.]—Colonial cts. of equitable jurisdiction, unless more limited by the terms of the Charter, have a general jurisdiction over Charities.—*A.-G. v. BRODIE* (1846), 6 Moo. P. C. C. 12; 4 Moo. Ind. App. 190; 11 Jur. 137; 13 E. R. 586, P. C.

See, also, *CHARITIES*, Vol. VIII., p. 383, Nos. 1976 *et seq.*

E. Contempt of Court.

See, generally, *CONTEMPT OF COURT, ATTACHMENT & COMMITTAL*, Vol. XVI., pp. 10 *et seq.*

Appeals from orders of colonial courts—Jurisdiction of Judicial Committee to entertain.]—*See* Part IX., Sect. 2, *post*.

Cts. in the province in which the cause of action arose, having competent jurisdiction:—*Held*: the enactment was valid.—*DOYLE v. BELL* (1884), 11 A. R. 326.—*CAN.*

t. — .]—Orders & regulations made by virtue of a delegated authority from a legislature are open to review by the cts. & are invalid if they do not come within the powers conferred by the legislative enactment, that is, if they are not merely ancillary, subsidiary & subordinate to such enactment & passed for the purpose of the more convenient & effective operation thereof, or are inconsistent with the direct enactments of the legislature which conferred the delegated power or of any legislative body superior thereto or the principles of the common law.—*Re LEWIS*, [1918] 13 Alta. L. R. 423; 41 D. L. R. 1.—*CAN.*

a. — .]—An appeal from an order of the Public Utilities Commission lies only to the extent & in the manner prescribed by the Act, & cannot be otherwise interfered with by the Cts. even on the ground of want of jurisdiction. The constitutionality of the Act or the status of the Comrs. cannot be questioned in collateral proceedings.—*WINNIPEG v. WINNIPEG ELECTRIC Ry. Co.* (1920), 3 W. W. R. 240.—*CAN.*

b. — Not appointment of judge.]—The Supreme Ct. has no power to decide the validity of the appointment of one of its members.—*STODDART v. PRENTICE* (1898), 6 B. C. R. 308.—*CAN.*

c. — Not succession to foreign state.]—The Cts. in British India have no jurisdiction to decide a question as to who is entitled to succeed to the Raj. of a Foreign Sovereign State or to any immovable property, which goes with the Raj.—*SAMARENDRA CHANDRA DEB v. BIRENDRA KISHORE DEB* (1908), 1 L. R. 35 Calc. 777.—*IND.*

d. — High Court of Southern Rhodesia.]—The High Ct. of Southern Rhodesia has every right to inquire whether any statute has transgressed

the limits of the subjects in regard to which the Legislature of that country is empowered to legislate, but it has no right to inquire whether in dealing with subjects within its competence the Legislature has acted wisely or unwisely for the benefit of the public or for the benefit of private individuals.—*R. v. MCCHERRY* (1912), App. D. 199.—*S. AF.*

e. — Not order in Council.]—The validity of an Order in Council promulgated as law in a colony which does not enjoy responsible government cannot be questioned on the ground that it deals with one individual & one set of assets alone, or on the ground that it involves the confiscation of private property without compensation.—*N.-Z.A.S.M. v. DOUGLAS COLLIERY, LTD.*, & *C.S.A.R.* (1905), T. S. 374.—*S. AF.*

f. Criminal jurisdiction—Unless crime committed in another country.]—The cts. have no jurisdiction in the matter of crimes committed in another country.—*Re JU KI SHING (alias JRU CHON)*, *Re CHINESE EXTRADITION ORDINANCE 1889*, (1908), 3 Hong Kong L. R. 20.—*HONG KONG.*

g. Procedure of legislative assembly—Court cannot review.]—As the Legislative Assembly has power under its Standing Orders pursuant to Constitution Act, 1867, s. 8, to regulate its internal procedure relating to orderly conduct, the Supreme Ct. has no jurisdiction to take cognisance of the mode in which a resolution for the suspension of a member was passed.—*BROWN v. COWLEY* (1895), 6 Q. L. J. 234.—*AUS.*

h. Persons acting under Royal Commission—No power to restrain—Unless course of justice obstructed.]—Royal Commissions of inquiry are lawful; & the cts. have no power to restrain persons acting under the authority of such commissions, provided that they do not invade private rights, or interfere with the course of justice.—*CLOUGH v. LEAHY* (1904), 3 C. L. R. 139.—*AUS.*

k. Treaty with China—British subject—Alien soldier of Indian Army.]—*It. v. IBRAHIM* (1912), 8 Hong Kong L. R. 1.—*HONG KONG.*

l. Yukon Territorial Court.]—The Supreme Ct. of Canada has jurisdiction to hear appeals from the judgments of the Territorial Ct. of the Yukon Territory, sitting as the Ct. of Appeal constituted by the Ordinance of the Governor-in-Council of the 18th of March, in respect to the hearing & decision of disputes affecting mineral lands in the Yukon Territory.—*HARTLEY v. MATSON* (1902), 32 S. C. R. 575.—*CAN.*

m. Discretion of Governor to expropriate—Court will not determine necessity.]—Where a co. is authorised by statute to expropriate lands, & the necessity of such expropriation is left to the discretion of the Governor in Council, the ct. will not entertain an appl. to declare the necessity of such expropriation.—*MILLER v. HALIFAX POWER CO., LTD.*, *THOMSON v. HALIFAX POWER CO., LTD.* (1913), 13 E. L. R. 394.—*CAN.*

n. Confined to territory—Unless extended by legislative authority.]—The jurisdiction of a Colonial Ct. is, in respect to persons, restricted to such persons as are at the moment of the initiation of proceedings within its territorial jurisdiction, though it may be extended by legislative authority.—*It. M.*, [1918] 1 W. W. R. 579.—*CAN.*

o. Injunction to restrain proceedings in Court beyond jurisdiction.]—The jurisdiction of the High Ct. to restrain proceedings in cts. outside its jurisdiction is governed by the same principles as those that govern Cts. of Equity in England, namely, that the party, whom it is sought to restrain, must be within the limits of the jurisdiction of the High Ct., so that in the event of an injunction being granted against him & being disobeyed, he would be subject to process for contempt.—*VULCAN IRON WORKS v. BISHUMBER PROSAD* (1908), 1 L. R. 36 Calc. 233.—*IND.*

Sect. 4.—The judicial power: Sub-sect. 2, E., F., G., H., I. & J.]

Power to punish for publication of scandalous matter respecting court—After adjudication.]—See CONTEMPT OF COURT, ATTACHMENT & COMMITTAL, Vol. XVI., p. 20, No. 152.

Chancery Court of Isle of Man.]—See CONTEMPT OF COURT, ATTACHMENT & COMMITTAL, Vol. XVI., p. 21, No. 162.

Exercise of Crown's power of pardon—Remission of sentence by Governor.]—See CONTEMPT OF COURT, ATTACHMENT & COMMITTAL, Vol. XVI., p. 9, No. 19.

F. Declaration of Right against Crown.

218. Power to make—Suit brought under Crown Liabilities Act, 1888—Cape Colony.]—COOK v. SPRIGG, No. 215, ante.

Acts of State, see CONFLICT OF LAWS, Vol. XI., p. 412, Nos. 796-799; PUBLIC AUTHORITIES & PUBLIC OFFICERS.

G. Matrimonial Causes.

See HUSBAND & WIFE.

H. Probate.

See EXECUTORS & ADMINISTRATORS.

I. Disciplinary Jurisdiction over Barristers and Solicitors.

219. Power to prevent advocates from practising—Misconduct.]—The power of colonial cts. to prevent advocates who misconduct themselves from practising before them cannot be disputed.

In England the cts. of justice are relieved from the unpleasant duty of dis-barring advocates in consequence of the power of coming to the Bar & dis-barring having in remote times been delegated to the Inns of Ct. In the colonies there are no Inns of Ct., but it is essential for the due administration of justice, that some person should have authority to determine who are fit persons to practise as advocates & attorneys there. Now advocates & attorneys have always been admitted in the Colonial Cts. by the judges & the judges only. The power of suspending from practice must, we think, be incidental to that of admitting to practice, as in the case in England with regard to attorneys. In Antigua the characters of advocates & attorneys are given to one person; the ct. therefore that confers both characters, may, for just cause, take both away. Although indeed our own cts. do not dis-bar for the reason I have mentioned, I have no doubt they might prevent a barrister, who had acted dishonestly from practising before them. While advocates in the colonies have an appeal to His Majesty, the power to

remove them from practice can never be abused (LORD WYNFORD).—*Re ANTIGUA JJ.* (1830), 1 Knapp, 267; 12 E. R. 321, P. C.

Annotation:—*Reid. Re Monckton* (1837), 1 Moo. P. C. C. 455.

Jurisdiction over barristers.]—See BARRISTERS, Vol. III., p. 323, Nos. 103 et seq.

Jurisdiction over solicitors.]—See SOLICITORS.

Punishment for contempt of court.]—See, generally, CONTEMPT OF COURT, ATTACHMENT & COMMITTAL, Vol. XVI.

Appeals from.]—See Part IX., Sect. 3, sub-sect. 3, post.

J. Indian Courts.

220. Constitution of Supreme Court—Judge sitting as judge & jury.]—By the constitution of the Supreme Cts. in India, the judges for the purpose of the trial of an action, sit as a jury as well as judges, & the same weight is to be given to a decision of the judges, in such circumstances, as to the verdict of a jury in this country in which the judge who tries the cause makes no objection.—MUSADEE MAHOMED CAZUM SHERAZEE v. MEERZA ALLY MAHOMED SHOOSTRY (1854), 8 Moo. P. C. C. 9; 6 Moo. Ind. App. 27; 14 E. R. 35, P. C.

See, generally, COURTS, Vol. XVI., pp. 101 et seq.
221. Extent of power to nonsuit—Compared with power of English Courts.]—There is no power in the cts. in India, similar to that exercised by Cts. of Equity or Common Law in England, to dismiss a suit with liberty for plff. to bring a fresh suit for the same matter, or to enter a non-suit. Such power of the Indian Cts. is limited to questions of form, as in the case (1) of misjoinder of parties, or of the matters in suit, (2) where a material document has been rejected for not having a proper stamp, & (3) if there has been an improper valuation of the subject-matter of the suit; but not to a case where the issue has been joined, & plff. fails to produce the evidence he is bound to give to support the issue.—WATSON v. RAJSHAHYE (COLLECTOR) (1869), 13 Moo. Ind. App. 160; 20 E. R. 511, P. C.

222. Jurisdiction resting on British statutes—Whether transferable without legislation—Cession of territory of native State.]—The jurisdiction of the cts. of the Bombay Presidency over Gangli rested in 1866 upon British statutes, & could not be taken away or altered, as long as Gangli remained British territory, so as to substitute for it any native or other extraordinary jurisdiction, except by legislation in the manner contemplated by those statutes. The transfer of British territories from ordinary British jurisdiction to the supervision, laws & regulations of a political agency, by excluding such territories from the British regulations & codes theretofore in force therein, & from the jurisdiction of all British cts.

PART II. SECT. 4, SUB-SECT. 2.—J.

p. Jurisdiction resting on British statute.]—The High Cts. are not Cts. of ordinary original civil jurisdiction over the whole of the territories of the presidencies to which they belong, & there is no presumption in favour of jurisdiction beyond what is found expressly conferred by the Charters of Constitution.—SUGANCHAND SHIVDAS v. MULCHAND JOHARIMAL (1875), 12 Bom. 113.—IND.

228 i. Jurisdiction of High Court—Bombay—Power to transfer action to High Court—From Court of Resident of Aden.]—Plff. brought a suit in the ct. of the Assistant Resident at Aden for a declaration of heirship & an injunction with reference to certain property of the value of upwards

of Rs. 50,000. The Assistant Resident rejected the plaint on the ground that it was not properly stamped. Against the order of the Assistant Resident plff. appealed to the Resident at Aden, & on Sept. 23, 1908, presented an appln. under Aden Act (I of 1864), s. 8, to state a case to the High Ct. upon certain questions specified in the appln. The Resident, however, on the next day, Sept. 24, summarily dismissed the appeal under s. 551 of the Civil Procedure Code (Act XIV. of 1882), s. 551. The judgment dismissing the appeal was read out to the plff. on the 7th October following. Plff. thereupon preferred an appln. for revision to the High Ct. praying that the order dismissing the appeal might be quashed & that the Resident be required to state a case. A question

having arisen as to whether the High Ct. had jurisdiction to interfere in revision with any order passed by the Resident in the exercise of his Civil jurisdiction under the Aden Act, (II of 1864).—Held & with regard to questions which might arise regarding cases to be stated by the Resident for the decision of the High Ct. under the provisions of the Act, the Resident's Ct. is subordinate to the High Ct.—RHIMBAI JAMALSHOHY v. MARIAM BINTI ABDUL (1909), I. L. R. 34 Bom. 267.—IND.

r. — Criminal jurisdiction—Offence committed on high seas—Within territorial limits.]—An offence committed on the high seas, but within three miles from the coast of British India, as being committed within the

heretofore established therein, with a view to substitution of a native jurisdiction under British supervision & control, cannot be made without a legislative Act. Such transfer of jurisdiction, even if valid, would not amount to a cession of British territory to a native State; nor would it deprive the Crown of its territorial rights over the transferred districts or the persons resident therein of their rights as British subjects.—**DAMODHAR GORDHAN v. DEORAM KANJI** (1876), 1 App. Cas. 332, P. C.

Annotation.—**Mentd.** Hemchand Devchand v. Azan Sakarjal Chhotamial, [1906] A. C. 212.

223. Jurisdiction granted over railways in native State—Whether extending to offences not committed on railway—Hyderabad.]—The Nizam of Hyderabad having granted to the British Govt. civil & criminal jurisdiction along the line of railway within his dominions, as was the case on other lines running through independent states, a native of the Nizam's State was arrested at a station on the railway by warrant granted by a magistrate at Simla in respect of an offence committed in British territory:—**Held**: (1) the arrest was illegal. The jurisdiction granted does not relate to offences not committed on a railway, nor in any way connected with its administration; (2) in the absence of cession of territory by the Nizam a notification by the Governor-General in Council was inoperative to give jurisdiction, or as the source of authority in excess of that granted by the Nizam.—**MUHAMMAD YUSUF-UD-DIN v. QUEEN-EMPRESS** (1897), L. R. 24 Ind. App. 137, P. C.

Annotation.—**Refd.** Hemchand Devchand v. Azan Sakarjal Chhotamial, (1906) A. C. 212.

224. — Whether extended by notification of Governor-General in Council.]—**MUHAMMAD YUSUF-UD-DIN v. QUEEN-EMPRESS**, No. 223, *ante*.

225. Jurisdiction of High Court—At Calcutta—Criminal jurisdiction—Person resident out of jurisdiction.]—Under the general jurisdiction of the Supreme Ct. at Calcutta, a person though resident

at Benares is liable to its jurisdiction, if privy to & co-operating in a misdemeanour committed within it.—**JANNOKEE DOSS v. BINDABUN DOSS** (1836), 1 Moo. Ind. App. 67; 18 E. R. 26, P. C.

226. — Native subjects of Burmah under government of East India Company.]—The Supreme Ct. at Calcutta has no jurisdiction under Criminal Law, India, Act, 1828 (c. 74), s. 56, to try an indictment for murder committed & wholly completed at a place within the trading limits of the East India Co.'s charter, by native subjects of Burmah under the govt. of the East India Co., representing the Crown, who would not under former statutes regulating the jurisdiction of the Supreme Ct., have been amenable to its criminal jurisdiction.—**NGA HOONG v. R.** (1857), 7 Moo. Ind. App. 72; 30 L. T. O. S. 356; 22 J. P. 208; 6 W. R. 199; 7 Cox, C. C. 489; 19 E. R. 237, P. C.

227. — Bombay—Admission of attorneys & solicitors.]—The Supreme Ct. of Judicature at Bombay has no power to admit persons as attorneys & solrs., to practise in the cts. there, other than those qualified in the manner pointed out by the Charter of Dec. 8, 1823, by which that ct. was established.—**MORGAN v. LEECH** (1842), 3 Moo. P. C. C. 368; 2 Moo. Ind. App. 428; 6 Jur. 225; 13 E. R. 149, P. C.

Annotation.—**Mentd.** Cromdli v. Parker, The Aspasla (1857). 11 Moo. P. C. C. 79.

228. — Power to transfer action to High Court—From court of Resident of Aden.]—The Ct. of the Resident at Aden is subject to the superintendence of the High Ct. of Bombay, so as to enable that Ct. to remove a suit from the Ct. of the Resident at Aden into the High Ct. for the purpose of trial.—**ADEN (MUNICIPAL OFFICER) v. HAJEE ISMAIL HAJEE ALLANA** (1905), 22 T. L. R. 95, P. C.

229. Jurisdiction of Inferior Civil Courts—Court of Punjab—Administration of property of insolvent—Whether ouster of jurisdiction of High Court.]—By Punjab Laws Act IV., 1872, s. 27, it was enacted that the property of the insolvent

territorial limits of British India, is punishable under the provisions of the Penal Code. The ordinary Criminal Ct. of the country have jurisdiction over such offences by virtue of 12 & 13 Vict. c. 98, ss. 2 & 3, extended to India by 23 & 24 Vict. c. 88.—**R. v. KASTYA RAMA** (1871), 8 Bom. 63.—**IND.**

s. — The rule to the effect that English & not Indian law is applicable to offences committed on the high seas, is altered by Stat. 37 & 38 Vict. c. 27, which provides that such offences shall be tried & punished according to the local law. The accused, who was captain of a native craft, was charged with having dishonestly sold his cargo & scuttled his ship in the course of a voyage from Aloppey to Bombay. The accused was arrested in the Ratnagiri District, & committed for trial to the Sessions Judge of Ratnagiri, who convicted him under Penal Code, ss. 407, 437, & sentenced him to five years' rigorous imprisonment. On appeal, the accused contended that the Sessions Judge of Ratnagiri had no jurisdiction to try the case: (1) because the first offence, if it took place at all, was committed within the territorial waters of Goa; & (2) because the offence, if committed on the high seas, could only be tried according to the law of England & not according to the Penal Code.—Held**: (1) the ct. at Ratnagiri had jurisdiction. If the offence was committed within three miles of Goa, the Treaty Act (IV of 1880) between England &**

Portugal as regards the Goa territory conferred the right to try such cases in British India. (ii) If the offence were committed beyond the three-mile limit & on the high seas, the ct. had jurisdiction & the Penal Code applied under the provisions of 30 & 31 Vict. c. 124, s. 11, & 37 & 38 Vict. c. 27.—**R. v. ABDUL RAHMAN** (1889), 1 L. R. 14 Bom. 227.—**IND.**

t. — Consular Court of Zanzibar—No power of revision.]—**Held**: the High Ct. at Bombay has no power of revision over civil cases tried by the Consular Ct. at Zanzibar, though it is authorised to hear appeals from the decisions of that Ct. as a District ct. by the Zanzibar Order in Council of 1884. A power of revision is not an incident of appellate powers, but, on the contrary, can only be exercised where there is no appeal: & had it been intended to give such powers to the High Ct. at Bombay, it would necessarily have been expressly provided for.—**KHOJA SIVJI v. HASHAM GULAM** (1900), 1 L. R. 20 Bom. 480.—**IND.**

a. — Suit in Small Causes Court—Power to restrain by injunction.]—The High Ct. of Bombay has inherent power to restrain by injunction a deft. in a suit filed in the High Ct. from proceeding in the Small Cause Ct. at Bombay with a suit filed by deft. referring to the same matter to which the suit in the High Ct. relates; or from filing further suit relating to the same subject matter pending the hearing of the High Ct. suit.—**UDERAM**

KESAJI v. HYDERALLY ABDUL KAYUM (1908), 1 L. R. 33 Bom. 469.—**IND.**

b. — Court of British India—Criminal jurisdiction—Person resident out of jurisdiction.]—The accused was a subject of the Cambay State. He lived there and traded with his business partner A. He conspired with A. at Cambay & sent A. to a professional forger at Umreth, a place in British India, with instructions to instigate the latter to forge a valuable security. To facilitate the forgery, the accused sent his khata book with A. In pursuance of A.'s instigation the forgery was committed at Umreth. On these facts, the accused was charged, in a ct. in British India, with the offence of abetment of forgery, under Indian Penal Code, ss. 467, 109. The trying judge referred to the High Ct. the question whether the accused, not being a British subject, was amenable to the jurisdiction of his ct.:—**Held**: the ct. in British India had jurisdiction to try the accused, for the accused's offence was not wholly completed within Cambay limits, but having been initiated there, was continued & completed within the British Territory of Umreth. Where a foreigner starts the train of his crime in foreign territory, & perfects & completes his offence within British limits, he is triable by the British Ct. when found within its jurisdiction.—**R. v. CHHOTALAL BABAR** (1912), 1 L. R. 36 Bom. 524.—**IND.**

c. — Suit to recover meane profits—Land outside jurisdiction.]—A suit to recover meane profits of

Sect. 1.—Application of English law: Sub-sect. 2, A. & B. (a), (b) & (c).]

247. ——— Until granted to colony.]—CAMPBELL v. HALL, No. 5, ante.

248. ———.]—BEAUMONT v. BARRETT, No. 70, ante.

249. General introduction of English law—No application of parts manifestly unsuitable.]—CAMPBELL v. HALL, No. 5, ante.

250. ———.]—The general introduction of English law into a conquered or ceded country by acts of the sovereign power does not draw with it such parts as are manifestly inapplicable to the circumstances of the settlement.—LYONS CORPN. v. EAST INDIA CO. (1836), 1 Moo. P. C. C. 175; 1 Moo. Ind. App. 175; 3 State Tr. N. S. 647; 12 E. R. 782, P. C.

Annotations:—*Consd. Advocate-General of Bengal v. Surnomoye Dosssee* (1863), 9 Moo. Ind. App. 387; *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (1876), 2 App. Cas. 186. *Refd. Mitford v. Reynolds* (1842), 1 Ph. 185; *Whicker v. Hume* (1851), 14 Beav. 509; *Muslipatam v. Cavalry Vencata Narrainapah* (1860), 8 Moo. Ind. App. 500; *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L. R. 6 P. C. 381; *Lyons Corpn. v. Bengal Advocate-General* (1876), 1 App. Cas. 91. *Mentd. A.-G. v. Brodie* (1846), 6 Moo. P. C. C. 12; *Re Taylor, Martin v. Freeman* (1888), 58 L. T. 538.

251. ———.]—The power of appeal to Her Majesty & the authority of the Supreme Ct. of the Straits Settlements to grant leave to do so, contained in the Letters Patent of the Queen of Aug. 10, 1855, were not abrogated by Ordinance No. 5 of 1868, establishing the present Supreme Ct. All the provisions of the repealed Letters Patent applicable to the old ct. were virtually re-enacted by the Ordinance & made applicable to the new ct. which was put in its place.

It is really immaterial to consider whether Prince of Wales' Island, or, as it is now called, Penang, should be regarded as ceded or newly settled territory, for there is no trace of any laws having been established there before it was acquired by the East India Co. In either view the law of England must be taken to be the governing law, so far as it is applicable to the circumstances of the place & modified in its application by these circumstances. In applying this general principle, it has been held that statutes relating to matters & exigencies peculiar to the local condition of England, & which are not adapted to the circumstances of a particular colony, do not become a part of its law, although the general law of England may be introduced into it (*per CUR.*).—*YEAP CHEAH NEO v. ONG CHENG NEO* (1875), L. R. 6 P. C. 381, P. C.

Annotations:—*Mentd. Elliott v. Totnes Union* (1892), 57 J. P. 151; *Re Manser, A.-G. v. Lucas* (1904) 74 L. J. Ch. 95; *Re Howell, Re Buckingham, Liggins v. Buckingham* (1914), 84 L. J. Ch. 209; *Bourne v. Keane*, [1919] A. C. 815.

252. ——— Fundamentally opposed to native law—Indian law of suicide.]—When

249 l. General introduction of English law.]—The territorial law of British India is a modified form of English law.—SECRETARY OF STATE v. BENGAL ADMINISTRATOR GENERAL (1868), 1 B. L. R. 87.—IND.

k. ——— Local laws not preserved by treaty.]—The Portuguese inhabitants of Bombay, not having had their laws, & usages having the force of laws, preserved to them by the treaty by which Bombay was in 1661 ceded to the English, are subject to English law, so far as the same has been introduced into Bombay, & has not since been varied by legislation.—LOPES v. LOPES (1868), 5 Bom. O. C. 173.—IND.

l. Conquered country having system

of law—Adoption or rejection of part of English law.]—The English law of trusts forms no portion of our jurisprudence, nor have our courts adopted it; but it does not follow that testamentary dispositions couched in the form of trusts cannot be given full effect to in terms of our own law.—KEMP'S ESTATE v. McDONALD'S TRUSTEE'S TRUSTEE, [1915] App. D. 499.—S. AF.

m. ———.]—The English principle of estoppel by conduct *in pais* has been accepted by our cts. & is a principle of the Roman-Dutch laws.—MORUM BROTHERS v. NEPOEN (1916), C. F. D. 392.—S. AF.

Englishmen establish themselves in an uninhabited or barbarous country, they carry with them their own laws & sovereignty of their own state. But this was not the nature of the first settlement in India, the settlement there being made for the purposes of trade, without the introduction of the sovereignty of the English Crown. Though, since the English acquired sovereignty in India, the English laws have been introduced, this has been with the qualification that such law is not fundamentally opposed to the native laws. For this reason the English law of suicide is inapplicable, & has no force in India among the natives.—*ADVOCATE-GENERAL OF BENGAL v. SURNOMOYE DOSSEE (RANEE)* (1868), 2 Moo. P. C. C. N. S. 22; 9 Moo. Ind. App. 387; 2 New Rep. 530; 8 L. T. 843; 9 Jur. N. S. 877; 12 W. R. 21; 15 E. R. 811, P. C.

Annotation:—*Mentd. Papayanni v. Russian Steam Navigation & Trading Co.* (1863), 2 Moo. P. C. C. N. S. 161.

See, also, Nos. 290, 294, post.

B. Native Law.

(a) Continuance.

253. General rule—Native laws continued—Until altered by Crown.]—CALVIN'S CASE, No. 243, ante.

254. ———.]—Where an uninhabited country is found out & planted by English subjects, all laws in force here are immediately in force there; but in the case of an inhabited country conquered, not till declared so by the conqueror.—BLANKARD v. GALDY (1693), 2 Salk. 411; 4 Mod. Rep. 215; Holt, K. B. 341; Comb. 228; 91 E. R. 356.

Annotations:—*Refd. Memorandum* (1722), 2 P. Wms. 74; *Lyons Corpn. v. East India Co.* (1836), 1 Moo. P. C. C. 175; *Cooper v. Stuart* (1889), 14 App. Cas. 286. *Mentd. R. v. Norwich Corpn.* (1706), 2 Ld. Raym. 1244; *Huggins v. Bambridge* (1740), Willes, 241; *Phillips v. Eyre* (1870), 10 B. & S. 1004.

255. ———.]—MEMORANDUM, No. 246, ante.

256. ———.]—The argument is strong that the Statutes 12 Ric. 2 (c. 2), & Sale of Offices Act, 1552 (c. 16) do not extend to Jamaica; though they were enacted long before that island belonged to the Crown of England. If Jamaica was considered as a conquest, they would retain their old laws, till the conqueror had thought fit to alter them. If it is considered as a colony, which it ought to be, the old inhabitants having left the island, then these Statutes are positive regulations of police, not adapted to the circumstances of a new colony; & therefore no part of that law of England which every colony, from necessity, is supposed to carry with them at their first plantation. No Act of Parliament made after a colony is planted, is construed to extend to it, without express words showing the intention

PART III. SECT. 1, SUB-SECT. 2.—B. (a).

253 l. General rule—Native laws continued—Until altered by Crown.]—PERLMAN v. PICHE (1918), Q. R. 54 S. C. 170.—CAN.

n. Indian native state—Presumption against continuance.]—It lies on him, who asserts it, to prove that the law of the Native State differs from the law in British India, & in the absence of such proof it must be held that no difference exists except possibly so far as the law in British India rests on specific Acts of the Legislature.—RAGHUNATH v. VARIVANDAS (1906), 1 L. R. 30 Bom. 578.—IND.

of the legislature to be that it should (LORD MANSFIELD, C.J.).—*R. v. VAUGHAN* (1769), 4 Burr. 2494; 98 E. R. 308.

Annotations.—*Mentd.* *R. v. Scofield* (1784), Cald. Mag. Cas. 397; *R. v. Higgins* (1801), 2 East, 5; *R. v. Phillips* (1805), 6 East, 184; *R. v. Pollman* (1809), 3 Camp. 239; *R. v. Rowed* (1842), 11 L. J. M. C. 74; *R. v. Brailford*, [1905] 2 K. B. 730; *R. v. Whitaker*, [1914] 3 K. B. 1283.

257. — — — — —.]—*CAMPBELL v. HALL*, No. 5, *ante*.

258. — — — — —.]—If a country is discovered & colonised by Englishmen the inhabitants are governed by English law. In a conquered country the old law prevails until altered by the King in Council (HOLROYD, J.).—*FORBES v. COCHRANE* (1824), 2 B. & C. 448; 2 State Tr. N. S. 147; 3 Dow. & Ry. K. B. 679; 2 L. J. O. S. K. B. 67; 107 E. R. 450.

Annotations.—*Reid.* *The Slave, Grace, R. & His Majesty's Procurator-General & Wyke v. Allan* (1827), 3 State Tr. N. S. 273; *R. v. Lopez*, *R. v. Sattler* (1858), Dears. & B. 525.

259. Exceptions to rule—Infidel country—Native laws immediately abrogated.]—*CALVIN'S CASE*, No. 243, *ante*.

260. — — — — —.]—*DUTTON v. HOWELL*, No. 35, *ante*.

Compare No 5, *ante*.

261. — Native laws contrary to religion.]—*MEMORANDUM*, No. 246, *ante*.

262. — Native laws malum in se.]—*MEMORANDUM*, No. 246, *ante*.

263. — Native laws not applicable to status of conquerors.]—The doctrine that the law in force in a conquered or ceded territory, until altered by the conqueror, remains in force & binds all persons within the territory, cannot be applied without qualification, especially as regards the personal status of the conquerors (LORD STOWELL).—*RUDING v. SMITH* (1821), 2 Hag. Con. 371; 1 State Tr. N. S. 1053.

Annotations.—*Mentd.* *Kent v. Burgess* (1840), 11 Sim. 361; *R. v. Millis* (1844), 10 Cl. & Fin. 534; *Ward v. Day* (1846), 5 Notes of Cases, 66; *Connelly v. Connelly* (1850), 2 Rob. Eccl. 201; *Brook v. Brook* (1858), 3 Sm. & G. 481; *Armitage v. Armitage* (1866), L. R. 3 Eq. 343; *Bater v. Bater*, [1906] P. 209.

264. — — — — — Laws blended with native religions.]—What is the law, as far as British subjects are concerned, now existing in the district of Calcutta? Undoubtedly it is the law of England. I think it clear, that those persons who there established themselves carried with them the English law. It does not appear, at least it has not been stated, that the English law was established there, in the first instance, by any proclamation or charter; but it is probable that the English carried with them, & acted upon, the law of England, from the necessity of their situation; because the two systems of law, which at that time existed there, the Mahomedan & the Hindoo laws, were so blended with the particular religions of the two descriptions of persons, as to render it almost impossible for that law to have been adopted by the English settlers (LORD LYNCHURST, C.).—*FREEMAN v. FAIRLIE* (1828), 1 Moo. Ind. App. 305; 2 State Tr. N. S. 1000; 18 E. R. 117, L. C.

Annotations.—*Reid.* *Jephson v. Riera* (1835), 3 Knapp, 130. *Mentd.* *Oldham v. Eboral* (1833), *Coop. temp. Brough*, 27; *Lyons Corp. v. East India Co.* (1836), 1 Moo. Ind. App. 175; *Baboo Dhunput Singh v. Gooman Singh* (1867), 11 Moo. Ind. App. 433; *Gunga Gobind Mundul v. Collector of the Twenty-four Pergunnahs* (1867), 11 Moo. Ind. App. 345.

265. — — — — — Aboriginal tribes of low civilisation.]—*Re SOUTHERN RHODESIA*, No. 7, *ante*.

(b) Mode of Changing.

266. Proclamation.]—The law of a conquered country may be altered by the King by proclamation or letters patent under the Great Seal, & not solely by means of an Order in Council.—*JEPHSON v. RIERA* (1835), 3 Knapp, 130; 3 State Tr. N. S. 591; 12 E. R. 598, P. C.

Annotations.—*Reid.* *Cameron v. Kyte* (1835), 3 Knapp, 332. *Mentd.* *Re Stepney Election Petn.*, *Isaacson v. Durant* (1886), 17 Q. B. D. 54; *A.-G. for Canada v. Cain*, *A.-G. for Canada v. Gilhula*, [1906] A. C. 542.

267. Letters patent under Great Seal.]—*JEPHSON v. RIERA*, No. 266, *ante*.

268. Order in council.]—*JEPHSON v. RIERA*, No. 266, *ante*.

See, also, Vol. XI., p. 503, Nos. 59, 60.

(c) Particular Instances.

269. Roman Dutch law—Ceylon.]—*LINDSAY v. ORIENTAL BANK AT COLUMBO* (1860), 13 Moo. P. C. C. 401; 15 E. R. 151, P. C.

Annotation.—*Reid.* *Lindsay v. Duff* (1862), 15 Moo. P. C. C. 452.

270. — — — — —.]—*HETTIHEWAGE SIMAN APPU v. QUEEN'S ADVOCATE* (1884), 9 App. Cas. 571; 53 L. J. P. C. 72; 51 L. T. 401, P. C.

Annotation.—*Reid.* *Farnell v. Bowman* (1887), 12 App. Cas. 643.

271. — — — — — Application to marriage law.]—The doctrine of the Roman-Dutch law that persons who have lived in adultery are incapacitated from ever marrying one another, or from taking testamentary gifts from one another, is not part of the marriage law of Ceylon.—*RABOT v. DE SILVA*, [1909] A. C. 376; 78 L. J. P. C. 73; 100 L. T. 242; 25 T. L. R. 332, P. C.

272. — — — — — Griqualand West.]—*WEBB v. GIDDY*, *GIDDY v. WEBB* (1878), 3 App. Cas. 908; 47 L. J. P. C. 71; 38 L. T. 822, P. C.

Annotation.—*Reid.* *Webb v. Wright* (1883), 8 App. Cas. 318.

273. — — — — — Natal.]—*MOLYNEUX v. NATAL LAND & COLONIZATION CO.*, [1905] A. C. 555; 74 L. J. P. C. 108; 93 L. T. 59; 21 T. L. R. 645, P. C.

274. Ordinances by Governor & Court of Policy—Made when colony under Dutch government—Cape of Good Hope.]—The ordinances & regulations made by the Governor & Ct. of Policy when the colony of the Cape was under Dutch Government do, unless modified or repealed by subsequent legislation, still form part of the *lex scripta* of the colony, & having this force, they must be obeyed, though they may have derogated from the rights of individuals.—*VAN BREDA v. SILBERBAUER* (1869), L. R. 3 P. C. 84; 6 Moo. P. C. C. N. S. 319; 39 L. J. P. C. 8; 22 L. T. 667; 18 W. R. 553; 16 E. R. 746, P. C.

Annotation.—*Mentd.* *French Holk Comrs. v. Hugo* (1885), 10 App. Cas. 336.

275. French law—Lower Canada—Droit d'aubaine.]—The *droit d'aubaine* became the law of Lower Canada, with regard to aliens, on the ancient French law being established there, by British North America (Quebec) Act, 1774 (c. 83).—*DONEGANI v. DONEGANI* (1835), 3 Knapp, 63; 3 State Tr. N. S. 1282; 12 E. R. 571, P. C.

Annotations.—*Reid.* *Re Adam* (1838), 1 Moo. P. C. C. 460. *Mentd.* *A.-G. for Canada v. Cain*, *A.-G. for Canada v. Gilhula*, [1906] A. C. 542.

276. — — — — —.]—*HUTCHINSON v. GILLESPIE* (1844), 4 Moo. P. C. C. 378; 13 E. R. 349, P. C.

Annotation.—*Reid.* *Symes v. Cuvillier* (1880), 5 App. Cas. 138.

277. — — — — — Certificate of notary public—

Sect. 1.—Application of English law: Sub-sect. 2, B. (c) & C.; sub-sects. 3, 4, 5 & 6. Sect. 2: Sub-sect. 1, A.]

Proof of due execution of instrument.]—By the French law prevailing in Lower Canada a certificate of a Notary public in the Province of Lower Canada is sufficient evidence in the cts. of that Province of the due execution of the instrument referred to in the certificate, & identity of the parties thereto, but the certificate of a Notary public in Upper Canada, where the English law prevails, will not be received in the cts. in Lower Canada *per se* as proof of due execution of an instrument, or of the identity of the parties.—*NYE v. MACDONALD* (1870), L. R. 3 P. C. 331; 7 Moo. P. C. C. N. S. 134; 39 L. J. P. C. 34; 23 L. T. 220; 18 W. R. 1075; 17 E. R. 52, P. C.

278. — Prior to codes.]—Prior to the Codes, the law relating to property in the province of Quebec was, except in special cases, the French law.—*EXCHANGE BANK OF CANADA v. R.* (1896), 11 App. Cas. 157; 55 L. J. P. C. 5; 54 L. T. 802; 2 T. L. R. 342, P. C.

Annotations:—*Refd.* Maritime Bank of Canada, Liquidators v. New Brunswick, Receiver General, [1892] A. C. 437.

279. — Mauritius—Code de commerce.]—*D'EPINAY v. COCKERELL* (1836), 1 Moo. P. C. C. 103; 12 E. R. 751, P. C.

280. — Code civile.]—*Re ADAM* (1837), 1 Moo. P. C. C. 460; 3 State Tr. N. S. 1284; 12 E. R. 889, P. C.

Annotations:—*Refd.* A.-G. for Canada v. Cain, A.-G. for Canada v. Gillula, [1906] A. C. 542; *Simon v. Phillips* (1916), 25 Cox. C. C. 315; *ohnstone v. Pedlar*, [1921] 2 A. C. 262.

281. — —.]—The law in force in Mauritius is the French law, as settled by the *Code Civile*.—*LANG, FREELAND & Co. v. REID, IRVING & Co.* (1858), 12 Moo. P. C. C. 72; 14 E. R. 838, P. C.

282. — —.]—The Code Civil of France is in force in the Island of Mauritius. *PROCUREUR, H. M. v. BRUNEAU* (1860), L. R. 1 P. C. 169; 4 Moo. P. C. C. N. S. 1; 35 L. J. P. C. 50; 12 Jur. N. S. 551; 14 W. R. 951; 10 E. R. 217, P. C.

Annotations:—*Refd.* Barlow v. Orde (1870), 6 Moo. P. C. C. N. S. 437.

283. — St. Lucia—French act passed shortly before conquest by England.]—A law promulgated in France on Apr. 10, 1803, by which change of name was to be made under the authority of govt. in a prescribed mode, was probably not law in St. Lucia, since it was passed so shortly before St. Lucia passed under British dominion, & considering the character of the law, & the then critical position of the French West India Colonies, it was not likely that care was taken to transmit the law from France to St. Lucia before the conquest of the latter.—*DU BOULAY v. DU BOULAY* (1869), L. R. 2 P. C. 430; 6 Moo. P. C. C. N. S. 31; 38 L. J. P. C. 35; 22 L. T. 228; 17 W. R. 594; 10 E. R. 638, P. C.

Annotation:—*Refd.* Cowley v. Cowley, [1901] A. C. 540.

C. Country with no System of Law.

284. Application of English law—Modified by local circumstances.]—*YEAP CHEAH NEO v. ONG CHENG NEO*, No. 251, *ante*.

PART III. SECT. 1, SUB-SECT. 2.—C.

284.1. Application of English law—Modified by local conditions.]—Under the Charter, English law, as at the date of the Charter, is applicable to the Colony, so far as circumstances admit, & also subsequent decisions explana-

tory of that law; but where the decision of an English Ct. is based upon customs & practice within the knowledge & understanding of the parties to a contract, the ct. in construing a similar contract entered into in Hong Kong will consider whether the principles of the decision are applicable

SUB-SECT. 3.—SETTLED COLONIES.

285. Application of English law.]—*BLANKARD v. GALDY*, No. 254, *ante*.

286. —.]—*MEMORANDUM*, No. 246, *ante*.

287. —.]—*FORBES v. COCHRANE*, No. 258, *ante*.

288. — Statute & common law in force.]—*KIELLEY v. CARSON*, No. 15, *ante*.

289. — At date of settlement.]—New South Wales is a settled colony of Great Britain, & consequently amenable, according to received authorities, to such portions of the statute law & the common law of the mother country as were in force at the date of the settlement of that colony, & were applicable to its condition. There can be no doubt that the common law of England as respects marriages was carried to New South Wales, for in Lord Hardwicke's Act there is no mention of the colonies; its operation was confined to England & Wales (*DR. LUSHINGTON*).—*CATTERALL v. CATTERALL* (1847), 1 Rob. Eccl. 580; 11 Jur. 914; 163 E. R. 1142.

Annotations:—*Mentd.* Beamish v. Beamish (1861), 9 H. L. Cas. 274; *Sichell v. Lambert* (1864), 3 New Rep. 385.

290. — Common law modified by such statutes & local ordinances as apply.]—The Falkland Islands having been acquired by occupation, the law prevailing there is the common law of England, modified by such statutes & local ordinances as apply to those Islands.—*FALKLAND ISLANDS Co. v. R.* (1864), 2 Moo. P. C. C. N. S. 266; 11 L. T. 9; 10 Jur. N. S. 807; 13 W. R. 57; 15 E. R. 902, P. C.

291. — —.]—Marriages of British subjects in British plantations are governed by the common law of England, unless it is otherwise provided by the Imperial legislature or that of the colony.—*LIMERICK (COUNTESS) v. LIMERICK (EARL)* (1863), 4 Sw. & Tr. 252; 32 L. J. P. M. & A. 92; 11 W. R. 503; 104 E. R. 1512.

292. —.]—*ADVOCATE-GENERAL OF BENGAL v. SURNOMOYE DOSSEE (RANEE)*, No. 252, *ante*.

293. —.]—When English settlers go out to a colony & settle there they carry with them, so far as may be applicable to their purpose, all the immunities & privileges of the law of England as the law of England was at that time (*LORD BLACKBURN*).—*LAUDERDALE PEERAGE* (1885), 10 App. Cas. 692, H. L.

Annotations:—*Mentd.* Lovat Peorage (1885), 10 App. Cas. 763; *Winans v. A.-G.*, [1904] A. C. 287; *Casdagli v. Casdagli*, [1919] A. C. 145.

294. — In so far as reasonably applicable to local conditions.]—With regard to possessions after-acquired by occupancy, settlers from the parent country take with them, as part of the law which is to govern them in such possessions, all the laws of the parent country which are applicable & may reasonably be applied to the conditions in which they exist.

The law of the parent country may also be applied—(1) by the exercise by the Governor of the new colony, in any manner within the limits of his authority, of legislative powers given to him; (2) by the new territory over which the Governor has by Royal Commission legislative powers, becoming British territory; (3) by the extension of the boundaries of a colony in which

to the circumstances of the Colony.—*LAN YEONG WOOD v. STANDARD OIL Co. of New York* (1908), 3 Hong Kong L. R. 53.—**HONG KONG.**

PART III. SECT. 1, SUB-SECT. 3.

294.1. Application of English law—In so far as reasonably applicable to

the law is already in force.—*R. v. JAMESON* (1896), as reported in 65 L. J. M. C. 218; 60 J. P. 602.

Annotations.—*Generally*, *Mentd.* *R. v. Audley*, [1907] 1 K. B. 383; *R. v. Stride & Millard*, [1908] 1 K. B. 617; *R. v. Potter* (1909), 3 Cr. App. Rep. 237; *R. v. Crowe*, *Ex p. Sekgome*, [1910] 2 K. B. 576; *Coldingham Parish Council v. Smith*, [1918] 2 K. B. 90.

295. —.]—*PICTOU MUNICIPALITY v. GEL-DERT*, [1893] A. C. 524; 63 L. J. P. C. 37; 69 L. T. 510; 42 W. R. 114; 9 T. L. R. 638; 1 R. 447, P. C.

Annotations.—*Mentd.* *Thompson v. Brighton Corpn.*, *Oliver v. Horsham L. B.*, [1894] 1 Q. B. 332; *Brabant v. King*, [1895] A. C. 632; *Saunders v. Holborn District Board of Works*, [1895] 1 Q. B. 64; *Sydney Municipal Council v. Bourke*, [1895] A. C. 433; *Maguire v. Liverpool Corpn.*, [1905] 1 K. B. 767; *Short v. Hammersmith Corpn.*, (1910), 104 L. T. 70; *Dawson v. Bingley U. C.*, [1911] 2 K. B. 149; *Papworth v. Battersca B. C.* (1914), 79 J. P. 105.

See, also, Nos. 250, 251, *ante*.

SUB-SECT. 4.—PROTECTORATES.

296. *Exterritoriality granted by treaty—Appl-ication of local law—Zanzibar.*—*SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING & Co.*, No. 666, *post*.

See, also, *COURTS*, Vol. XVI., p. 190, Nos. 950 *et seq.*

local conditions.—The whole of the English common law will be recognised as in force here, excepting such parts as are obviously inconsistent with the circumstances of the country.—*UNIACKE v. DICKSON*, et al. (1853), *JAMES*, 287.—*CAN.*

o. ——— *At time of settlement.*—All the laws of England in force at the time of the arrival of the first settlers in the Colony, & which are applicable to the conditions of the infant Colony, must from the outset become & continue to be the law of the Colony, until by its own Legislature it proceeds to shape, modify, or abrogate the existing law, so as to adapt it to its own circumstances & situation.—*R. v. DE BAUN* (1901), 3 W. A. L. R. 1.—*AUS.*

p. ——— *Until abrogated by statute.*—The English law governing inheritance of real property was brought to Newfoundland, together with the whole law of England at that time, by the earliest settlers, & continued to operate fully until otherwise provided by statute.—*WALBANK v. ELLIS* (1853), 3 Nfld. L. R. 400.—*NFLD.*

q. ——— *Whether subsequent English decisions binding.*—The cts. of this province are not to follow the decisions of the Q. B. in England more than those of the other Cts. & more particularly as the effect then is not to diverge from the decisions of each other but to reconcile their differences & to have a common & harmonious rule decision & practice in every case. Judges should exercise their judgment as to which is the best rule & practice to adopt if there be a difference in the English Cts. & adopt that which will be most convenient & suitable to this province, whether it shall be the decision of the one ct. or the other.—*HAWKINS v. PATERSON* (1863), 3 P. R. 264.—*CAN.*

r. ——— *When a decision of the ct. of appeal in England is at variance with a decision of the ct. of appeal of this Province, the latter should be followed here, as the former ct. is not the ct. of ultimate appeal for the Province.*—*MACDONALD v. MACDONALD* (1886), 11 O. R. 187.—*CAN.*

s. ——— *At fixed date* — *Whether machinery by which law carried*

out adopted.—The legislative adoption by British Columbia in Mar., 1867, of the English law as it existed in England on Nov. 19, 1858, did not necessitate the adoption of the machinery by which the English law was carried out in England, but coupled with the language constituting the Supreme Court in British Columbia, was a direct legislative sanction & authority to carry out that law in the Province by local tribunals & local machinery.—*M—— (falsely called S——) v. S——* (1877), 1 B. C. R. pt. 1, 25.—*CAN.*

t. ——— *In considering whether English common law as it stood in July, 1870, is applicable to this province, our cts. should not consider themselves strictly bound by the decisions of English Cts. upon the common law of England in 1870, but they are at liberty to take cognisance of the difference of conditions, including not only physical conditions, but the general condition of public affairs & the general attitude of the community in regard to the particular matter in question.*—*R. v. CYR*, [1917] 3 W. W. R. 819; 13 Alta. L. R. 320.—*CAN.*

PART III. SECT. 2 SUB-SECT. 1.—A.

a. *Whether applicable to colony without express words—After settlement.*—The cts. of the colony may apply here any English statute, affecting the fundamental personal rights of British subjects, whether in force in England subsequent or prior to July 28, 1828.—*Ex p. NICHOLS* (1839), 1 Legge, 123.—*AUS.*

b. ——— *The Imperial Act, 18 & 19 Vict. c. 104, applies to Victoria though no particular colony, but that of Hong Kong, is expressly referred to in the Act.*—*R. v. MIDDLETON* (1868), 5 W. W. & A.B. 182.—*AUS.*

c. ——— *The British Senate has expressed one method, by which the colonial legislature shall declare the applicability of English law, "by making ordinances for that purpose," & the colonial legislature is excluded from declaring such applicability by recitals in, or implications to be gathered from, ordinances, made for other purposes.*—*R. v. ROBERTS* (1850), 1 Legge, 544.—*AUS.*

d. ——— *In considering whether an Imperial Act, passed after*

SUB-SECT. 5.—CHANNEL ISLANDS.

See Part X., *post*.

SUB-SECT. 6.—ISLE OF MAN.

See Part XI., *post*.

SECT. 2.—APPLICABILITY AND CONSTRUCTION OF STATUTES.

SUB-SECT. 1.—ENGLISH STATUTES.

A. In General.

See, generally, *STATUTES*.

297. *Not applicable to colony without express words—After settlement.*—*MAMORANDUM*, No. 246, *ante*.

298. ——— *—R. v. VAUGHAN*, No. 256, *ante*.

299. *Modes of application.*—*R. v. JAMESON*, No. 294, *ante*.

300. *Statutes in their nature inapplicable—Not introduced along with general law.*—*YEAP CHEAH NEO v. ONG CHENG NEO*, No. 251, *ante*.

the settlement of the Colony of N.S.W. & before The Australian Cts. Act (1828), c. 83, can be "applied in the administration of justice" in N.S.W., within the meaning of sect. 24 of the latter Act, the test is whether the provisions of the Act under consideration were suitable to the conditions of the Colony, & capable of being reasonably applied there, when such Act was passed.—*QUAN YICK v. HINDS* (1905), 2 C. L. R. 345.—*AUS.*

e. ——— *English Laws Act.*—*Seemle*: an Imperial statute may be "applicable to the circumstances of the colony" within the meaning of English Laws Act, 1858, although it might not at common law have been part of the law of England, which every colony is supposed to carry with it at its first plantation.—*RUDDICK v. WETHERED* (1889), 7 N. Z. L. R. 491.—*N.Z.*

f. ——— *Matters already provided for by colonial legislation.*—The Imperial statute 11 & 12 Vict. c. 12, for the better security of the Crown & government of the United Kingdom, does not override 3 Vict. c. 12, of this Province, to protect the inhabitants against aggression from foreigners, for the latter is re-enacted by the consolidation of the statutes, which took place in 1859.—*R. v. SLAVIN* (1867), 17 C. P. 205.—*CAN.*

g. ——— *The Imperial Mutiny Act does not override C.S.O. c. 100, but the latter Act was passed in aid of it, & is therefore in force.*—*R. v. SHERMAN* (1867), 17 C. P. 167.—*CAN.*

h. ——— *MOOLCHAND v. P. ALWAR CHETTY*, [1916] I. L. R. 39 Mad. 548.—*IND.*

300 i. *Statutes in their nature inapplicable—Not introduced along with general law.*—None of the statute law will be received except such parts as are obviously applicable & necessary. The increasing lapse of time since the settlement of the Province should render the ct. more cautious in recognizing English statutes which have not been previously introduced.—*UNIACKE v. DICKSON* et al. (1853), *JAMES*, 287.—*CAN.*

300 ii. ——— *There are certain portions of the English statute law which from their very nature were only passed for reasons connected with England, & which would not be*

Sect. 2.—Applicability and construction of statutes:
Sub-sect. 1, A. & B.]

301. Repeal of English Statutes by Colonial legislation—Statute of Limitations—Impliedly repealed by New South Wales Statute.]—HARRIS v. DAVIES, No. 189, ante.

B. Particular Statutes.

See, generally, STATUTES.

302. Australian Courts Act, 1828 (c. 83), s. 16—Application in New South Wales—All English laws & statutes in force when Act passed—Not being inconsistent.]—The above sect. only applies to New South Wales, all the laws & statutes in force in England at the time of the passing of that Act, not being inconsistent therewith or with any charters or letters patent, or orders in council which might be issued in pursuance thereof.—ASTLEY v. FISHER (1848), 6 C. B. 572; 18 L. J. C. P. 59; 12 Jur. 1051; 136 E. R. 1372.

303. Bankruptcy Acts—6 Geo. 4, c. 16, & 2 & 3 Will. 4, c. 114—Whether applicable to India.]—The above Acts made to facilitate the proof of bkpcy. & assignment in England, do not extend

to the cts. in India & in these cts. such evidence of the bkpcy. must be given as would have been required to prove the fact if no statutory regulations had been made.—CLARK v. MULLICK (1840) 3 Moo. P. C. C. 252; 2 Moo. Ind. App. 263; 18 E. R. 106, P. C.

304. — 2 & 3 Vict. c. 41 (Scotland)—Whether applicable to colonies.]—C. & Co. carried on business in copartnership, in Scotland, & in the Island of Tobago. A sequestration issued against them in Scotland:—Held: 2 & 3 Vict. c. 41, extended to the Colonies.

Qu.: whether Interpleading Act, 1831 (c. 58), extends to the Colonies. By an Act of the Colonial Legislature of Tobago, passed in 1841, & confirmed by the Queen in Council, it was declared that such of the common law, & all statutes & parts of the public & general statute laws of England, as were or should be or become applicable & suitable to the circumstances & population of the colony, should be in force in the Island:—*Qu.*: whether by this Colonial Act the Interpleading Act could be held to extend to Tobago.—COLONIAL BANK v. WARDEN (1846), 5 Moo. P. C. C. 340; 10 Jur. 745; 13 E. R. 521, P. C.

305. — 12 & 13 Vict. c. 106—Not applicable

applicable in India or any Colony of the British Crown.—SARKIES v. PROSONO-MOYKE DOSSEK (1880), 1 L. R. 6 Calc. 794; 8 C. L. R. 76.—IND.

k. Modes of application—By Statute.]—21 Geo. III. c. 49, is in force in New South Wales both as part of the law regulating Sunday observance, which the first Colonists brought with them to this Colony, & also by virtue of the 9 Geo. IV. c. 83, s. 24.—WALKER v. SOLOMON (1890), 11 N. S. W. L. R. 88; 6 N. S. W. W. N. 167.—AUS.

l. — By colonial statute.]—MER-CHANTS BANK v. MULVEY (1890), 6 Man. L. R. 467.—CAN.

m. — — — — — Art. 1056 C.C. embodies the action previously given by a statute of the Province of Canada re-enacting Lord Campbell's Act.—R. v. GRENIER (1890), 30 S. C. R. 42.—CAN.

n. — — — — — Alberta Act.]—Independently of North-West Territories Act, 1906, the effect of Alberta Act was not to repeal the former North-West Territories Act but to prevent its remaining in force *proprio vigore*; & to continue in force the law therein contained as a body of law, in the same manner as the common & statute law of England, as it stood on the 15th July, 1870, was introduced into the Territories.—TOLL v. CANADIAN PACIFIC RY. CO. (1908), 8 W. L. R. 795; 1 Alta. L. R. 318.—CAN.

o. Statutes for the administration of which the colony has no machinery are inapplicable.]—18 Geo. II., s. 8, is not applicable to this Colony from want of machinery to carry the same into effect.—R. v. SCHOFIELD (1838), 1 Legge, 97.—AUS.

p. — — — — — But part may be applicable.]—RYAN v. HOWELL (1848), 1 Legge, 470.—AUS.

q. Statute ceasing to be applicable by its own terms.]—Ex p. DEEDO (1844), 1 Legge, 193.—AUS.

r. Fiscal statutes not applicable.]—Those statutes which require a licence from a magistrate for the retail of liquors have for their object the preservation of the health & morals of the people, & are applicable to the condition of Newfoundland. But those statutes which require a licence from comrs. of excise have a fiscal object, & cannot be enforced in Newfoundland.—YONGE v. BLAIRIE (1842), 1 Nfld.

L. R. 277.—NFLD.

s. Repeal of English statute by colonial legislation.]—WOOLF v. TOWNS (1878), 1 N. S. W. S. C. R. N. S. 242.—AUS.

t. — — — — — MITCHELL v. SCALES (1907), 5 C. L. R. 405.—AUS.

u. — — — — — NOLAN v. MCADAM (1906), 39 N. S. R. 380.—CAN.

v. — — — — — HARRIS v. MEYERS (1916), 50 N. S. R. 112.—CAN.

w. — — — — — How far implied.]—A Canadian statute, dealing with the same subject, but containing no similar provision, does not repeal a provision in an Imperial statute.—R. v. AH POW (1880), 1 B. C. R. pt. 1, 147.—CAN.

x. Repeal in England of English statute—No effect in colony after application.]—R. v. MASON (1904), 6 W. A. L. R. 134.—AUS.

y. — — — — — 43 Eliz. c. 6, authorising a Judge to certify to deprive a plff. of costs, being part of the practice of the Ct. of King's Bench when the Supreme Ct. of this province was established, is in force here, & is not affected by a subsequent repeal of it in England.—KELLY v. JONES (1852), 2 All. 473.—CAN.

z. Orders in Council—Not necessarily in force although statute under which made is in force.]—Orders in Council passed in England under powers of an Imperial statute, are not in force *proprio vigore* in a colony, although the statute itself may be in force there.—REYNOLDS v. VAUGHAN (1872), 1 B. C. R. pt. 1, 3.—CAN.

PART III. SECT. 2, SUB-SECT. 1.—B.

a. Administration of Estates Act, 1796—Applicable to Ontario.]—MER-CHANTS BANK v. MONTEITH (1884), 10 P. R. 334.—CAN.

b. Army Acts—Whether applicable to Canada.]—HOLMES v. TEMPLE (1882), 8 Q. L. R. 351.—CAN.

c. — — — — — Re GREY, [1918] 3 W. W. R. 111; 42 D. L. R. 1.—CAN.

d. Bankruptcy Acts—6 Geo. IV. c. 16—Not applicable to Ontario.]—MAUL-SON v. COMMERCIAL BANK (1846), 2 U. C. R. 338.—CAN.

e. — — — — — Not applicable to Hong Kong.]—Re CHUNG SHUN KOV, Ex p. HONG KONG LAND INVESTMENT & AGENCY CO., LTD. (1906), 2 Hong Kong L. R. 18.—HONG KONG.

f. Bonds to the King—33 Hen. VIII. c. 39, s. 50—Applicable to New Brunswick.]—R. v. MCLAUGHLIN (1836), N. B. Dig. 139.—CAN.

g. — — — — — 13 Eliz. c. 4—Not applicable to Nova Scotia.]—UNIAKKE v. DICKSON ET AL. (1853), James, 287.—CAN.

h. Bubble Acts—6 Geo. I. c. 18—14 Geo. II. c. 37—Whether applicable to Ontario.]—BANK OF MONTREAL v. BETHUNE (1834), 4 O. S. 165, 193.—CAN.

i. Civil Procedure Act, 1833, s. 28—Whether applicable to Manitoba.]—MCKENZIE v. CHAMPION (1887), 12 S. C. R. 649.—CAN.

j. Companies Acts—How far applicable in Ontario.]—HOWELL v. DOMINION OF CANADA OILS REFINERY CO. (1875), 37 U. C. R. 484.—CAN.

ka. — — — — — How far applicable in New Zealand.]—BANK OF OTAGO v. COMMERCIAL BANK OF NEW ZEALAND, Mac. 233.—N.Z.

kb. Conveyance by disscisee—32 Hen. VIII. c. 9—Applicable to New South Wales.]—NICHOLS v. ANGLO AUSTRALIAN INVESTMENT FINANCE & LAND CO. (1890), 11 N. S. W. L. R. 354; 7 N. S. W. W. N. 57.—AUS.

kc. Conveyancing Act, 1881, s. 32 (1)—How far applicable in Victoria.]—WILMOT v. THORPE (1890), 16 V. L. R. 85.—AUS.

kd. Corrupt Practices Act—7 & 8 Will. III. c. 4—Whether applicable to Ontario.]—DUNDAS ELECTION, COOK v. BRODER, 1 H. E. C. 205.—CAN.

ke. Courts—16 Car. 1, c. 10—How far applicable to Ontario.]—STARK v. FORD (1854), 11 U. C. R. 363.—CAN.

kf. — — — — — Applicable to Canada & the provinces.]—Re GARTSHORE, R. v. CLEMENT, [1919] 1 W. W. R. 372; 44 D. L. R. 623; revid. 3 W. W. R. 115.—CAN.

kg. — — — — — 42 Edw. III. c. 3—Applicable to New Zealand.]—COOK v. A.-G. (1909), 28 N. Z. L. R. 405.—N.Z.

kh. Customs export bonds—8 & 9 Will. III. c. 11, s. 8—Not applicable in Quebec.]—R. v. FINLAYSON (1897), 6 Exch. C. R. 202.—CAN.

ki. Distress—3 Will. & Mar. c. 5, s. 2—Applicable to Manitoba.]—DEWAR v. CLEMENTS (1910), 20 Man. L. R. 212.—CAN.

kl. — — — — — Distress for Rent Act, 1737 (c. 19)—Applicable to Queensland.]

to New Zealand.]—The above Act does not extend to the colony of New Zealand.

In consequence of the poverty of pltf. the Supreme Ct. of New Zealand allowed an appeal to the Queen in Council without requiring the usual security for costs.—*BUNNY v. HART* (1857), 11 Geo. P. C. C. 189; 14 E. R. 667, P. C.

306. — Whether binding on colonies.]—The English bkpy. law is binding upon the colonies.—*ELIZ v. M'HENRY* (1871), L. R. 6 C. P. 228; 40 J. C. P. 109; 23 L. T. 861; 19 W. R. 503.

—*Reid*. New Zealand Loan & Mercantile Agency Co. v. Morrison, [1898] A. C. 349; *Re Nelson, Ex p. Dare & Dolphin*, [1918] 1 K. B. 459. *Mentd. Swiss Bank Corpn. v. Boehmische Industriale Bank*, [1923] 1 K. B. 673.

— Bankruptcy Act, 1869 (c. 71)—Vesting of realty according to law of colony.]—See *BANKRUPTCY & INSOLVENCY*, Vol. V., p. 691, Nos. 6104, 6105.

— English, Colonial & Foreign Orders of Discharge.]—See *BANKRUPTCY & INSOLVENCY*, Vol. IV., p. 593, Nos. 5425 et seq.

307. Companies Acts—Joint Stock Companies Management Act, 1870 (c. 104)—Whether applicable to colonies.]—The above Act does not apply to the colonies.

BARRETT v. AUSTIN, Ex p. AUSTIN (189), 8 Q. L. J. 157.—AUS.

— Not applicable to Nova Scotia.]—*CORNELIUS v. BURTON* (1871), N. S. R. 337.—CAN.

— Divorce—Matrimonial Causes Act, 1857 (c. 85)—Applicable to British Columbia.]—*SHEPPARD v. SHEPPARD* (1908), 13 B. C. R. 486.—CAN.

— Ecclesiastical leases—13 Eliz. c. 10—Whether applicable to New Brunswick.]—*BEDRELL v. FREDERICKSON PARISH (RECTOR, ETC.)* (1855) 3 All. 217.—CAN.

— Evidence—Breach of Promise—Evidence, Further Amendment, Act, 1869 (c. 68)—Applicable to Manitoba.]—*COCKREILL v. HARRISON* (1903), 23 C. L. T. 123; 14 Man. L. R. 366.—CAN.

— Excise—24 Geo. III. c. 45—Not applicable to Ontario.]—*LEITH v. WILLIS* (1835), 5 O. S. 101.—CAN.

— Hearings (1843), 6 O. S. 452.—CAN.

— Extradition Act, 1870 (c. 52)—Extradition Act, 1873 (c. 60)—Applicable to Victoria.]—*Re GERNHARD* (1901), 27 V. L. R. 655.—AUS.

— Fire Prevention (Metropolis) Act, 1774 (c. 78), s. 86—Applicable to South Australia.]—*HAVELBERG v. BROWN*, [1905] S. A. L. R. 1.—AUS.

— Applicable to Ontario.]—*CANADA SOUTHERN RY. CO. v. PHELPS* (1884), 14 S. C. R. 132.—CAN.

— Applicable to New Zealand.]—*HUNTER v. WALKER* (1888), 6 N. Z. L. R. 690.—N.Z.

— Fisheries—15 Geo. III. c. 31—49 Geo. III. c. 27—Applicable to Newfoundland.]—*DOYLE'S SERVANTS v. RECEIVERS OF THE VOYAGE* (1821), 1 Nfld. L. R. 261.—NFLD.

— 5 Geo. IV. c. 51, s. 10—Applicable to Newfoundland.]—*Re SULLIVAN'S INSOLVENT ESTATE* (1846), 3 Nfld. L. R. 1.—NFLD.

— Foreign Entitlement Act, 1819—Applicable to Ontario.]—*R. v. SCHRAM, R. v. ANDERSON* (1863), 14 C. P. 318.—CAN.

— Gaming Acts—Applicable to New South Wales.]—*A-G. v. EDGLEY* (1888), 9 N. S. W. L. R. 157; 4 N. S. W. W. N. 80.—AUS.

— Whether applicable to New South Wales.]—*QUAN YOCK v. HINDS* (1905), 2 C. L. R. 345.—AUS.

— Applicable to New South

Wales.]—*MUTUAL LOAN AGENCY, LTD. v. A-G.* (1909), 9 C. L. R. 73.—AUS.

— Applicable to Western Australia.]—*R. v. DE BAUN* (1901), 3 W. A. L. R. 1.—AUS.

— Applicable to Ontario.]—*CHRONYN v. WIDDER* (1858), 16 U. C. R. 359.—CAN.

— CORBY v. MC-DANIEL (1858), 16 U. C. R. 378.—CAN.

— CHRONYN v. GRIF-FITHS (1859), 18 U. C. R. 396.—CAN.

— MARSHALL v. PLATT (1859), 8 C. P. 186.—CAN.

— LOYD v. CLARK (1861), 11 C. P. 248.—CAN.

— Whether applicable to Nova Scotia.]—*DORAN v. CHAMBERS* (1887), 20 N. S. R. (8 R. & G.), 309; 9 C. L. T. 7.—CAN.

— Inclosure Consolidation Act, 1801 (c. 109)—Not applicable to Ireland.]—*ST. PATRICK'S HOSPITAL (GOVERNORS) v. DOWLING* (1826), Batt. 296.—IR.

— Infant's Relief Act, 1874, s. 2—Not applicable to Alberta.]—*BRAND v. GRIFFIN* (1908), 9 W. L. R. 427.—CAN.

— Jurisdiction of Justices—5 Eliz. c. 4—20 Geo. II. c. 19—Whether applicable to Ontario.]—*SHEA v. CHOAT* (1846), 2 U. C. R. 211.—CAN.

— 28 Geo. III. c. 49, s. 1—Not applicable to Ontario.]—*R. v. ROW* (1863), 14 C. P. 307.—CAN.

— Jurisdiction of Supreme Court—Recognizances—33 Hen. VIII. c. 39.—Applicable to New Brunswick.]—*R. v. MORSE* (1826), N. B. Dig. 736.—CAN.

— R. v. APPLEY (1839), Ber. 595.—CAN.

— Landlord & Tenant—4 Geo. II. c. 28—Applicable to New Zealand.]—*SUTTIE v. TE WINTANA TUPOTAHU*, [1914] 33 N. Z. L. R. 1216.—N.Z.

— Locke King's Act—Acts amending this Act not applicable to New South Wales.]—*MOSS v. MOSS* (1898), 19 N. S. W. Eq. 146.—AUS.

— Lunatics—11 Geo. IV. & 1 Will. IV. c. 60—How far applicable to Ontario.]—*THOMPSON v. BENNETT* (1879), 22 C. P. 393.—CAN.

— Market Overt—2 Ph. & M. c. 7—31 Ehs. c. 12—Whether applicable to Australia.]—*FITZGERALD v. LUCK* (1839), 1 Legge, 118.—AUS.

— Marriage Acts—In general—

— Not applicable to

— Not applicable to

— Not applicable to

— Not applicable to

— Not applicable to

— Not applicable to

— Not applicable to

— Not applicable to

It is impossible to contend that the Companies Acts as a whole extend to the colonies or are intended to bind the colonial cts. The colonies possess & have exercised the power of legislating on these subjects for themselves, & there is every reason why legislation of the United Kingdom should not unnecessarily be held to extend to the colonies & thereby overrule, qualify, or add to their own legislation on the same subject (*per CUR.*).—*NEW ZEALAND LOAN & MERCANTILE AGENCY CO. v. MORRISON*, [1898] A. C. 349; 67 L. J. P. C. 10; 77 L. T. 603; 46 W. R. 239; 14 T. L. R. 141; 5 Mans. 171, P. C.

Annotation.—*Consd. Re Nelson, Ex p. Dare & Dolphin*, [1918] 1 K. B. 459.

Copyright Acts—Fine Arts Copyright Act, 1862 (c. 68)—Not applicable to British Dominions outside United Kingdom.]—See *COPYRIGHT*, Vol. XIII., p. 163, No. 15.

Copyright Act, 1842 (c. 45)—Acquisition of copyright by alien friend resident in colony.]—See *COPYRIGHT*, Vol. XIII., p. 181, No. 165.

308. Crown Suits Act, 1768 (c. 16)—Application in New South Wales—To lands never dealt with by Crown—Effect of Australian Courts Act, 1828 (c. 83).—Crown Suits Act, 1768 (c. 16), is in force

Applicable to New South Wales.]—*MILLER v. MAJOR* (1906), 4 C. L. R. 219.—AUS.

— 26 Geo. II. c. 33, s. 11—Not applicable to Ontario.]—*R. v. ROBLIN* (1862), 21 U. C. R. 352.—CAN.

— LAWLESS v. CHAMBERLAIN (1889), 18 O. R. 296.—CAN.

— 5 & 6 Will. IV. c. 54—Not applicable to Queensland.]—*Re CARL AUGUST LADING KREUTZ* (1890), 4 Q. L. J. 16.—AUS.

— How far applicable to Ontario.]—*DOE d. BRAKEY v. BRAKEY* (1846), 2 U. C. R. 349.—CAN.

— R. v. SECKER (1856), 14 U. C. R. 604.—CAN.

— Not applicable to colonies.]—*HODGINS v. MCNEIL* (1862), 9 Gr. 305.—CAN.

— Medical Act, 1858—How far applicable to Ontario.]—*R. v. COLLEGE OF PHYSICIANS & SURGEONS* (1879), 44 U. C. R. 564.—CAN.

— Mortgage of reversionary interest—5 & 6 Will. & Mar. c. 16, s. 2—Whether applicable to New South Wales.]—*LANGDON v. REUSS* (1883), 3 N. S. W. Eq. 28.—AUS.

— Mortmain Acts—Applicable to Ontario.]—*MACDONNELL v. PURCELL*, *CLEARY v. PURCELL* (1894), 23 S. C. R. 101.—CAN.

— Not applicable to Saskatchewan.]—*Re MILLAR'S ESTATE*, [1918] 1 W. W. R. 929, 11 Sask. L. R. 76.—CAN.

— Mutiny Acts—Applicable to New South Wales.]—*Ex p. WEBSTER* (1889), 10 N. S. W. L. R. 79; 5 N. S. W. W. N. 118.—AUS.

— Practice Statutes—Certiorari—5 Geo. II. c. 19—13 Geo. II. c. 18—Applicable to Victoria.]—*R. v. OLIVER* (1888), 14 V. L. R. 679.—AUS.

— Not applicable to New Brunswick.]—*Ex p. RITOUHE* (1842), 2 Kerr, 75.—CAN.

— BUSTIN (1851), 2 All. 211.—CAN.

— Certiorari—13 Geo. II. c. 18—Applicable to Victoria.]—*Ex p. DUNN, Ex p. ASPINALL* (1906), V. L. R. 584.—AUS.

— Not applicable to

— Not applicable to

— Not applicable to

— Not applicable to

— Not applicable to

— Not applicable to

— Not applicable to

Sect. 2.—Applicability and construction of statutes:
Sub-sect. 2. Part IV.]

Cases, 222; 6 L. T. O. S. 19; 9 Jur. 951; 163 E. R. 1047; *subsequent proceedings, sub nom.* CATTERALL v. CATTERALL (1847), 1 Rob. Eccl. 580.

Annotations:—Mentd. Campbell v. Corley (1856), 28 L. T. O. S. 109; Anon. (1857), Dea. & Sw. 295; Chichester v. Mure (1863), 3 Sw. & Tr. 223.

318. — Colonial statute in same terms as Imperial Statute—English Court of Appeal & House of Lords decisions on Imperial Statute—Binding.]—Where a colonial Legislature has passed an act in the same terms as an Imperial statute, & the latter has been authoritatively construed by a Ct. of Appeal in England, such construction should be adopted by the cts. of the colony.—TRIMBLE v. HILL (1879), 5 App. Cas. 342; 49 L. J. P. C. 49; 42 L. T. 103; 28 W. R. 479, P. C.

Annotations:—Apld. Hunt v. Frupp, [1898] 1 Ch. 675. *Mentd.* Strachan v. Universal Stock Exchange (No. 2), [1896] 2 Q. B. 697; *Re* Cronmire, *Ex p.* Wand, [1898] 2 Q. B. 383; Shoolbred v. Roberts, [1899] 2 Q. B. 560; Burge v. Ashley & Smith, [1900] 1 Q. B. 744.

319. — — — — —.]—The question is one as to the law of Victoria, which of course is before me a question of fact, & I have heard expert evidence upon the subject. B., who is an advocate in a neighbouring colony but is also acquainted with the law of Victoria, is accepted as a good expert on the subject, & no objection is suggested to his evidence. The effect of his evidence is, & that is now common ground, that there is no material difference between the phraseology of the Victorian statute laws & the English Bkpcy. Act, so far as concerns the matters with which I have to deal; that, although not in the strict sense of the word binding, the decisions of the Ct. of Appeal in England are regarded with the highest respect in the cts. in the colonies, & that substantially you are entitled to look at the English decisions turning upon the construction of similar statutes as giving the law which, should the precise point arise, the cts. in the Australian colonies would act upon (BYRNE, J.).—HUNT v. FRIPP, [1898] 1 Ch. 675; 67 L. J. Ch. 377; 77 L. T. 516; 46 W. R. 125; 42 Sol. Jo. 47; 5 Mans. 105.

Annotations:—Mentd. *Re* Bennett, *Ex p.* Official Receiver,

by Immigration Act, 1906, having provided a complete code dealing with immigration, British Columbia Immigration Act, 1908, is inoperative.—R. v. NARAIN (1908), 7 W. L. R. 781; 8 W. L. R. 790.—CAN.

318 i. — Colonial statute in same terms as Imperial statute—English Court of Appeal decision on Imperial statute—Binding.]—Where there is a clause in a New Zealand statute identical with a clause in an English statute which has been construed by the English Ct. of Appeal, the cts. of New Zealand should adopt the construction put upon the clause by the English Ct. of Appeal.—R. v. NORTWORTHY (1907), 26 N. Z. L. R. 536.—N.Z.

g. — Australian Constitution—Reference to draft bills.]—In the interpretation of the Constitution reference may be had, as matter of history of legislation, to the draft bills of 1891, 1897, & 1898, prepared under legislative authority of the several States.—TASMANIA (STATE OF) v. AUSTRALIA (COMMONWEALTH OF) (1904), 1 C. L. R. 329.—AUS.

h. — Cape Colony—English decisions & not Roman-Dutch authorities to be looked at.]—In construing statutes made in Cape Colony after the cession to the British Crown the Court should be guided by the decisions of the

English Courts, & not by the Roman-Dutch authorities.—DE VILLIERS v. CAPE DIVISIONAL COUNCIL (1875), Buch. 64.—S. AF.

k. — Orange Free State Law Book.]—Act 5 of 1910 of the Union Parliament repeals Ordinance 3 of 1902 of the Orange Free State. That Ordinance enacted that the translation in English, published in 1901, of the *Wetboek* (Law Book) of the late Orange Free State, should be deemed & taken to contain & be the Statute law of which it was a translation, & that in construing any of the provisions of the Statute law the text of the translation should be followed.—*Held:* Act 5 of 1910 did not repeal the original Dutch laws of the Orange Free State.—*It v.* FARDULLY, [1914] App. D. 187.—S. AF.

323 i. Application of—Confined to territorial limits of colony.]—The Sydney Corp'n. Act, s. 110, should be construed as not intended to apply to land the property of the Commonwealth.—SYDNEY MUNICIPAL COUNCIL v. THE COMMONWEALTH (1904), 1 C. L. R. 208.—AUS.

323 ii. — — —.]—Where the Constitution of a State merely empowers the Legislature to make laws for the peace, welfare, & good government of the State in all cases, one of the canons

[1907] 1 K. B. 149; *Re* Behrend's Trust, Surman v. Biddell, [1911] 1 Ch. 687.

320. — Dominion Statutes—Provincial Acts not regarded.]—Provincial statutes cannot be looked at in deciding questions arising upon the construction of dominion statutes.—GRAND TRUNK RY. CO. OF CANADA v. WASHINGTON, [1899] A. C. 275; 68 L. J. P. C. 37; 80 L. T. 301, P. C.

321. — Admissibility of evidence—Reference to Evidence Act of colony—English rules not admitted to vary or deny effect to.]—The rule & principle of the law of evidence in any colony must be found in the Evidence Act of that colony, & the acceptance of a rule or principle adopted in or derived from the English law is not permissible to vary, or deny effect to, the statute under consideration.—MAHOMED SYEDOL ARIFFIN v. YEOH OOI GARK, [1916] 2 A. C. 575; 86 L. J. P. C. 15; 115 L. T. 564; 32 T. L. R. 673, P. C.

322. — Statutory code—Reference to earlier law & decisions.]—An appeal to earlier law & decisions for the purpose of interpreting the provisions of a statutory code can only be justified on some special ground, such as the doubtful import or previously acquired technical meaning of the language used therein.

In advising a grant of special leave to appeal, the Judicial Committee will take into consideration the general importance of the question, whether it has caused great difference of judicial opinion in the cts. below, & the extent to which the decision has been based upon English authorities.—ROBINSON v. CANADIAN PACIFIC RY. CO., [1892] A. C. 481; 61 L. J. P. C. 79; 67 L. T. 505; 8 T. L. R. 722, P. C.

Annotations:—Mentd. Miller v. Grand Trunk Ry., [1906] A. C. 187; Sanday v. British & Foreign Marine Insce., [1915] 2 K. B. 781; Canadian Pacific Ry. v. Parent, [1917] A. C. 195.

323. Application of—Confined to territorial limits of colony.]—Low v. ROUTLEDGE, No. 62, ante.

324. — — — Right of Crown to sue in England—Not affected by Victorian procedure Act.]—*Re* ORIENTAL BANK CORPN. (No. 2), No. 19, ante.

Purporting to give appeal to Privy Council—*Ultra vires.*—*See* Vol. XVI., p. 134, No. 321.

of construction to be applied in regard to the Stamp Duties Acts of the State is that unless either by express words or necessary implication such Acts are shown to violate the principle of territoriality they must be construed as limited in their operation to that State, & consequently, as not selecting as the subject-matter of taxation any person, thing, or circumstance not within its territory.—QUEENSLAND STAMPS COMRS. v. WIENHOLT (1915), 20 C. L. R. 531.—AUS.

323 iii. — — —.]—A Canadian statute cannot affect a contract made beyond the limits of the territorial jurisdiction of the Canadian Legislature or invalidate a contract which was good by the law of the country wherein it was made.—NATIONAL CASH REGISTER CO. v. LOVETT, MOORE v. NATIONAL CASH REGISTER CO. (1906), 1 E. L. R. 321.—CAN.

i. Indian Codes—"Illustrations"—Effect on construction.]—Illustrations in Acts of the Legislature ought never to be allowed to control the plain meaning of the section to which they are appended, especially when the effect would be to curtail a right which the section in its ordinary sense would confer.—KOYLASH CHUNDER GHOSH v. SONATUN CHUNG BAROOIE (1881), 1 L. R. 7 Calo. 132.—IND.

Part IV.—Ecclesiastical Law.

See, generally, ECCLESIASTICAL LAW.

325. Colony with independent legislature—No power of Crown to establish Metropolitan See or Province—Or create ecclesiastical corporation—Requiring recognition of status & rights by colony.]—*Re NATAL (LORD BP.)* (1865), 3 Moo. P. C. C. N. S. 115; 5 New Rep. 471; 12 L. T. 188; 11 Jur. N. S. 353; 13 W. R. 549; 16 E. R. 43, P. C.

Annotations.—*Consd. Natal Bp. v. Gladstone* (1866), L. R. 3 Eq. 1; *Merriman v. Williams* (1882), 7 App. Cas. 484. *Reid. Ex p. Jenkins* (1868), L. R. 2 P. C. 258; *Cape Town Bp. v. Natal Bp.* (1869), L. R. 3 P. C. 1. *Mentd. Ex p. Selwyn* (1872), 36 J. P. Jo. 54; *Read v. Lincoln Bp.* (1889), 14 P. D. 88.

326. — Where ecclesiastical status created between Metropolitan & suffragan bishops—Whether Crown can confer jurisdiction or coercive legal authority upon Metropolitan.]—*Re NATAL (LORD BP.)*, No. 325, *ante*.

327. — — — — — Obedience enforced by recourse to civil courts.]—(1) Funds were subscribed & vested in trustees in England for the creation & endowment of a bishop of the United Church of England & Ireland in Natal, a colony having an independent legislature, & the Crown, on the appln. of the trustees, appointed pltf. bishop of the see or diocese of Natal by letters patent purporting to give him coercive jurisdiction over his clergy, & to make him subject to the Bishop of Cape Town as his Metropolitan. Pltf. was consecrated in 1853. A suit was instituted by pltf. to obtain payment of the income of the endowment. The trustees alleged by their answer that the effect of the judgment in *Re Lord Bishop of Natal*, No. 325, *ante*, was that, inasmuch as no coercive jurisdiction could be given to a bishop in a colony possessed of an independent Legislature, the letters patent had failed to create a legal see or diocese, & thus the objects of the subscribers had failed:—*Held*: pltf. retained his legal status as Bishop of Natal notwithstanding the judgment; & though the letters patent had failed to confer upon him any effective coercive jurisdiction over his clergy, he could still enforce obedience by having recourse to the civil cts.; & as no allegation was raised in the pleadings against pltf.'s character or doctrine, he was entitled to the income of the endowment.

(2) The fact of calling themselves in communion with the Church of England would not make such a church a part of the Church of England, nor would it make the members of that church members of the Church of England (*LORD ROMILLY, M.R.*).—*NATAL (BP.) v. GLADSTONE* (1866), L. R. 3 Eq. 1; 15 L. T. 465; *sub nom. COLENSE v. GLADSTONE*, 36 L. J. Ch. 2; 12 Jur. N. S. 971; 15 W. R. 29.

Annotations.—*Reid. Ex p. Jenkins* (1868), L. R. 2 P. C. 258; *Cape Town Bp. v. Natal Bp.* (1869), L. R. 3 P. C. 1. *Mentd. Brown v. Montreal (Curé, etc.)* (1874), L. R. 6 P. C. 157.

328. — — — — — Oath of canonical obedience by Suffragan to Metropolitan—Whether jurisdiction

conferred on Metropolitan.]—*Re NATAL (LORD BP.)*, No. 325, *ante*.

329. — — — — — Ultimate appellate jurisdiction given to Archbishop of Canterbury—Invalid.]—*Re NATAL (LORD BP.)*, No. 325, *ante*.

330. — — — — — Founding Church of England in—Establishment of church in communion with Church of England.]—*NATAL (BP.) v. GLADSTONE*, No. 327, *ante*.

331. Colony or settlement where no established church—Prerogative of Crown to create bishopric—Or Ecclesiastical Roman Catholic Corporation.]—The right of the Crown to present to an English benefice upon the appointment of the incumbent by the Crown to a bishopric is not barred by the Crown having, before such appointment, granted the advowson to a subject. But no such right exists in the case of an appointment to the Bishopric of Christchurch in New Zealand.

We do not question the power of the Queen to create a bishopric in any part of her dominions except where, as in Scotland, such an exercise of prerogative is forbidden. In a newly settled colony such an exercise of prerogative is lawful; but we must bear in mind that in such a colony there is no established church, & that the ministers of religion in communion with the Church of England, with the Church of Scotland, & with the Church of Rome, in the absence of any imperial or colonial legislation on the subject, are all upon an equal footing. If, by legislative enactment, there were a fund created for the support of "the protestant clergy in New Zealand," according to the opinion given by the judges in the House of Lords upon the *Canada Reserves*, H. L. Journal, May 4, 1840, p. 254, the episcopalian & presbyterian clergy in the colony would be entitled to share it in equal proportions. It has likewise been held that the Crown may create an Ecclesiastical Roman Catholic Corp'n. in an English colony, as well as a Protestant Bishopric (*per CUR.*).—*R. v. ETON COLLEGE (PROVOST & FELLOWS)* (1857), 8 E. & B. 610; 27 L. J. Q. B. 132; 30 L. T. O. S. 186; 4 Jur. N. S. 335; 6 W. R. 72; 120 E. R. 228.

332. — — — — — Status of Church of England in—In same position as other religious bodies.]—*R. v. ETON COLLEGE (PROVOST & FELLOWS)*, No. 331, *ante*.

333. — — — — — Rules of discipline binding on members assenting thereto.]—*LONG v. CAPE TOWN (BP.)* (1863), 1 Moo. P. C. C. N. S. 411; *Brod. & F.* 293; 2 New Rep. 465; 8 L. T. 738; 11 W. R. 900; 15 E. R. 756; *sub nom. LONG v. GRAY (LORD BP. OF CAPE TOWN)*, 9 Jur. N. S. 805, P. C.

Annotations.—*Consd. Natal Bp. v. Gladstone* (1866), L. R. 3 Eq. 1. *Apld. Brown v. Montreal (Curé, etc.)* (1874), L. R. 6 P. C. 157. *Consd. Merriman v. Williams* (1882), 7 App. Cas. 484. *Reid. Re Natal (Lord Bp.)* (1865), 3 Moo. P. C. C. N. S. 115; *Ex p. Jenkins* (1868), L. R. 2 P. C. 258; *Natal Bp. v. Green* (1868), 18 L. T. 112; *Cape Town Bp. v. Natal Bp.* (1869), L. R. 3 P. C. 1. *Mentd. The Parlement Belge* (1879), 4 P. D. 129; *Read v.*

PART IV.

m. Colony with independent legislature—Letters Patent creating bishopric—Whether Crown can confer jurisdiction upon Bishop—Obedience enforced by resort to Civil Courts.]—BRITISH

COLUMBIA (BP.) v. CRIDGE (1874), 1 B. C. R. pt. 1, 5.—CAN.

n. Colony or Settlement where no Established Church—Dean subject to authority of bishop—While member of Anglican Church.]—*NATAL (BP.) v. GREEN*, (1868), 18 L. T. 112.—S. AF.

o. — — — — — Validity of Act of Assembly of Church of England—Not at variance with authorised faith—Whether inquired into by court.]—*GLADSTONE v. ARMSTRONG*, [1908] V. L. R. 454.—AUS.

p. — — — — — Religious, Educational, & H H 2

Lincoln Bp. (1889), 14 P. D. 88, *Free Church of Scotland (General Assembly) v. Overtoun, Macalister v. Young*, (1904) A. C. 615.

334. — Whether ecclesiastical law carried by settlers from Mother Country.]—*Re NATAL* (LORD BP.), No. 325, *ante*.

335. — Alleged synod convened by colonial bishop without consent—Acts purporting to bind all members of Church of England—Illegal.]—*LONG v. CAPE TOWN* (BP.), No. 333, *ante*.

336. South Africa—Dutch reformed church in Cape of Good Hope—Constitution of—Jurisdiction of synod.]—The Dutch Reformed Church in the Colony of the Cape of Good Hope is a voluntary society, constituted & subsisting by mutual agreement. The regulation of its ecclesiastical affairs depends upon contract; & the authority of its governing bodies is derived wholly from the admission & agreement of the members, ecclesiastical & lay, which constitute the church or society. This contract or agreement is embodied in certain laws & regulations, which were settled by Ordinance, No. 7, in 1843, & subsequently altered, in 1847, by virtue of authority contained in the Ordinance of 1843. By Ordinance 1843, Art. 187, the Synod or General Assembly was organised, & made the sole & exclusive tribunal for the trial of charges of false doctrine against ministers. By one of the alterations made in 1847, the jurisdiction & authority thus given to the Synod as a ct. of first instance was transferred to the Presbytery, with an appeal to the Synod; with liberty, where a case which concerns the welfare of the church in general had been decided in the Superior Ct., & being capable of appeal, no appeal had been brought, for the Synod to take cognisance of it; though incapable of exercising or enforcing an original primary jurisdiction.—*MURRAY v. BURGERS* (1867), L. R. 1 P. C. 302; 4 Moo. P. C. C. N. S. 250; 30 L. J. P. C. 44; 16 L. T. 40; 15 W. R. 722; 16 E. R. 311, P. C.

337. — Church of Province of—Relation to established church—Jurisdiction of Bishop of.]—The Church of the Province of South Africa is not a Church in connection with the Church of England as by law established. Although there are in the articles in the constitution of the Church of the Province of South Africa general expressions affirming in the strongest way the connection of the church of the province with the Church of England, & its adherence to the faith & doctrine of the Church of England, yet by the proviso in the articles to the effect that in the interpretation of such faith & doctrine it is not bound by the decisions of the tribunals of the Church of England, it is practically declared that the connection is not maintained.

In a suit by the Bishop of Graham's Town, one of the dioceses of the Church of the Province, against the officiating minister in possession of the church of St. George in Graham's Town to enforce sentences of the Diocesan Ct. of Graham's Town, whereby deft., a member of the Church of the Province, subject to its constitution & canons, & to the episcopal jurisdiction of pltf., had been found guilty of contumacious disobedience, suspended from his ministerial functions until he should engage not to repeat the offence of preventing the bishop from preaching or ministering in the church of St. George, & finally excommuni-

cated, it appeared that the church of St. George had been duly dedicated to ecclesiastical purposes in connection with the Church of England as by law established, & for no other purposes, & was held by trustees for those purposes:—*Held*: pltf. had no right in the church of St. George, & his suit must be dismissed.—*MERRIMAN v. WILLIAMS* (1882), 7 App. Cas. 484; 51 L. J. P. C. 95; 47 L. T. 51, P. C.

Annotation:—*Mentd.* *Free Church of Scotland (General Assembly) v. Overtoun, Macalister v. Young* (1904), 91 L. T. 394.

338. — Crown grant of land for cathedral—Trusteeship of.]—*CAPE TOWN* (BP.) *v. NATAL* (BP.) (1869), L. R. 3 P. C. 1; 6 Moo. P. C. C. N. S. 203; 38 L. J. P. C. 58; 16 E. R. 702; *sub nom.* *NATAL* (BP.) *v. CAPETOWN* (BP.), 17 W. R. 1050, P. C.

339. Jersey—Jurisdiction of ecclesiastical court of—To entertain suit against clergyman—Scandalous conduct.]—The Ecclesiastical Ct. of Jersey has jurisdiction, under Canons 17 & 46, to entertain a suit against a clergyman, charging him with certain acts of conduct, "which created a scandal against morality & religion, & especially against the established church of which he is a minister," though the alleged acts, if proved, would constitute a criminal offence, over which the ecclesiastical ct. has no jurisdiction: the gravamen of the charge being, the scandal induced by the reports of the acts in question, for which a clergyman is amenable to his Ordinary, & not their criminality, for which he is liable to the criminal tribunal of the Island.—*JERSEY (DEAN) v. — (RECTOR)* (1840), 3 Moo. P. C. C. 229; 13 E. R. 97, P. C.

Annotations:—*Apld.* *Burder v. —* (1844), 3 Curt. 822. *Refd.* *Pusey v. Jowett* (1863), 1 New Rep. 488. *Mentd.* *Elphinstone v. Purchas* (1870), L. R. 3 P. C. 245.

340. New Zealand—Whether Crown can present to benefice—In appointment of incumbent to Bishopric of Christchurch.]—*R. v. ETON COLLEGE* (PROVOST & FELLOWS), No. 331, *ante*.

341. Bermudas—Power of court of Chancery—To issue writ de vi laicâ removendâ.]—*Bermuda Act, 1814, s. 29*, by which jurisdiction is conferred in the Ct. of Ch. of the Islands, with power "to examine, hear, judge, determine, & decree all matters, causes, & things whatever, as fully & amply to all intents & purposes whatsoever as the High Ct. of Ch. in England, may or can do" does not necessarily confer on that ct. the power to issue a writ de vi laicâ removendâ.—*Ex p. JENKINS* (1868), L. R. 2 P. C. 258; 5 Moo. P. C. C. N. S. 351; 38 L. J. P. C. 6; 19 L. T. 583, P. C.

342. Lower Canada—Status of Roman Catholic Church in—Ecclesiastical law governing Roman Catholics—Jurisdiction of civil courts.]—*G.*, a lay Roman Catholic parishioner of M., on Nov. 18, 1869, died, a member of the "*Institut Canadien*," a literary society which had incurred ecclesiastical censures. In his lifetime a pastoral letter of the Bishop of M. had forbidden such membership on pain of being deprived of the Sacrament "*même a l'article de la mort*." During illness the priest who administered unction had refused to administer Holy Communion; & at his death six years thereafter the curé of M., under the direction of the bishop, refused "*la sepulture ecclesiastique*," after request duly made in that behalf; that is to say the curé refused burial in the larger part of the

Charitable Institutions Act, 1861—*Gifts to congregations of Church of England in colony.*—*Re PRATTIE, KING v. A.-G.* (1910), S. R. Q. 276.—*AUS*

q. Church pews—Successive occupancy by Crown servants—Crown's

right to dispose—*By Governor.*—*FITZ-HERBERT v. WILLIAMS & GILL* (1818), 1 Nhd. L. R. 115.—*NFLD.*

r. Jurisdiction of Methodist Conference—*Writ of prohibition—Whether second charge for same offence maintain-*

able.—*Ex p. CURRIE* (1889), 28 N. B. R. 475.—*CAN.*

s. India—Roman Catholic Church—*Seating of congregation—Caste.*—*MICHAEL PILLAI v. BARTLE* (1916), I. L. R. 39 Mad. 1056.—*IND.*

local cemetery, in which Roman Catholics are usually buried with the rites of the church, & in which the graves are consecrated; that he offered burial without rites in the smaller or reserved part, in which the graves are never consecrated, & in which are buried unbaptised infants, criminals, & those who have died "*sans les secours ou les sacrements de l'Eglise*." This proposal was rejected, though G.'s widow offered to accept burial in the larger part without religious services.

On a petition by G.'s widow for a *mandamus* to resps. upon receipt of the customary fees to bury G.'s body in the cemetery conformably to usage & law, & to enter such burial in the civil register, a writ of summons was issued by the Superior Ct. which, in substance, called upon resps. to show cause why a writ of *mandamus* should not be issued. Thereupon resps. petitioned, *inter alia*, that the writ being of summons & not of *mandamus*, might be annulled for irregularity, traversed pltf.'s petition, & pleaded, first, the irregularity above mentioned; secondly, that they had not refused, but had offered such burial as G. was entitled to; thirdly, that they were legal proprietors of the cemetery, free from civil interference or control as respects the service of religion & the exercise of its ceremonies, & were legally entitled to point out the precise spot in the cemetery where each burial was to be made; that they were also civil officers within certain limits, & civilly responsible in that capacity only; that they had offered such burial, & refused nothing but ecclesiastical burial, on the ground that G. had been for ten years previously to his death "notoriously & publicly subject to canonical penalties," resulting from the before-mentioned membership, & at the direction of the proper ecclesiastical authorities. They further, in special replication to pltf.'s answer, denied that the civil cts. could examine the grounds of refusing ecclesiastical burial, which they nevertheless specified, averring that in consequence of the premises G. must be considered "*un pecheur public*," & as such deprived of ecclesiastical burial by the Roman Catholic ritual:—*Held*: (1) the writ of summons was in proper form according to the Code of Procedure in Canada; (2) S. never having been excommunicated *nominatim*, & never having been adjudged or proved to be "*un pecheur public*" within the meaning of the Quebec ritual, was not at the time of his death under any such valid ecclesiastical sentence or censure as would, according to the Quebec ritual, or any law binding upon Roman Catholics in Canada, justify the denial of ecclesiastical sepulture to his remains; (3) resps., who were sued in their corporate capacity as holders of land & administrators of the cemetery, were bound to give to G.'s remains burial in the larger part of the cemetery, on payment of the accustomed fees; & a peremptory writ of *mandamus* should be issued accordingly.

Although the Roman Catholic Church in Canada, may, on the conquest in 1762, have ceased to be an established church in the full sense of the term, it nevertheless continued to be a church recognised by the state, retaining its endowments & continuing to have certain rights enforceable at law.

Although the civil cts. in Canada may not be competent to entertain a suit in the nature of the "*appel comme d'abus*," yet the jurisprudence & precedents relating to such a suit may be considered as evidencing the law of the Roman Catholic Church in Canada.

Even if the Roman Catholic Church in Canada were to be regarded merely as a private & voluntary religious society resting only upon a consensual

basis, cts. of justice are still bound, when due complaint is made that a member of the society has been injured as to his rights in any matter of a mixed spiritual, & temporal character, to inquire into the laws & rules of the tribunal or authority which has inflicted the alleged injury, & to ascertain whether the act complained of was in accordance with the law & rules & discipline of the Roman Catholic Church which obtain in Lower Canada, & whether the sentence, if any, by which it is sought to be justified was regularly pronounced by competent authority.

Semble: the Ecclesiastical Law which now governs Roman Catholics in Lower Canada must be taken to be identical with that which governed the French province of Quebec; except so far as modifications are proved to have been introduced by valid consensual contract.—*BROWN v. MONTREAL (CURE)* (1874), L. R. 6 P. C. 157; 44 L. J. P. C. 1; 31 L. T. 555, P. C.

Annotation:—*Generally*. *Menté. Verchères (Cure) v. Verchères Corp.* (1875), L. R. 6 P. C. 330.

343. — Right to burial according to Roman Catholic ritual.—*BROWN v. MONTREAL (CURE)*, No. 342, *ante*.

344. Lower Canada—Valid decree for canonical erection of new parish—Foundation for civil recognition of parish—Whether proceedings subject to review.—Under Revised Statutes of Quebec, tit. ix., c. 1, every decree for the canonical erection of a new parish which is valid according to ecclesiastical law is sufficient foundation for proceedings with the view of obtaining the civil recognition of that parish. No objection thereto can be taken on the ground of antecedent irregularity of procedure. Proceedings before the comrs. of the diocese with a view to such civil recognition are not subject to the review or control of a ct. of justice.

An objection to the formation of a new parish, on the ground that one of the old parishes dismembered for that purpose was in debt, is valid under Revised Statutes of Quebec, s. 3380; but where the debt relied on was contracted by the *Fabrique*, it must be proved that the *Fabrique* was unable to pay it, & that a levy on the Roman Catholic freeholders of the parish has been duly authorised.—*ALEXANDRE v. BRASSARD*, [1895] A. C. 301; 64 L. J. P. C. 83; 72 L. T. 366, P. C.

345. — Objection to formation of new parish—Inability of Fabrique to pay debt of old parish—Levy on Roman Catholic freeholders.—*ALEXANDRE v. BRASSARD*, No. 344, *ante*.

346. Cyprus—Legitimacy of Roman Catholic Ottoman subject in—Application of canon law of Roman Catholic Church.—By the Law of Cyprus the legitimacy of a Roman Catholic Ottoman subject is to be ascertained by applying the canon law of the Roman Catholic Church.—*PARAPANO v. HAPPAZ*, [1894] A. C. 165; 63 L. J. P. C. 63; 70 L. T. 254; 10 T. L. R. 266; 6 R. 420, P. C.

347. Greek Orthodox Church—Land dedicated by government to use of—Exclusion of Roman Catholic & Uniate churches.—Emigrants from Galicia settled in the North-West Territories from 1892, & in 1896 there were thirty Galician families in the neighbourhood of Star, who resolved to provide a place for religious worship & secure the services of a priest. In Galicia the population is divided between Poles & Little Russians, the former being Roman Catholic, the latter Orthodox Greek, who, as a condition of being allowed to use their own liturgy & conduct their services in the old Slavonic language are compelled to acknowledge the supremacy of the Pope, all else being allowed to remain Greek. There results a composite Church known as the Uniate Church, liable in

Galicia to taxation by the Pope, in consequence of its enforced union with Rome. Resps., trustees of the Star congregation, on Dec. 7, 1897, obtained from the land office a permit to cut logs for a church on the govt. land in suit, "to be used in the erection of a church building for the mission of the Greek Orthodox Church & for no other purpose":—*Held*: this permit being an invitation to the trustees to build a church on the land in suit, the land became, when the permit was acted on, impressed in the hands of the govt. with a trust for that purpose, & was dedicated by the govt. to the use of the mission of the Greek Orthodox Church & not of the Roman Catholic or Uniate Church.—*ZACKLYNSKI v. POLUSHIE*, [1908] A. C. 65; 77 L. J. P. C. 17; 24 T. L. R. 152, P. C.

Property in land.]—*See* Part VIII., *post*.

348. Appeal to Crown—Judicial Committee substituted for commission of delegates.]—*Re NATAL* (LORD BP.), No. 325, *ante*.

349. — Dispute between two independent prelates—Previously referable to Pope—Reference to Judicial Committee.]—*Re NATAL* (LORD BP.), No. 325, *ante*.

350. — Inquiry & finding before bishop as to misconduct—Person nominated to colonial chaplaincy.]—Applt. was nominated by resp. to a colonial chaplaincy within his diocese, & the nomination was accepted by the Secretary of State. In consequence of certain reports as to his conduct, the Colonial Govt. decided to suspend the issue of his official letter of appointment pending an inquiry. An inquiry was held before the bishop, who found certain charges of misconduct proved, & withdrew his nomination:—*Held*: there being no litigation which the bishop had jurisdiction to determine, no appeal lay to the Judicial Committee from his act in withdrawing the nomination.—*WARD v. MAURITIUS* (BP.) (1906), 95 L. T. 854; 23 T. L. R. 52, P. C.

Part V.—Extradition and Fugitive Offenders.

See Fugitive Offenders Act, 1881 (c. 69), & generally, EXTRADITION & FUGITIVE OFFENDERS.

351. Removal for trial to another part of His Majesty's Dominions—Trial in accordance with procedure of place where case removed—Removal to Gibraltar—Trial by jury.]—The Consular Ct. of Morocco & the Supreme Ct. of Gibraltar having a concurrent jurisdiction in the matter of an offence charged against the applt., he was arrested in London & ordered by the Q. B. Div. to be tried before the Supreme Ct. at Gibraltar:—*Held*: as an incident to that order he was entitled to be tried according to the procedure of that ct., i.e. by a jury.—*SPILSBURY v. R.*, [1899] A. C. 392; 68 L. J. P. C. 66; 80 L. T. 602; 63 J. P. 691; 15 T. L. R. 345; 19 Cox, C. C. 303, P. C.

352. — British subject apprehended in England—Charged with offence within jurisdiction of Morocco Consular Court—Removal to Gibraltar instead of Tangier.]—(1) Accused, a British subject, being apprehended in England & charged with riot within the jurisdiction of the Morocco Consular Ct. was by virtue of the Morocco Order in Council, sent to Gibraltar instead of Tangier.

(2) The Fugitive Offenders Act, 1881 (c. 69), does not take away from the High Ct. its inherent power to grant bail to a fugitive offender, apprehended in England & committed to prison by a magistrate to await his surrender to take his trial at a Consular Ct.—*R. v. SPILSBURY*, [1898] 2 Q. B. 615; 67 L. J. Q. B. 938; 79 L. T. 211; 62 J. P. 600; 14 T. L. R. 579; 42 Sol. Jo. 717; 19 Cox, C. C. 160, D. C.

Annotations:—*As to* (2) *Consd. R. v. Phillips* (1922), 128 L. T. 113. *Reid. R. v. Brixton Prison, Ex p. Savarkar*, [1910] 2 K. B. 1050; *R. v. Hole* (1898), 14 T. L. R. 578.

353. — Order made by magistrate—Presumption that offence committed.]—An order was made by a magistrate sitting at Bow Street, under Fugitive Offenders Act, 1881 (c. 69), s. 5,

committing V. to prison, before being sent out to South Africa, there to stand his trial on charges of fraud alleged against him. A rule *nisi* to show cause why a writ of *habeas corpus* should not issue was granted. The ct., on cause being shown against its being made absolute, expressly left open the question whether they could consider under sect. 10 of the Act or otherwise whether there was, on the evidence before the magistrate, a strong or probable presumption that the fugitive had committed the offence mentioned in the warrant. Assuming, however, that the ct. could consider such a question, they were of opinion that on the facts of this case there was such a strong & probable presumption, & discharged the rule.—*R. v. VYNER* (1903), 68 J. P. 142, D. C.

354. — Proof that offence punishable according to law of country—With hard labour for twelve months or more.]—In order that a magistrate may have jurisdiction under Fugitive Offenders Act, 1881 (c. 69), s. 9, to commit a fugitive offender for return to a colony, it is necessary that there should be evidence before him that the offender has committed an offence punishable according to the law of the colony in which it is alleged to have been committed by imprisonment with hard labour for a term of twelve months or more.—*R. v. BRIXTON PRISON* (GOVERNOR), *Ex p. PERCIVAL*, [1907] 1 K. B. 696; 76 L. J. K. B. 619; 96 L. T. 545; 71 J. P. 148; 23 T. L. R. 238; 21 Cox, C. C. 387, D. C.

355. — Sufficiency of grounds for—Connection with similar charges to place of removal—Witnesses resident where offender removed.]—Where the applt. obtained a rule *nisi* for a writ of *habeas corpus*, & the K. B. Div. merely decided that the rule should be discharged, without adjudicating upon any applt. for relief under the Fugitive Offenders Act, 1881 (c. 69):—*Held*: the Ct. of Appeal, as a "Superior Ct." within the

PART V.

t. Removal for trial to another part of His Majesty's Dominions—Sufficiency of grounds for.]—*Re BRADSHAW & O'KELLY* (1848), 3 Nfld. L. R. 44.—Nfld.

a. Australia—Power of Commonwealth Parliament to legislate as to fugitive offenders.]—*McKELVEY v. MEAGHER* (1906), 4 O. L. R. 265.—AUS.
b. Canada—Power of Dominion Government to establish court for extradition purposes.]—*GAYNOR v.*

LAFONTAINE (1904), Q. R. 14 K. B. 99.—CAN.

c. Chinese Extradition Ordinance, 1889—Powers of magistrates in extradition proceedings.]—*Re HUNG SIN LUN* (1915), 10 Hong Kong L. R. 114.—HONG KONG.

meaning of that expression in the Act, had jurisdiction to entertain an appln. for relief by the appct. under that Act.

The appct. was committed for removal to India under the Act, the charges against him being *inter alia*, the uttering of seditious speeches in India, & the subsequent uttering of seditious speeches in England, & the procuring of arms to be taken to India for use against the Government:—*Held*: the connection of the charges with seditious acts in India & the fact that nearly all the witnesses to be called at the trial of the appct. were in India, constituted *prima facie* sufficient grounds for sending the appct. to India to be tried; & the fact that the appct. would, under the provisions of a statute in operation in India, be tried by judges alone & not by a jury was not a ground for saying that his return to India would be "unjust & oppressive" within sect. 10 of the Act.—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. SAVARKAR*, [1910] 2 K. B. 1056; 80 L. J. K. B. 57; 103 L. T. 473; 74 J. P. 417; 26 T. L. R. 561; 54 Sol. Jo. 635, C. A.

Annotations:—*Mentd. Ex p. Le Gros* (1914), 30 T. L. R. 249; *R. v. Garrett, Ex p. Sharf*, [1917] 2 K. B. 99; *Home Secretary v. O'Brien* (1923), 39 T. L. R. 638.

356. — Whether return "unjust or oppressive"—Trial by judges alone & not by jury—According to statute operative in place of removal.]—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. SAVARKAR*, No. 355, *ante*.

357. Relief under Fugitive Offenders Act, 1881 (c. 69)—Jurisdiction of court of appeal to award—"Superior court"—Discharge of rule nisi for habeas corpus by King's Bench Division.]—*R. v. BRIXTON PRISON (GOVERNOR), Ex p. SAVARKAR*, No. 355, *ante*.

358. Prisoner removed to England from dominions—Liability to be tried on charges other than that for which removed.]—A prisoner who had been arrested in Canada under the Colonial Arrest Act, 6 & 7 Vict. c. 91, upon a charge of burglary, for which the bill was ignored, allowed to be arraigned upon another charge.—*R. v. PHILIPS* (1858), 1 F. & F. 105.

Annotation:—*Fold. R. v. Cohen* (1907), 71 J. P. 190.

359. — — —.]—Prisoner was indicted in one indictment for obtaining goods by false pretences & for various offences under Debtors Act, 1869 (c. 62). He was also indicted for a felony under the same Act. Prisoner had been arrested & returned from Cape Colony under Fugitive Offenders Act, 1881 (c. 69), on charges of obtaining goods by false pretences in this country. He was committed for trial in this country on all the

charges. At the trial, counsel for the defence contended that the prisoner could only be tried on the counts for false pretences on which he was returned:—*Held*: the prisoner could be tried on all the charges.—*R. v. COHEN* (1907), 71 J. P. 190.

360. Ball pending return.]—*R. v. HARVEY* (1895), cited in Biron & Chalmers's Law & Practice of Extradition, p. 50.

361. — Jurisdiction of High Court.]—*R. v. SPILSBURY*, No. 352, *ante*.

362. — — —.]—*R. v. HOLE* (1898), 62 J. P. 616; 14 T. L. R. 578, D. C.

Annotation:—*Reid. R. v. Spilsbury* (1898), 62 J. P. 600.

363. Prisoner remanded to enable prosecution to bring forward evidence—No right of judge to treat remand warrant as nullity—Canadian law.]—Where a prisoner is brought before a competent tribunal, & charged with an offence within the meaning of an extradition treaty, & remanded in order that the prosecution may bring forward the evidence by which it is proposed to support the charge, a judge has no jurisdiction, under the Canadian law, to treat the remand warrant as a nullity, & adjudicate upon the case as though the whole evidence were before him.—UNITED STATES OF AMERICA *v. GAYNOR*, [1905] A. C. 128; 74 L. J. P. C. 44; 92 L. T. 276; 21 T. L. R. 254, P. C.

364. Canadian Extradition Act (R. S. C., 1906), c. 155, s. 10—Whether inconsistent with extradition treaty with Russia, 1866, Art. IX.]—Under Art. IX. of the Extradition Treaty with Russia, 1866, after a requisition in due form, it is obligatory on the authorities to arrest the fugitive. The art. does not provide that there shall be no arrest till after requisition, & is not inconsistent with s. 10 of the Extradition Act (R. S. C., 1906, c. 155).—A.-G. FOR CANADA *v. FEDORENKO*, [1911] A. C. 735; 81 L. J. P. C. 74; 105 L. T. 343; 27 T. L. R. 541, P. C.

365. Apprehension of bankrupt on charge under Fugitive Offenders Act, 1881 (c. 69)—Whether public examination postponed.]—The ordinary rule of practice, by which the public examination is postponed until after the conclusion of the criminal proceedings, is inapplicable to proceedings instituted under the Fugitive Offenders Act, 1881 (c. 69), or where it is sought to extradite a person to a foreign country.—*Re ATIERTON*, [1912] 2 K. B. 251; 81 L. J. K. B. 791; 106 L. T. 641; 28 T. L. R. 339; 56 Sol. Jo. 446; 19 Mans. 126.

Removal for trial in Ireland—Crime committed in Ireland—Notwithstanding Habeas Corpus Act.]—*See CROWN PRACTICE*, Vol. XVI., p. 253, No. 543.

Part VI.—Conflict of Laws—Colonial Judgments.

366. Colonial judgments—On same footing as foreign judgments—In English Courts.]—In England the colonial judgment stands upon the same footing as a foreign judgment (WILDE, C.J.).—*BANK OF AUSTRALASIA v. HARDING* (1850), 9 C. B. 661; 19 L. J. C. P. 345; 14 Jur. 1094; 137 E. R. 1052.

Annotations:—*Reid. Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *Kelsall v. Marshall* (1856), 1 C. B. N. S. 241; *Barber v. Lamb* (1860), 8 C. B. N. S. 95; *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; *Thelwall v. Yelverton* (1864), 16 C. B. N. S. 813; *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Copin v. Adamson, Copin v. Strachan* (1874), L. R. 9 Exch. 345; *Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600; *Ridson Iron & Locomotive Works & Furness*, [1906] 1 K. B. 49.

367. — — —.]—The judgment of a colonial ct. of the British Empire comes within the category of a foreign judgment (LORD CAMPBELL, C.J.).—*BANK OF AUSTRALASIA v. NIAS*, No. 187, *ante*.

See, now, Administration of Justice Act, 1920 (c. 81), ss. 9–14.

As to foreign judgments (including colonial judgments).]—*See CONFLICT OF LAWS*, Vol. XI., pp. 444, No. 1027 *et seq.*

368. Action for same object in colonial & English courts—Concurrent winding up proceedings—Bankruptcy of firms in England & India—Same

partners.]—The co-partners of a firm in England & of a firm in India were the same three persons. A receiving order having been made in England against the English firm, & the estate of the Indian firm having become vested in the official assignee of Madras, the ct. sanctioned a scheme under which the proceedings in England & in Madras should continue concurrently & the assets be pooled & distributed rateably amongst all the creditors whose proofs should be admitted in the English bkpcy. & in the Indian insolvency.—*Re MACFADYEN (P.) & Co., Ex p. VIZIANAGARAM MINING CO., LTD.*, [1908] 1 K. B. 675; 77 L. J. K. B. 319; 98 L. T. 220; 24 T. L. R. 254; 52 Sol. Jo. 226; 15 Mans. 28.

Stay of proceeding—*Lis alibi pendens.*]—See CONFLICT OF LAWS, Vol. XI., p. 477, No. 1310 *et seq.*

Questions concerning real property.]—See CON-

FLICT OF LAWS, Vol. XI., p. 307, No. 6, p. 344, No. 314 *et seq.*

Questions concerning personality.]—See CONFLICT OF LAWS, Vol. XI., p. 358, No. 409 *et seq.*

Succession—To movables & immovables.]—See CONFLICT OF LAWS, Vol. XI., p. 362, No. 436 *et seq.*

Contracts.]—See CONFLICT OF LAWS, Vol. XI., p. 387, No. 639 *et seq.*

Torts.]—See CONFLICT OF LAWS, Vol. XI., p. 409, No. 773 *et seq.*

Matrimonial causes.]—See CONFLICT OF LAWS, Vol. XI., p. 421, No. 873 *et seq.*

Assignment of property in marriage.]—See CONFLICT OF LAWS, Vol. XI., p. 433, No. 957 *et seq.*

Rights & liabilities of spouses inter se—& in respect of their children.]—See CONFLICT OF LAWS, Vol. II., p. 441, No. 1013 *et seq.*

Part VII.—Mandamus to examine Witnesses in India and the Colonies.

See East India Act, 1773 (c. 63), ss. 40, 44; Evidence on Commission Act, 1831 (c. 22), s. 1; Evidence by Commission Act, 1885 (c. 74), s. 3; EVIDENCE.

Part VIII.—Property in Land.

SECT. 1.—IN GENERAL.

369. Canada—Respective rights of Dominion & Province—Territory ceded by Indians—British North America Act, 1867 (c. 3).]—The British North America Act, 1867, s. 109. provides that "all lands belonging to the several provinces of Canada at the Union shall belong to the several provinces in which the same are situate, subject to any trusts existing in respect thereof." By Royal Proclamation of 1763, certain lands in Canada, now part of the province of Ontario, were reserved for the use of the Indian inhabitants. By treaty of 1873, the use of these lands was surrendered by the Indian inhabitants to the Govt. of the Dominion for the use of the Crown:—*Held*: (1) sect. 109 give to each province, subject to the administration & control of its own legislature, the entire beneficial interest of the Crown in all lands within its boundaries which at the time of the Union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under sect. 108, or might assume for purposes specified in sect. 117; (2) the interest of the Crown in the lands surrendered by the Indian inhabitants became vested in the province of Ontario, & not in the Dominion of Canada.—*ST. CATHERINE'S MILLING & LUMBER CO. v. R.* (1888), 14 App. Cas. 46; 58 L. J. P. C. 54; 60 L. T. 191; 5 T. L. R. 125, P. C.

Annotations:—*As to* (1) *Reid*. Maritime Bank of Canada,

Liquidators v. New Brunswick, Receiver General, [1892] A. C. 437; *Ontario Mining Co. v. Seybold*, [1903] A. C. 73. *As to* (2) *Reid*. *Ontario Mining Co. v. Seybold*, [1903] A. C. 73; *A.-G. for Quebec v. A.-G. for Canada*, [1921] 1 A. C. 401. *Generally Reid*. *Dominion of Canada v. Province of Ontario*, [1910] A. C. 637; *Mentd. A.-G. for Canada v. Cain*, *A.-G. for Canada v. Gilhula*, [1906] A. C. 542; *Amodu Tijani v. Southern Nigeria*, [1921] 2 A. C. 399.

370. — — — — —.]—(1) By treaties in 1850 the Governor of Canada, as representing the Crown & the provincial govt., obtained the cession from the Ojibway Indians of lands occupied as Indian reserves, the beneficial interest therein passing to the provincial govt., together with the liability to pay to the Indians certain perpetual annuities:—*Held*: these lands being within the limits of the Province of Ontario, created by British North America Act, 1867 (c. 3), the beneficial interest therein vested under s. 109 in that province.

(2) The perpetual annuities having been capitalised on the basis of the amounts specified in the treaties, the Dominion assumed liability in respect thereof under s. 111. Thereafter the amounts of these annuities were increased according to the treaties:—*Held*: liability for these increased amounts was not so attached to the ceded lands & their proceeds as to form a charge thereon in the hands of the province, under s. 109. They must be paid by the Dominion with recourse to the provinces of Ontario & Quebec conjointly,

PART VIII. SECT. 1.

d. Canada—Right of half breed to land—*Manitoba Act*—Whether rights of half breed relinquished by acceptance & subsequent return of Indian Annuities under Treaty.]—*R. v. THOMAS* (1891),

2 Exch. C. R. 246.—CAN.

e. — *Vancouver Island*—Grant under *Settlers' Rights Act*—Necessity for notice to railway company—Assent of Crown.]—*ESQUIMALT & NANAIMO RY. CO. v. FIDDIS* (1909), 11 W. L. R.

509.—CAN.

f. Australia—Right of Crown to gold & silver mines—Construction of grant of "all mines."—Crown grants of land in Victoria have the same effect as English Crown grants. in the same

under ss. 111 & 112; in the same manner as the original annuities.

Colonial statutes which purport to give an appeal "to the Privy Council of England, in case their Lordships are pleased to entertain the appeal" are *ultra vires*, & ignore the constitutional rule that an appeal lies to Her Majesty & not to the Judicial Committee, who are merely the Queen's advisers, upon whom no jurisdiction can be conferred by any Colonial Legislature.—A.-G. FOR DOMINION OF CANADA *v.* A.-G. FOR ONTARIO, A.-G. FOR QUEBEC *v.* A.-G. FOR ONTARIO, [1897] A. C. 199; 66 L. J. P. C. 11; 75 L. T. 522; 13 T. L. R. 103, P. C.

371. ————.]—Lands in Ontario surrendered by the Indians by the treaty of 1873 belong in full beneficial interest to the Crown as representing the province, subject only to certain privileges of the Indians reserved by the treaty. The Crown can only dispose thereof on the advice of the Ministers of the province & under the seal of the province. The Dominion Government having purported without the consent of the province, to appropriate part of the surrendered lands under its own seal as a reserve for the Indians in accordance with the treaty:—*Held*: this was *ultra vires* the Dominion which had by British North America Act, 1867 (c. 3), s. 91, exclusive legislative authority over the lands in question but had no proprietary rights therein.—ONTARIO MINING CO. *v.* SEYBOLD, [1903] A. C. 73; 72 L. J. P. C. 5; 87 L. T. 449; 19 T. L. R. 48, P. C.

372. ————.]—The title to lands in the Province of Quebec appropriated for the use of Indians, pursuant to 14 & 15 Vict. (Can.), c. 106, & surrendered to the Crown in 1882, passed to the Province under s. 109 of British North America Act, 1867 (c. 3). The effect of 13 & 14 Vict. (Can.), c. 42, was not to give the Indians an equitable estate in the lands; the title remained in the Crown, the commr. for Indian Lands being given such an interest as to enable him to exercise the powers of management committed to him by that statute.—A.-G. FOR QUEBEC *v.* A.-G. FOR CANADA, [1921] 1 A. C. 401; 90 L. J. P. C. 33; 124 L. T. 513; 37 T. L. R. 125, P. C.

373. ————]—Transfer of proprietary rights vested in provinces to dominion—Not presumed from grant of legislative jurisdiction to dominion—Effect of British North America Act, 1867 (c. 3).—A.-G. FOR DOMINION OF CANADA *v.* A.-G. FOR PROVINCES OF ONTARIO, QUEBEC & NOVA SCOTIA, A.-G. FOR PROVINCE OF ONTARIO *v.* A.-G. FOR DOMINION OF CANADA, A.-G. FOR PROVINCES OF QUEBEC & NOVA SCOTIA *v.* A.-G. FOR DOMINION OF CANADA, No. 119, *ante*.

374. ————]—Rights of Dominion & private person—Public harbours.—By the British North America Act, 1867 (c. 3), s. 108, it was provided that certain public works & property, including "public harbours," should be the property of Canada:—*Held*: (1) "public harbour," in the above connection, meant not merely a place suited by its physical characteristics for use as a harbour, but a place to which on the relevant date the public had access as a harbour & which they had actually used for that purpose; (2) the date at which the test must be made was the date at which the British North America Act, by becoming applicable, effected a division of the assets between the province & the dominion; that date being, in

the case of British Columbia, 1871.—A.-G. FOR DOMINION OF CANADA *v.* RITCHIE CONTRACTING & SUPPLY CO., [1919] A. C. 999; 88 L. J. P. C. 189; 121 L. T. 655; 36 T. L. R. 1, P. C.

375. ————]—Crown grant of land under Provincial Act—Subsequent disallowance of Act by Governor-General—Title of grantee.—Disallowance by the Governor-General of Canada, under British North America Act, 1867, ss. 59, 90, of a Provincial Act in virtue of which a Crown grant of land in the Province has been issued before the disallowance, does not invalidate the title of the grantee.—WILSON *v.* ESQUIMALT & NANAIMO RY. CO., [1922] 1 A. C. 202; 91 L. J. P. C. 21; 126 L. T. 451, P. C.

376. ————]—Payment by dominion in respect of land ceded—In pursuance of treaty—Liability of province to contribute to payment.—A.-G. FOR DOMINION OF CANADA *v.* A.-G. FOR ONTARIO, A.-G. FOR QUEBEC *v.* A.-G. FOR ONTARIO, No. 370, *ante*.

377. ————]—By a treaty dated Oct. 3, 1873, the Dominion Govt., acting in the interests of the Dominion as a whole, secured to the Salteaux tribe of the Ojibeway Indians certain payments & other rights, at the same time extinguishing by consent their interest over a large tract of land about 50,000 square miles in extent, the greater part of which was subsequently ascertained to lie within the boundaries of the Province of Ontario. It having been decided that the release of the Indian interest effected by the treaty enured to the benefit of Ontario, the Dominion Govt. sued in the Exchequer Ct. for a declaration that it was entitled to recover from & be paid by the Province of Ontario a proper proportion of annuities & other moneys paid & payable under the treaty:—*Held*: having regard to the jurisdiction conferred upon the Exchequer Ct., the action must be dismissed as unsustainable on any principle of law. In making the treaty, although it resulted in direct advantage to the province, the Dominion Govt. did not act as agent or trustee for the province or with its consent, or for the benefit of the lands, but with a view to great national interests, that was, for distinct & important interests of their own, in pursuance of powers derived from the British North America Act, 1867 (c. 3).—DOMINION OF CANADA *v.* PROVINCE OF ONTARIO, [1910] A. C. 637; 80 L. J. P. C. 32; 103 L. T. 331; 26 T. L. R. 681, P. C.

378. ————]—Grant of water rights by provincial Act—*Ultra vires*—Claims of dominion.—BURRARD POWER CO., LTD. *v.* R., No. 174, *ante*.

———]—Conveyance of land by province to dominion—Whether passing precious metals contained.—See CONSTITUTIONAL LAW, Vol. II., p. 585.

379. South Africa—Mining concessions obtained from native chief—Precious metals—Restrictions imposed by British Bechuanaland Concession Court.—The British Bechuanaland Concession Ct. has power to restrict a mining concession, found to have been honestly obtained from a native chief, to the rights as to precious metals allowed to subjects of the Crown by the proclamation of 1889.—VILANDER CONCESSIONS SYNDICATE *v.* CAPE OF GOOD HOPE GOVERNMENT, [1907] A. C. 186; 76 L. J. P. C. 47; 96 L. T. 275; 23 T. L. R. 298, P. C.

380. Ceylon—Land needed for public purposes—Decision of governor in council—Finality of.]—

words, would have, & therefore, a colonial Crown grant, including in the description all mines, will not pass royal mines. The reasons given for

the right of the Crown to gold & silver mines in England, apply equally to the colonies; & accordingly their prerogative right to gold extends to

Victoria.—WOOLLEY *v.* IRONSTONE HILL LEAD GOLD-MINING CO. (1876), 1 V. L. R. 237.—AUS.

Sect. 1.—In general. Sect. 2.]

The decision of the Governor of Ceylon in Council under the Land Acquisition Ordinance that land in a specified locality is needed for a public purpose is final & conclusive & cannot be questioned in any Ct.—*WIRYSEKERA v. FESTING*, [1919] A. C. 646; 88 L. J. P. C. 52; 121 L. T. 1, P. C.

SECT. 2.—CROWN LANDS.

381. Canada — Rights of province — Land escheated to Crown—British North America Act, 1867 (c. 3), s. 109.]—By the British North America Act, 1867 (c. 3), s. 109, it is provided that "All lands, mines, minerals, & royalties belonging to the several provinces of Canada at the Union shall belong to the several provinces in which the same are situate or arise":—*Held*: land escheated to the Crown in default of heirs belonged to the province in which the land is situate.—*A.-G. OF ONTARIO v. MERCER* (1883), 8 App. Cas. 767; 52 L. J. P. C. 84; 49 L. T. 312, P. C.

Annotations:—*Consol. St. Catherine's Milling & Lumber Co. v. R.* (1888), 14 App. Cas. 46; *A.-G. of British Columbia v. A.-G. of Canada* (1889), 14 App. Cas. 295; *R. v. A.-G. for British Columbia* (1923), 40 T. L. R. 13. *Mentd.* Maritime Bank of Canada, Liquidators v. New Brunswick Receiver General, [1892] A. C. 437; *A.-G. v. British Museum Trustees*, [1903] 2 Ch. 598; *S.S. Magnhild v. McIntyre*, [1920] 3 K. B. 321.

382. ——— Right to precious metals—British North America Act, 1867 (c. 3), s. 109.]—A conveyance by the Province of British Columbia to the Dominion of Canada of "public lands" being in substance an assignment of its right to appropriate the territorial revenues arising therefrom, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. The precious metals in, upon & under such lands, are not incidents of the land, but belong to the Crown, & under British North America Act, 1867 (c. 3), s. 109, beneficially to the province, & an intention to transfer them must be expressed or necessarily implied.—*A.-G. OF BRITISH COLUMBIA v. A.-G. OF CANADA* (1889), 14 App. Cas. 295;

58 L. J. P. C. 88; 60 L. T. 712; 5 T. L. R. 385, P. C.

Annotations:—*Consol. A.-G. for British Columbia v. A.-G. for Canada*, [1914] A. C. 153. *Reid.* Maritime Bank of Canada Liquidators v. New Brunswick Receiver-General, [1892] A. C. 437; *Esquimalt Ry. v. Bainbridge*, [1896] A. C. 561; *Burrard Power Co. v. R.*, [1911] A. C. 87; *R. v. A.-G. for British Columbia* (1923), 40 T. L. R. 13.

383. ——— Swamp land—Canadian Act, 48 & 49 Vict. c. 53, s. 1—Revised Statutes of Canada, c. 47, s. 4.]—By above Act sect. 1 subsequently re-enacted by Revised Statutes of Canada, c. 47, s. 4, it was provided that all Crown lands which may be shown to the satisfaction of the Dominion Govt. to be swamp lands shall be transferred to the province & ensure wholly to its benefits and uses:—*Held*: by its true construction the sect. did not operate an immediate transfer to the province of any swamp lands or of the profits arising therefrom but only from the date of the Order in Council made after survey & selection as prescribed by the Act directing that the selected lands be vested in the province. Down to that date the profits resulting from the transferred land belonged to the Dominion.—*A.-G. FOR MANITOBA v. A.-G. FOR CANADA*, [1904] A. C. 799; 73 L. J. P. C. 100; 91 L. T. 300; 20 T. L. R. 769, P. C.

384. ——— & dominion—Land reserved for military purposes.]—Where it appeared from the evidence that, as a fact, land in a colony had been reserved by the Crown for military purposes:—*Held*: it remained Imperial property at the time of passing of the British North America Act, 1867, & did not fall to the colony by virtue of sect. 117 of the Act, nor to the Dominion of Canada by virtue of sect. 108.—*A.-G. OF BRITISH COLUMBIA v. A.-G. OF CANADA*, [1906] A. C. 552; 75 L. J. P. C. 114; 95 L. T. 571; 22 T. L. R. 764, P. C.

Annotation:—*Mentd.* Vancouver City v. Vancouver Lumber Co. (1911), 81 L. J. P. C. 69.

385. ——— Land surrendered by Indian tribe.]—*A.-G. FOR QUEBEC v. A.-G. FOR CANADA*, No. 372, ante.

386. Australia—Land in New South Wales—Held by Crown for distribution—Registration of title by purchaser.]—The Crown Lands Occupation Act, 1861, s. 36, of the colony of New South Wales confers on the Governor in Council power to make

PART VIII. SECT. 2.

g. Canada — Rights of province—Purchase-money of ordnance land.]—The purchase-money of ordnance land, comprised in the second sched. of 19 Vict. c. 45, but sold by the principal officers before that Act, is thereby transferred to the Provincial Govt.—*SECRETARY OF STATE FOR WAR DEPARTMENT v. GREAT WESTERN RY. CO.* (1867), 13 Gr. 503.—CAN.

h. ——— Indian lands.]—The title to land in this province reserved for the Indians is in the provincial govt., & not in the Dominion Govt.—*DORRIS v. BURK v. CORMIER* (1890), 30 N. B. R. 142.—CAN.

k. ——— Crown land claimed by Province & Dominion—Seizure of timber cut.]—If timber has been cut upon Crown Lands over which this province has exercised & continues to exercise jurisdiction it is liable to seizure, though the territory where it is cut is claimed by the Govt. of Canada as being part of that province, & license to cut timber has been granted by that govt.—*TIBBIS v. ALLAN* (1846), 3 Kerr, 280.—CAN.

l. ——— & Dominion — Immaterial when Crown right in conflict with private rights.]—To an information of intrusion filed by Her Majesty's A.-G. for the Dominion, prosecuting

for Her Majesty, deff. pleaded that the lands mentioned were not ordnance property, or property in any manner under the control of the Dominion of Canada, but, on the contrary thereof, the said lands became upon the passing of the B. N. A. Act, 1867 (c. 3), & still are the property of the Province of Ontario, in which they are situated. Issue being joined on this plea, the title at the trial was gone into, & a verdict entered for the Crown, with leave to deff. to move to enter it for him:—*Held*: the Crown was clearly entitled to recover, for, among other reasons, the plea set up no title in deff., & admitted the Crown title by stating the lands to belong to this Province; & the fact of the A.-G. for Canada prosecuting for the Crown could not show that a Dominion title was necessarily claimed.—*A.-G. v. HARRIS* (1871), 33 U. C. R. 94.—CAN.

384 l. ——— Land reserved for military purposes.]—In an action by p'ts., claiming under a patent from the Ontario Govt., & deff. claiming under a lease from the Dominion Govt. to try the right to a part of the chain reserved along the bank of the N. River & the slope between the top of the bank & the water's edge, which had been reserved out of the original survey of the township of S., & was claimed by

deffs. to have been reserved or set apart for "military" or "ordnance" purposes:—*Held*: the "chain reserve" was part of the waste lands of the Crown held for public purposes, & was a "government reserve" originally made for public purposes.—*QUEEN VICTORIA NIAGARA FALLS PARK COMRS. v. HOWARD* (1892), 23 O. R. 1; 23 A. R. 355.—CAN.

384 ll. ———.]—*A.-G. OF BRITISH COLUMBIA v. LUDGATE & A.-G. OF CANADA, DEADMAN'S ISLAND CASE* (1900), 8 B. C. R. 242; *reced.*, [1906] A. C. 552.—CAN.

m. ——— Public lands in railway belt in British Columbia.]—On Sept. 10, 1883, D. obtained a certificate of pre-emption under the British Columbia Land Act, 1875, & Land Amendment Act, 1879, of 640 acres of unsurveyed lands within the twenty mile belt south of the Canadian Pacific Ry., reserved on Nov. 29, 1882, under an agreement between the two Govts. of the Dominion & of the Province of British Columbia, & which was ratified by 47 Vict. c. 14 (B. C.). On Aug. 29, 1885, this certificate was cancelled, & on the same day a like certificate was issued to resp., & on July 31, 1889, letters patent under the great seal of British Columbia were issued to resp. By the agreement,

regulations for carrying the Act into full effect, such regulations to be published in the Gazette & laid before the Colonial Parliament. Such regulations may govern not only the form but the effect of instruments of transfer of those rights which precede the grant of Crown leases. Such regulations, to be valid, must relate to matters arising under the provisions of the Act, & not provided for in the Act, & must be in accordance with the provisions of the Act. A person who has *bond fide* paid money without notice of any other title, may afterwards, even *pendente lite*, get a legal title if he can, & may hold it though during the interval between the payment & the getting in of the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself. The Crown lands of the Colony are held by Her Majesty for distribution according to the Constitution Act, & as now directed to be disposed of under the Crown Lands Act of 1861.—*BLACKWOOD v. LONDON CHARTERED BANK OF AUSTRALIA* (1874), L. R. 5 P. C. 92; 43 L. J. P. C. 25; 30 L. T. 45; 22 W. R. 419, P. C. *Annotations*.—*Mentd.* Taylor v. Russell, [1892] A. C. 244; London & County Banking Co. v. Goddard (1897), 76 L. T. 277.

387. — — — **Sale of—Where land temporarily reserved for sale.**—Under the provisions of the Acts relating to Crown lands in New South Wales, it is not competent for the Governor with the advice of his Council to sell by appraisalment to the holder, improved land which has been temporarily reserved from sale, before such reservation had been revoked.

But where an application to purchase has been made before such revocation & the sale is not completed till after the revocation, it is good, even though there was an application for a conditional purchase by another person before the contract of sale was complete.—*RICKETSON v. BARBOUR*, [1893] A. C. 194; 62 L. J. P. C. 55; 68 L. T. 543; 1 R. 346, P. C.

Annotation.—*Mentd.* Abbott v. Lands Minister (1895), 11 R. 466.

388. — — — **Reservation of minerals.]**

ratified by 47 Vict. c. 6 (D.), it was also agreed that three & a half million additional acres in Peace River District should be conveyed to the Dominion Govt. in satisfaction of the right of the Dominion under the terms of union to have made good to it, from public lands contiguous to the railway belt, the quantity of land that might at the date of the conveyance be held under pre-emption right or by Crown grant:—*Held*: the land in question was exempt from the statutory conveyance to the Dominion Govt., & upon the pre-emption right granted to D. being subsequently abandoned or cancelled, the lands became the property of the Crown in right of the Province, & not in right of the Dominion.—*R. v. DEMERS* (1893), 22 S. C. R. 482.—*CAN.*

n. — — — — — **].—Semble**: letters patent for public lands situated within the railway belt in British Columbia should issue under the great seal of Canada & not under the great seal of British Columbia.—*R. v. FARWELL* (1893), 8 Exch. C. R. 271.—*CAN.*

c. — — — — — **Bed of navigable river.]**—The title to the soil in the beds of navigable rivers is in the Crown in right of the Province, not in right of the Dominion.—*R. v. MOSS* (1896), 26 S. C. R. 322.—*CAN.*

p. — — — — — **].—CHAURET v. PILON** (1907), 3 E. L. R. 9.—*CAN.*

q. — — — **Quebec—Implied reservations**

in Crown grants.—*LEAMY v. R.* (1915), 15 Exch. C. R. 189.—*CAN.*

r. Ordinance lands—Chain reserve along Niagara River.]—The "chain reserve" along the bank of the Niagara river, & the slope between the top of the bank & the water's edge, were not originally set apart for military or ordinance purposes, & on the Confederation did not pass to the Dominion Government as "Ordinance Lands," but remained part of the public domain of the Province of Ontario.—*QUEEN VICTORIA NIAGARA FALLS PARK COMRA. v. HOWARD* (1892), 23 O. R. 1; 23 A. R. 355.—*CAN.*

s. Newfoundland—Building erected on Crown land under revocable licence from Governor—Right of Crown to remove on notice of revocation.]—*HOYLES v. BLAND* (1819), 1 Nfld. L. R. 160.—*NFLD.*

t. — — — **Crown's claim to ship's room.]**—Under the statutes for regulating the fishery of Newfoundland & taking away the public use of certain ships' rooms in the town of St. John's in that island, the Crown is not entitled to claim a piece of ground formerly used as a ships' room, against such a possession as would have been a bar to the claim of the Crown if the land had not been clothed with that character.—*SIMMS (A.-G. OF NEWFOUNDLAND) v. CUDDING* (1836), 2 Nfld. L. R. 3.—*NFLD.*

u. Lease of Crown land—Withdrawal

—The Commonwealth having in 1915 acquired from the resps. fifty-six acres of land in New South Wales under the Lands Acquisition Act, 1906 (Com.), contended that the compensation payable should not include any sum in respect of limestone contained in the land. The land was part of a plot for which the resps. predecessor in title had applied under the Crown Lands Alienation Act, 1861 (N. S. W.), & prior to 1884 had been declared the conditional purchaser. That Act provided for a grant in fee simple after three years from the sale, reserving any minerals which the land might contain; minerals were not defined in the Act. The Crown Lands Act, 1884 (N. S. W.), repealed the Act of 1861, but preserved rights acquired thereunder. It provided that Crown grants should reserve "all minerals," which it defined so as not to include limestone. In 1886 a grant of the plot was made which recited that the grantee claimed as conditional purchaser under the Act of 1861; the grant reserved "all minerals"; it also made certain reservations provided for by the Act of 1884 but not by that of 1861. The Mining Act, 1906 (N. S. W.), provided by s. 46, sub-s. 2, that if a Crown grant reserved to the Crown "all minerals" the land should be open to public mining under that Act for "all minerals." The Act defined "minerals" as including any substance which might be declared by Proclamation to be a mineral within the meaning of the Act. By a Proclamation made in 1907 limestone was declared so to be:—*Held*: the grant of 1886 should be construed as having been made under the Act of 1884, & consequently it did not reserve the limestone to the Crown.—*AUSTRALIA COMMONWEALTH v. HAZELDELL, LTD.*, [1921] 2 A. C. 373; 90 L. J. P. C. 226, P. C.

389. — — — **Notification of non-renewal of licence—Not ultra vires the Crown.]**—An agreement by the govt. that in consideration of a licensee of land paying licence fees as demanded which had been refused because of a dispute as to a new appraisalment a notification to the effect that the licences had not been renewed owing to non-payment thereof should be revoked & that

of land leased—By proclamation—Whether ultra vires.]—A lease of Crown land, which purported to be an improvement lease, was in 1902, issued to ptfr. The lease was expressed to be for "about twenty years from the date of execution to terminate July 27, 1923," but contained a provision that the Governor might at any time & from time to time after the expiration of ten years withdraw the whole or any part of the land for the purposes of settlement without compensation except for the lessor's interest in improvements on the land so withdrawn; & also that upon such withdrawal of any land a reduction of the rent proportionate to the area withdrawn should be made. In 1913 the Governor by proclamation withdrew the whole of the land. Ptfr. having brought a suit asking for a declaration that the power of withdrawal contained in the lease was *ultra vires* & contrary to the provisions of the Crown Lands Act:—*Held*: ptfr. was not entitled to treat the lease as being free from the provisions as to withdrawal, & therefore, was not entitled to the declaration asked.—*STEWART v. WILLIAMS* (1914), 15 S. R. N. S. W. 4; 31 N. S. W. N. N. 108.—*AUS.*

b. Depasturing stock—Whether Crown lands—Public Works Act, 1900—Crown Lands Act, 1884, s. 133.]—On a charge under sect. 133 of the 1884 Act, of unlawfully occupying Crown lands by depasturing stock thereon, the evidence showed that one of deft.'s

Sect. 2.—Crown lands. Part IX. Sects. 1, 2 & 3:
Sub-sect. 1.]

the licensee should quietly enjoy his holding is not *ultra vires* the Crown as being contrary to the New South Wales Crown Lands Acts: & on breach thereof by the govt. an action will lie.—**WILLIAMS v. O'KEEFE**, [1910] A. C. 186; 79 L. J. P. C. 53; 101 L. T. 762; 26 T. L. R. 144, P. C.

390. — Improvement lease—Extension of unexpired term.]—There is no power under the Crown Lands Act, 1895 (N. S. W.), s. 26, to grant to the holder of an improvement lease, granted under that sect. an extension of his term from the date of the unexpired term of the existing lease. Sect. 44 of that Act, however, applies to an extension so granted, & it is consequently not void, but voidable; it can only be declared void by the procedure provided by sect. 44, & an information for a declaration that it is void cannot be maintained.—**BULL v. A.-G. FOR NEW SOUTH WALES**, [1916] 2 A. C. 564; 85 L. J. P. C. 217; 115 L. T. 561.

391. Nigeria—Land held by White Cap Chief—Radical title in Crown—Usufructuary title in the chief.]—The radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of which he is the head. That usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants must be regarded as having been introduced mainly, if not exclusively, for conveyancing purposes.

Public Lands Ordinance, 1903 (Lagos), s. 23, provides that the decision of the Supreme Ct. respecting any compensation shall be final & conclusive:—**Held**: this section did not preclude the prerogative of the Crown to give special leave to appeal.—**AMODU TJANI v. SOUTHERN NIGERIA (SECRETARY)**, [1921] 2 A. C. 399; 90 L. J. P. C. 236, P. C.

392. Southern Rhodesia—Administration by chartered company—Unalienated land.]—**Re SOUTHERN RHODESIA**, No. 7, *ante*.

Part IX.—Judicial Committee of the Privy Council.

SECT. 1.—IN GENERAL.

Nature & constitution of.]—**See** COURTS, Vol. XVI., p. 134, Nos. 321–323.

Jurisdiction generally.]—**See** COURTS, Vol. XVI., p. 134, Nos. 324–338.

Appeals in Admiralty matters.]—**See** ADMIRALTY, Vol. I., pp. 236–241.

Appeals in prize cases.]—**See** PRIZE LAW & JURISDICTION.

Appeals in ecclesiastical matters.]—**See** Part IV., *ante*; ECCLESIASTICAL LAW.

Power to retain suit on appeal.]—**See** COURTS, Vol. XVI., p. 134, No. 329; p. 152, Nos. 520–522.

Jurisdiction as to copyright.]—**See** Copyright Act, 1911 (c. 46), s. 4.

Jurisdiction as to schemes for endowed schools.]—**See** Endowed Schools Acts, 1869 (c. 56), s. 39; 1873 (c. 87), s. 14, & generally, EDUCATION.

Appeals as to costs.]—**See** COURTS, Vol. XVI., pp. 135–136, Nos. 339–346.

Practice & procedure generally.]—**See** COURTS, Vol. XVI., p. 137 *et seq.*

SECT. 2.—FROM WHAT COURTS APPEALS ENTERTAINED.

393. Courts acting in judicial character—Not confirmation of award of government agent—By

horses was found on the land, & it was proved that deft. knew of that fact & that he had been previously warned, without effect, to remove him; & it was shown that the land in question was land which had been resumed under 1900 Act, & vested in the Minister for Works:—**Held**: the land was not "Crown Land" or "land granted, reserved, or dedicated for public purposes," within the meaning of 1884 Act, s. 133.—**Ex p. COLLINS** (1914), 14 S. R. N. S. W. 31; 31 N. S. W. W. N. 25.—**AUS.**

c. Reservation in Crown Grants.]—A reservation of a Crown grant of "a road of 100 feet on the banks" is not void for uncertainty, & must be construed as a reservation of a right to make a road 100 feet wide anywhere along the waterside. Such reserva-

tion is not within the purview of the Nullum Tempus Act; *quare*, whether the Act is in force in the Colony, whether the existence of such reservation in land under contract for sale, is a matter of compensation is a question for the Master. A lessee with option of purchase, so soon as he has exercised the option, is, as regards specific performance, in the position of an ordinary purchaser.—**BURNS v. ALLEN** (1889), 10 N. S. W. Eq. 218.—**AUS.**

d. Crown Lands Consolidation Act, 1913—Contract to erect scrub fence—Whether void.]—Defts. were in possession of a Crown lease on behalf of a soldier on active service, but had no title themselves. By a lease in general terms they let to plffs. for three months,

Governor-in-Council—Without special reference.]

—The Govt. agent at Surat made an award, which award was confirmed by the Governor in Council. Upon appln. by a claimant dissatisfied with the award to the Judicial Committee, for leave to appeal from the Governor in Council's confirmation of the award:—**Held**: the award was not such a judicial act as to come within the operation of Judicial Committee Act, 1833 (c. 41), s. 3, or Judicial Committee Act, 1844 (c. 69), & could not be entertained by the Judicial Committee without a special reference to them by the Crown, under sect. 4 of the former statute.—**Re SURAT (NAWAB)** (1854), 9 Moo. P. C. C. 88; 5 Moo. Ind. App. 499; 14 E. R. 231, P. C.

394. — Not where acting as tribunal to try election petitions—Special jurisdiction delegated by colonial legislatures.]—Petitioner having been declared duly elected a member to represent the electoral district of Montmanier, in the Legislative Assembly of the Province of Quebec, his election was afterwards, on petn., declared null & void by judgment of the Superior Ct., under Quebec Controverted Elections Act, 1875. He then applied for special leave to appeal to Her Majesty in Council:—**Held**: such appln. must be refused. Although the prerogative of the Crown could not be taken away except by express words, & sect. 20 of above Act providing that such judgment should not be susceptible of appeal did not mention either

a condition of such lease being that defts. should erect a scrub fence on portion of the boundary. Defts. obtained the Minister's permission to agist plff.'s stock for the period of the lease, & plff. put his stock on the land & paid rent; but deft. did not erect the fence, & plff. sued to recover damages for stock which in consequence strayed & were lost:—**Held**: defts. having no title to the land, their contract to erect a fence thereon was void under par. 254 of the above Act, which provides that any person in the occupation of Crown lands without a title under the Crown Lands Act, who erects any building or other structure thereon shall be subject to a penalty.—**JOHNS v. CLARKE** (1919), 19 N. S. W. S. C. R. 378; 36 N. S. W. W. N. 149.—**AUS.**

the Crown or its prerogative, yet the fair construction of the above Act & the previous legislation was, that it was the intention of the Legislature, under that Act, which was assented to by the Crown, to create a tribunal for the purpose of trying election petns. in a manner which should make its decision final for all purposes, & should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative.—*THEBERGE v. LAUDRY* (1876), 2 App. Cas. 102; 46 L. J. P. C. 1; 35 L. T. 640; 25 W. R. 216, P. C.

Annotations.—*Consd. Cushing v. Dupuy* (1880), 5 App. Cas. 409. *Folld. Kennedy v. Purcell* (1888), 59 L. T. 279. *Apld. Moses v. Parker, Ex p. Moses*, [1896] A. C. 245. *Distd. Re Wi Matua's Will*, [1908] A. C. 448. *Consd. Canadian Pacific Ry. v. Toronto Corp'n. & Grand Trunk Ry. of Canada*, [1911] A. C. 461.

395. — Not where Supreme Court acting under special reference—Under agreement between parties.—Where the Supreme Ct. of a colony has acted under a special reference made to it, under an agreement between the parties, an appeal does not lie to the Queen in Council.—*A.-G. of NOVA SCOTIA v. GREGORY* (1886), 11 App. Cas. 229; 55 L. J. P. C. 40; 55 L. T. 270, P. C.

396. — Not where court directed by statute to be bound by equity & good conscience—& not bound by strict rules of law or equity.—Where it is provided by statute that a ct. is to be guided by equity & good conscience only & not bound by the strict rules of law or equity in any case or by any technicalities or legal forms whatever the decision of the ct. is not a judicial decision, & cannot be made the subject of appeal or give occasion for the exercise of Her Majesty's prerogative of granting appeals from cts. of justice.—*MOSES v. PARKER, Ex p. MOSES*, [1896] A. C. 245; 65 L. J. P. C. 18; 74 L. T. 112; 12 T. L. R. 254, P. C.

Annotation.—*Refd. Canadian Pacific Ry. v. Toronto Corp'n. & Grand Trunk Ry. of Canada*, [1911] A. C. 461.

397. — Not Commission appointed by Viceroy of India.—Special leave to appeal from the conviction of petitioner of a criminal offence by a Commission appointed by the Viceroy which was held to be not in any sense a ct. from which an appeal would lie, refused.—*MADHAVA SINGH (MAHARAJAH) v. SECRETARY OF STATE FOR INDIA IN COUNCIL* (1904), L. R. 31 Ind. App. 239, P. C.

398. — Not court of political agent.—The jurisdiction exercised by the ct. of the political agent & of the Governor of Bombay in Council is political & not judicial in character, & no appeal lies therefore to the King in Council.—*HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAMAL*, [1906] A. C. 212; L. R. 33 Ind. App. 1; 22 T. L. R. 208, P. C.

Indian courts.—*See* Sect. 8, sub-sect. 3, *post*.

SECT. 3.—JURISDICTION.

SUB-SECT. 1.—IN GENERAL.

399. Crown prerogative to review decisions—Of all colonial courts.—The court doubted much whether such sequestration should not be directed by the King in Council, where alone an appeal lies from the decrees in the plantations (IORD MACCLESFIELD, C.).—*FRYER v. BERNARD* (1724), 2 P. Wms. 261; 24 E. R. 722, L. C.

Annotation.—*Mentd. Portarlington v. Soulby* (1834), 3 My. & K. 104.

400. — Civil & criminal proceedings.—*R. v. JOYKISSEN MOOKERJEE*, No. 535, *post*.

401. — — — — —.]—The Crown, by virtue of its prerogative, has authority to review all the decisions of all the colonial cts., whether the proceedings be of a civil or of a criminal character, unless that authority has been parted with. But it is only in very peculiar circumstances, such as where the rights of the Crown are concerned, & involving questions of great importance, & where the proceedings are substantially more of a civil than of a criminal character, that appeals can be allowed in criminal proceedings.—*FALKLAND ISLANDS Co. v. R.* (1863), 1 Moo. P. C. C. N. S. 299; 9 L. T. 103; 12 W. R. 220; 9 Cox, C. C. 351; 15 E. R. 713, P. C.; *subsequent proceedings* (1864), 2 Moo. P. C. C. N. S. 266, P. C.

Annotations.—*Consd. R. v. Bertrand* (1867), L. R. 1 P. C. 520; *Re Dillet* (1887), 12 App. Cas. 459; *Arnold v. King-Emperor*, [1914] A. C. 644. *Refd. Levien v. R.* (1867), L. R. 1 P. C. 536.

402. — — — — —.]—It is the inherent prerogative right, & on all proper occasions, the duty of the Queen in Council to exercise an appellate jurisdiction in all cases, criminal as well as civil, arising in the colonies, from which an appeal lies, & where, either by the terms of a Charter, or Statute, the power of the Crown, has not been parted with, with a view not only to ensure, as far as may be, the due administration of justice in an individual case, but also to preserve generally the due course of procedure. The exercise of this branch of the prerogative in criminal cases is to be cautiously admitted, & is regulated by consideration of circumstances & consequences. Leave to appeal will only be granted in special circumstances, such as where a case raises questions of great & general importance in the administration of justice.—*R. v. BERTRAND* (1867), L. R. 1 P. C. 520; 4 Moo. P. C. C. N. S. 460; 16 L. T. 752; 31 J. P. 531; 10 Cox, C. C. 618; 16 E. R. 391; *sub nom. A.-G. of NEW SOUTH WALES v. BERTRAND*, 35 L. J. P. C. 51; 16 W. R. 9, P. C.

Annotations.—*Apld. R. v. Murphy* (1869), L. R. 2 P. C. 535. *Refd. R. v. Murphy* (1868), L. R. 2 P. C. 35; *Ibrahim v. R.*, [1914] A. C. 599. *Mentd. R. v. Duncan* (1881), 7 Q. B. D. 198; *Re Guerin* (1888), 58 L. J. M. C. 42; *Ex p. Bottomley*, [1909] 2 K. B. 14.

403. Necessity for court below to give judgment.]—The cts. in the islands of Jersey subject to the Crown cannot transmit a cause to the King in Council without giving any judgment in it.—*MAGOONS & PREMANEE v. DUMARESCUE* (1726), 2 Ld. Raym. 1448; 92 E. R. 442, P. C.

404. Effect of granting appeal.]—R. v. JOYKISSEN MOOKERJEE, No. 535, *post*.

405. Whether bound by own previous decisions—Different parties—Similar circumstances.]—A previous decision of the Judicial Committee of the Privy Council between other parties, & an Order of the Sovereign in Council thereon, is not necessarily conclusive in all similar cases subsequently coming before that tribunal.—*RIDSDALE v. CLIFTON* (1877), 2 P. D. 276; 46 L. J. P. C. 27; 36 L. T. 865; 42 J. P. 148, P. C.; *varying S. C. sub nom. CLIFTON v. RIDSDALE* (1876), 1 P. D. 316.

Annotations.—*Consd. Tooth v. Power*, [1891] A. C. 284. *Refd. Read v. Lincoln Bp.*, [1892] A. C. 644. *Mentd. Combe v. Edwards* (1877), 2 P. D. 354; *Howard v. Bodington* (1877), 2 P. D. 203; *Hudson v. Tooth* (1877), 2 P. D. 125; *Hughes v. Edwards* (1877), 2 P. D. 361; *Sergeant v. Dale* (1879), 43 J. P. 220; *Re St. Lawrence, Pittington* (1880), 5 P. D. 131; *Combe v. Dela Bere* (1881), 6 P. D. 157; *Heywood v. Manchester Bp.* (1884), 12 Q. B. D. 404; *The Vera Cruz* (No. 2) (1884), 9 P. D. 96; *R. v. London Bp.* (1889), 23 Q. B. D. 414; *St. v. London Bp. Leighton's Case*, [1891] 2 Q. B. 48; *St. John the Baptist, Timberhill (Vicar, etc.) v. St. John the Baptist, Timberhill (Rectors, etc.)*, [1895] P. 71; *St. John, Fendlebury (Vicar, etc.) v. St. John, Fendlebury (Parishioners)*, [1895] P. 178; *Barham*,

Sect. 3.—Jurisdiction: Sub-sects. 1, 2, 3 & 4.]

Suffolk (Rector) v. Barham, Suffolk (Parishioners), [1898] P. 256; Great Bardfield (Vicar & Churchwardens) v. All Having Interest, [1897] P. 185; Richmond (Vicar) & St. Matthias, Richmond (Chapelwardens) v. All Persons Having Interest, [1897] P. 70; Re Robinson, Wright v. Tugwell, [1897] 1 Ch. 85; Re St. Mark's, Marylebone Rd., St. Mark's (Vicar) v. St. Mark's (Parishioners), [1898] P. 114; Davey v. Hinde, [1901] P. 95; Re St. Anselm, Pinner, [1901] P. 202; Davey v. Hinde, [1903] P. 221; Pelgton (Vicar & Churchwardens) v. All Having Interest, [1905] P. 111; Re Christ Church, Ealing, [1906] P. 289; Markham v. Shirebrook Overseers, [1906] P. 239; St. John the Evangelist, Clevedon (Vicar, etc.) v. All Having Interest, [1909] P. 6; St. Paul, Bow Common (Vicar, etc.) v. St. Paul, Bow Common (Inhabitants), [1909] P. 245; St. Paul, Bow Common (1912), 28 T. L. R. 584; Fowke v. Berington, [1914] 2 Ch. 308; Re St. Paul's, Carlisle, [1919] P. 134; Re Tenbury Parish Church (1919), 36 T. L. R. 188; Gore-Booth v. Manchester Bp., [1920] 2 K. B. 412; Re St. Luke's, Southport (1920), 36 T. L. R. 733.

406. — Given *ex parte*.]—A decision of the Judicial Committee given *ex parte* does not preclude the ct. in a subsequent case, from examining the reasons upon which it was arrived at, & if they should find themselves forced to dissent from those reasons, from deciding upon their own view of the law.—TOOTH v. POWER, [1891] A. C. 284; 60 L. J. P. C. 39; 64 L. T. 698; 7 T. L. R. 495, P. C.

SUB-SECT. 2.—CONDUCT AND POWERS OF COLONIAL JUDGES AND OFFICERS.

407. Conduct of Chief Justice—Altering practice of court.]—*Re WELLS*, No. 207, *ante*.

408. — Intemperate & illegal conduct — Effect of lapse of time in making complaint.]—*Re GRENADA (REPRESENTATIVES, ETC.) & SANDERSON*, No. 206, *ante*.

409. Removal of judge from office—By Governor & Council.]—*MONTAGU v. VAN DIEMAN'S LAND (LIFUT.-GOV.)*, No. 48, *ante*.

410. — — —.]—*CLOETE v. R.*, No. 205, *ante*.
411. Refusal by bailiff to admit advocate to practise—Number of advocates limited by legal custom.]—*D'ALLAIN v. LE BRETON*, No. 681, *post*.

SUB-SECT. 3.—PUNISHMENT FOR CONTEMPT OF COURT.

Contempt of court generally, *see* CONTEMPT OF COURT, ATTACHMENT & COMMITTAL, Vol. XVI.

412. Whether appeal entertained—Practitioner suspended or struck off rolls.]—*Re ANTIGUA JJ.*, No. 219, *ante*.

413. — — —.]—An order of the Recorder's Ct. in the colony of Sierra Leone, disbarring & striking off from the rolls a practitioner of that ct., for alleged contumelious conduct, on appeal reversed & rescinded.

Semble: a fine imposed by a Ct. of Record for contempt of ct. cannot be remitted by this ct. on appeal.—*SMITH v. SIERRA LEONE JJ.* (1841), 3 Moo. P. C. C. 361; 13 E. R. 147, P. C.

Annotations:—*Fold. Itany v. Sierra Leone JJ.* (1853), 8 Moo. P. C. C. 47. *Consd. McDermott v. British Guiana Judges* (1868), L. R. 2 P. C. 341. *Reid. Re Wallace* (1866), L. R. 1 P. C. 283.

414. — — —.]—Two appeals against orders suspending barristers from practising in the ct. for six months:—*Held*: the orders should never have been made & the ct. would advise Her Majesty to reverse them.—*Re DOWNIE, Re ARRIN-*

DELL (1841), 3 Moo. P. C. C. 414; 13 E. R. 168, P. C.

Annotations:—*Reid. Re Wallace* (1866), L. R. 1 P. C. 283; *McDermott v. British Guiana Judges* (1868), L. R. 2 P. C. 341.

415. — — —.]—Two orders made by the judges at Sierra Leone, striking a practitioner of the cts. off the rolls, for alleged misrepresentation, contempt & misconduct:—*Held*: to have been improperly made, & ordered to be discharged, & applt. restored to the rolls.—*SMITH v. SIERRA LEONE JJ.* (1848), 7 Moo. P. C. C. 174; 13 E. R. 846 P. C.

Annotation:—*Reid. Re Wallace* (1866), L. R. 1 P. C. 283.

416. — — — No time allowed to prepare defence.]—An order *nisi* for striking an attorney & practitioner of the Ct. of Newfoundland off the rolls of that ct., unless cause to the contrary should be shown in four days, made absolute upon no cause being shown, notwithstanding an application made by him for enlargement of time to enable him to prepare his defence, reversed by the Judicial Committee as being irregularly & improperly made by the ct.—*EMERSON v. NEWFOUNDLAND JUDGES* (1854), 8 Moo. P. C. C. 157; 14 E. R. 60, P. C.

Annotation:—*Consd. Newton v. Judges of the High Court, North-Western Provinces* (1871), L. R. 4 P. C. 18.

417. — — —.]—*BUNNY v. NEW ZEALAND JUDGES*, No. 661, *post*.

418. — — — Penalty not appropriate to offence.]—An Order *nisi* for striking an attorney & barrister of the Supreme Ct. of Nova Scotia from practising in that ct., for having addressed a letter to the Chief Justice, reflecting on the judge & the administration of justice generally in the ct., discharged by the Judicial Committee, as it substituted a penalty & mode of punishment which was not the appropriate & fitting punishment for the offence.—*Re WALLACE* (1866), L. R. 1 P. C. 283; 4 Moo. P. C. C. N. S. 140; 16 E. R. 269; *sub nom. WALLACE v. NOVA SCOTIA JUDGES*, 36 L. J. P. C. 9; 15 W. R. 533, P. C.

Annotation:—*Distd. Re Sarbadhary* (1906), 95 L. T. 894.

419. — — —.]—Two orders of the High Ct. of the North-Western Provinces, the one being an order *nisi* calling on applt., a barrister & advocate practising in that ct., to show cause why he should not be suspended from the practice of his profession as an advocate of that ct., & the other order declaring him guilty of gross professional misconduct, & suspending him from practice for five years, on appeal, as to the rule on which the first order was made discharged, & the second order reversed; the Judicial Committee being of opinion, that, though applt. had been guilty of a grave irregularity & deserving of censure, yet the facts proved did not amount to that *mala praxis* on which the High Ct., having regard to the position & functions of an advocate in the North-Western Provinces, could fairly found any proceeding of a penal character.—*NEWTON v. NORTH-WESTERN PROVINCES (HIGH COURT JUDGES)* (1871), L. R. 4 P. C. 18; 8 Moo. P. C. C. N. S. 202; 14 Moo. Ind. App. 267; 17 E. R. 288, P. C.

420. — — — Professional misconduct — Reasonable cause for suspension.]—A High Ct. of Judicature established in India by letters patent had power "to approve, admit, & enrol such . . . advocates . . . as to the said High Ct. shall seem meet," & further, "to remove or to suspend from practice on reasonable cause the said advocates":—*Held*: the ct. had power to suspend from practice a member of the English Bar who had been admitted as an advocate of the ct.; & the

fact that an advocate had written & published, in a periodical of which he was editor, an article which was a libel reflecting on the judges of the High Ct. in their official capacity, though professing to be a vindication of his own professional conduct, amounted to a contempt of ct. which was a reasonable cause for suspending him from practice.—*Re SARBADHICARY* (1906), 95 L. T. 894; 23 T. L. R. 180; 51 Sol. Jo. 144, P. C.

421. — Where no contempt committed.]—By three orders of the Supreme Ct. of Sierra Leone applt. was fined for contempt of ct. & forgery & his name was removed from the roll of barristers & solicitors of the ct.:—*Held*: these orders must be reversed & the fines returned. Procurement of a warrant for arrest from a criminal ct., unless tainted by fraud, is not a contempt of the civil ct. which had previously refused to grant it.—*Re TAYLOR*, [1912] A. C. 347; 81 L. J. P. C. 169; 105 L. T. 973; 28 T. L. R. 204, P. C.

422. — Imprisonment—Where appeal pending in suit.]—This ct. has no jurisdiction to direct the release of a party imprisoned for a contempt of the ct. below, pending an appeal respecting the merits of the suit.—*HUGHES v. PORRAL* (1842), 4 Moo. P. C. C. 41; 13 E. R. 216.

423. — Order of Court of Record.]—The judges of the Supreme Ct. of British Guiana committed the publisher of a newspaper in the colony to prison for a contempt of ct., alleged to have been committed by the publication of certain libellous matter in newspaper articles. On appeal to the Judicial Committee against the order of the colonial judges:—*Held*: the Supreme Ct. of Civil Justice in British Guiana was a Ct. of Record; as such it had power to commit for that particular contempt; & leave to appeal ought not to have been granted.—*MCDERMOTT v. BRITISH GUIANA JUDGES* (1868), L. R. 2 P. C. 341; 5 Moo. P. C. C. N. S. 466; 38 L. J. P. C. 1; 20 L. T. 47; 16 E. R. 590; *sub nom. Re M'DERMOTT*, 17 W. R. 352, P. C.

424. —]—The High Ct. has power to punish summarily by imprisonment contempt of ct. committed by the publication of a libel out of ct. when the ct. is not sitting.

Such a case is not a proper one for an appeal to Her Majesty.—*SURENDRANATH BANERJEA v. BENGAL HIGH COURT CHIEF JUSTICE & JUDGES* (1883), L. R. 10 Ind. App. 171, P. C.

425. — Fine—Imposed by Court of Record.]—*SMITH v. SIERRA LEONE JJ.*, No. 413, *ante*.

426. —]—The Judicial Committee have no jurisdiction to entertain an appeal from orders made by a Ct. of Record in the Colonies, inflicting fines upon a practitioner for contempts of ct.—*RAINY v. SIERRA LEONE JJ.* (1853), 8 Moo. P. C. C. 47; 14 E. R. 19, P. C.

Annotations:—Consd. M'Dermott v. British Guiana Judges (1868), L. R. 2 P. C. 341. *Refd. Re Ramsay* (1870), L. R. 3 P. C. 427.

427. — Where no contempt committed.]—A barrister engaged before the Supreme Ct. at Hong Kong was, without notice of an alleged contempt, or rule to show cause, & without being heard in defence, by an Order of that ct., fined & adjudged to have been guilty of several contempts of ct. in disrespectfully addressing the Chief Justice while conducting a cause. Such Order, upon a reference by the Crown to the Judicial Committee, under Judicial Committee Act, 1833 (c. 41), s. 4, set aside, & the fine ordered to be remitted on the grounds, (1) that the Order was bad, inasmuch as the offences charged were not of themselves such contempts of ct. as legally constituted an offence; (2) no distinct charge

of the several alleged offences was stated, & no opportunity given to the party accused of being heard, before passing sentence.—*Re POLLARD* (1868), L. R. 2 P. C. 106; 5 Moo. P. C. C. N. S. 111; 16 E. R. 457, P. C.

Annotations:—As to (2) *Folld. Chang Hang Kiu v. Piggott, Re Lai Hing Firm*, [1909] A. C. 312. *Generally, Mentd. Cox v. Hakes* (1890), 15 App. Cas. 506.

428. —]—*Qu.*: whether an appeal lies to the Queen in Council against a judgment of the Ct. of Queen's Bench in Lower Canada quashing a writ of error against an Order of the Ct. of Queen's Bench on the Crown side, fining & ordering an attachment against a counsel for an alleged contempt of ct.

Semble: where a fine is imposed, the remedy is to petition the Crown for a reference to the Judicial Committee under Judicial Committee Act, 1833 (c. 41), s. 4.—*Re RAMSAY* (1870), L. R. 3 P. C. 427; 7 Moo. P. C. C. M. S. 263; 17 E. R. 101, P. C.

429. — Where party not heard in self-defence.]—*Re POLLARD*, No. 427, *ante*.

430. —]—Appls., having been summarily committed to prison by the Chief Justice under Hong Kong Supreme Court Ordinance 3 of 1873, s. 31, for wilful & corrupt perjury before the Bankruptcy Ct., moved unsuccessfully for a discharge of the order on the grounds that they had not been informed by the Chief Justice what statements made by them constituted the perjury & that they had had no opportunity of showing cause before sentence:—*Held*: (1) the Ordinance did not contemplate the accusation being formulated in a series of specific allegations of perjury & its gist had been made sufficiently clear; (2) as the Ordinance did not dispense with giving appls. an opportunity before sentence of explaining or correcting misapprehensions of their statements, it was essential that it should be accorded to them.—*CHANG HANG KIU v. PIGGOTT, Re LAI HING FIRM*, [1909] A. C. 312; 100 L. T. 310; 21 Cox, C. C. 778; *sub nom. Re LAI HING FIRM, Ex p. CHANG HANG KIU*, 78 L. J. P. C. 89, P. C.

Publication of scandalous matter after adjudication.]—*See CONTEMPT OF COURT, ATTACHMENT & COMMITTAL*, Vol. XVI., p. 20, No. 152.

SUB-SECT. 4.—LIMITATIONS OF JURISDICTION.

431. No power to issue mandatory orders—To colonial judge—To enter up judgment.]—The Judicial Committee of the Privy Council have no power under their general jurisdiction, as a Ct. of Error, to issue an order in the nature of a *mandamus* to the Judges of the Common Pleas of Tobago, to enter up judgment after verdict obtained on behalf of pltf. in an action of assault; though such judgment ought to have been entered up as of course.—*Re MUIR* (1839), 3 Moo. P. C. C. 150; 13 E. R. 65, P. C.

Annotations:—Folld. Re Manning's Assignees (1840), 3 Moo. P. C. C. 154. *Refd. Re Whitfield* (1845), 5 Moo. P. C. C. 157; *Colonial Bank v. Warden* (1846), 5 Moo. P. C. C. 340.

432. — On ex parte application.]—In ranking creditors under an execution sale, the ct. of British Guiana declared by definitive sentences the petitioner's constituents' claim preferential. Appeals were interposed from these sentences. Pending the appeals, the petitioner filed a petition in British Guiana, praying the ct. to proceed to judgment of *præ et concurrente*, & to award the moneys to be paid to him, *sub cautione de restituendo*: This ct. refused. The petitioner then applied *ex parte* to Her Majesty in Council, to

Sect. 3.—Jurisdiction: Sub-sects. 4 & 5. Sect. 4: Sub-sects. 1 & 2, A.]

reverse the order of refusal, & for an order upon the judges in British Guiana, directing them to entertain the petitioner's appln:—*Held*: an *ex parte* petition, under such circumstances, could not be entertained.—*Re BUTTS* (1842), 4 Moo. P. C. C. 92; 13 E. R. 236, P. C.

433. — To admit petitioner to practise at bar—Royal Court of Jersey.]—D'ALLAIN v. LE BRETON, No. 681, *post*.

434. — [Ontario.]—A member of the English Bar has no right to practise in the cts. of the Province of Ontario without having previously been admitted by the Law Society of Upper Canada. The Judicial Committee of the Privy Council have no power to issue a mandatory order.—*DE SOUZA'S PETITION* (1885), 1 T. L. R. 597, P. C.

435. Cannot consider propriety of dismissal of public servant—By governor-general of colony—Unless expressly referred by Crown—Office held during pleasure.]—The Judicial Committee have no jurisdiction to take into consideration the propriety of the dismissal of a public servant by a Governor-General of a Colony from an office held during his pleasure, unless the matter is expressly referred to them by the Crown.—*Re NEW SOUTH WALES (GOVERNOR-GENERAL), Ex p. ROBERTSON* (1858), 11 Moo. P. C. C. 288; 8 State Tr. N. S. 1065; 14 E. R. 704, P. C.

Annotation:—Folld. Re Sree Mohun Ghutuck (1870), 13 Moo. Ind. App. 343.

Jurisdiction as to colonial officers & judges.]—*See* Sub-sect. 2, *ante*.

436. Cannot order stay of sale in execution—Mortgage suit.]—Where a petitioner had obtained leave to appeal in regular form, an order granting leave to prosecute it *in forma pauperis* was made.

On petition for special leave to appeal (1) from a decree in a matrimonial separation suit, (2) in a mtge. suit, (3) from an order for execution of the last-mentioned decree:—*Held*: there being ground for appealing from the mtge. decree, the leave should be extended to both suits, which were mixed up together. The House has no jurisdiction to order a stay of sale in execution.—*QUINLAN v. CHILD, QUINLAN v. QUINLAN, Ex p. QUINLAN*, [1900] A. C. 496; 69 L. J. P. C. 85, P. C.

437. Cannot advise as to exercise of Crown's prerogative of pardon.]—The Judicial Committee is not a Ct. of Criminal Appeal, & has no power to stay the execution of a sentence. The tendering of advice to His Majesty as to the exercise of his prerogative of pardon is not within the province of the Judicial Committee, but is a matter for the Executive Government.—*BALMUKAND v. KING-EMPEROR*, [1915] A. C. 629; 84 L. J. P. C. 136; 113 L. T. 55; 24 Cox, C. C. 720, P. C.

438. Cannot inquire into policy or expediency of colonial statute—Only as to application.]—Special leave to appeal will not be granted where the question has been settled by a Colonial Legislature, the function of the Judicial Committee being the application, not the policy, of legislation.

It is not within the power or within the province of this Board to discuss or consider the policy or the expediency or wisdom of an Act, or to do anything beyond deciding whether the Act applies (*per cur.*).—*TILONKO v. A.-G. OF NATAL*, [1907] A. C. 461; 76 L. J. P. C. 105; 97 L. T. 613; 23 T. L. R. 668, P. C.

439. Cannot inquire into exercise of discretion by governor—Fair opportunity given of answering charges.]—The Protector of Immigrants made a

complaint to the acting Governor with regard to the treatment & condition of immigrants on applt.'s estate. The acting Governor thereupon made an order *ex parte* for their removal to another plantation. Applt. submitted that the order was invalid as he had had no opportunity afforded him to answer the allegations. The acting Governor having allowed applt. & his manager a fair opportunity to be heard, decided that the order as made must stand:—*Held*: the question was one for the acting Governor's decision, & as the applt. had been given a fair opportunity to answer the allegations as to the treatment & condition of the immigrants on his estate, it was no part of the duty of a ct. to review his discretion, & the appeal failed.—*DE VERTEUIL v. TRINIDAD ACTING GOVERNOR* (1918), 118 L. T. 738; 34 T. L. R. 325, P. C.

Prerogative right to hear criminal appeals—Unless limited.]—*See* Sub-sect. 1, *ante*.

How jurisdiction taken away—Necessity of express words.]—*See* Sub-sect. 5, *post*.

SUB-SECT. 5.—HOW JURISDICTION TAKEN AWAY.

Prerogative right to hear criminal appeals—Where no limitation on prerogative.]—*See* Sub-sect. 1, *ante*.

440. Only by express words.]—The subject cannot be deprived of his right to appeal by any words in the King's grant to that purpose, much less if the grant be silent in that particular.—*CHRISTIAN v. CORREN* (1716), 1 P. Wms. 329; 24 E. R. 411, P. C.

Annotations:—Reid. Parsee Murder Case, Ex p. Eduljee Byramjee, Ex p. Alloo Paroo (1847), 11 Jur. 855; *R. v. Alloo Paroo* (1847), 5 Moo. P. C. C. 296; *Re Crawford* (1849), 13 Q. B. 613. *Mentd. Re Nahon & Pariente* (1832), 2 Knapp, 66; *Plunkett v. Burlington* (1837), 1 Jur. 376.

441. —.]—*THÉBERGE v. LAUDRY*, No. 394, *ante*.

442. — Or necessary implication—Retrospective operation of statute.]—A right of appeal to a higher tribunal is a matter of substance, & not of procedure, & such a right, unless expressly or by necessary intendment, retrospectively abolished, is not taken away by subsequent legislation. Thus the right of appeal from the Supreme Ct. of a state to the King in Council, which was taken away by Australian Commonwealth Judiciary Act, 1903, but is not retrospective, still subsists in a suit pending when the Act was passed.—*COLONIAL SUGAR REFINING CO. v. IRVING*, [1905] A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513, P. C.

443. — Where decisions of court to be "final & conclusive"—Exercise of prerogative not excluded.]—*Re WI MATUA'S WILL*, No. 662, *post*.

444. Whether by Royal Grant.]—*CHRISTIAN v. CORREN*, No. 440, *ante*.

445. Whether by Colonial Act—Fixing appealable value—Special saving of rights & prerogatives of Crown.]—An Act of the Parliament of Great Britain declared, that all laws passed by the Legislature of a colony should be valid & binding within the colony, & directed that the Colonial Ct. of Appeal should be subjected to such appeal as it was previously to the passing of the Act, & also to such further & other provisions as might be made in that behalf by any Act of the Colonial Legislature. An Act having been passed by the Colonial Legislature, limiting the right of appeal to causes where the sum in dispute was not less than £500:—*Held*: a petn. for leave to appeal, in a cause where the sum was of less amount, could not

be received by the King, in Council, although there was a special saving in the Colonial Act of the rights & prerogatives of the Crown.

The King has no power to deprive the subject of any of his rights; but the King, acting with other branches of the Legislature, as one of the branches of the Legislature, has the power of depriving any of his subjects, in any of the countries under his dominion, of any of his rights (LEACH, M.R.).—*CUVILLIER v. AYLWIN* (1832), 2 Knapp, 72; 3 State Tr. N. S. App. 1280; 12 E. R. 406, P. C.

Annotations:—*Apld. R. v. Eduljee Byramjee* (1846), 5 Moo. P. C. C. 276. *Consd. R. v. Alloo Paroo* (1847), 5 Moo. P. C. C. 296; *Re Marois* (1862), 15 Moo. P. C. C. 189; *Cushing v. Dupuy* (1880), 5 App. Cas. 409. *Refd. Théberge v. Laury* (1876), 2 App. Cas. 102.

446. — Creation of special tribunal—To try election petitions.—*THEBERGE v. LAUDRY*, No. 304, *ante*.

—.]—*See* No. 442, *ante*, No. 662, *post*.

447. Waiver of right to appeal—What amounts to Agreement that rights to be ascertained by court—No stipulation giving up right of appeal.—An information by way of complaint was by consent amended by the introduction of the words that the rights, if any, of the several defts. might be ascertained & declared by decree of that Honourable Ct. There was no stipulation that the right of appeal should be given up:—*Held*: the right to appeal had not been waived.

Where it is alleged that the bringing of an appeal is contrary to agreement, the objection ought to be made when leave to appeal is applied for, or to be taken by a petn. to the Queen before the appeal comes on for hearing.—*PISANI v. A.-G. FOR GIBRALTAR* (1874), L. R. 5 P. C. 516; 30 L. T. 729; 22 W. R. 900, P. C.

Annotations:—*Mentd. Readdy v. Pendergast* (1886), 55 L. T. 767; *Moody v. Cox & Hatt* (1917), 116 L. T. 740; *Ware v. Whitlock*, [1923] 2 K. B. 418.

SECT. 4.—SPECIAL LEAVE TO APPEAL.

SUB-SECT. 1.—IN GENERAL.

Petition for leave to appeal—Generally.—*See* COURTS, Vol. XVI., p. 137, No. 352.

— **Contents of.**—*See* COURTS, Vol. XVI., p. 137, Nos. 353–356.

— **Time for.**—*See* COURTS, Vol. XVI., pp. 137, 138, Nos. 357–364.

— **Grounds for granting or refusing.**—*See* COURTS, Vol. XVI., pp. 138–140, Nos. 365–377.

— **On what terms granted.**—*See* COURTS, Vol. XVI., pp. 140–142, Nos. 378–403.

— **The Order.**—*See* COURTS, Vol. XVI., p. 142, Nos. 404, 405.

— **Rescission of.**—*See* COURTS, Vol. XVI., pp. 142–145, Nos. 406–436.

SUB-SECT. 2.—IN CIVIL PROCEEDINGS.

A. In General.

Appeals from particular Dominions & Colonies.—*See* Sect. 8, *post*.

448. General rule.—*VALIN v. LANGLOIS*, No. 111, *ante*.

449. ——.]—Their Lordships will not advise Her Majesty to admit an appeal from the Supreme Ct. of the Dominion save where the case is of gravity, involving matter of public interest or some J.—VOL. XVII.

important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance of a very substantial character.—*PRINCE v. GAGNON* (1882), 8 App. Cas. 103, P. C.

Annotations:—*Consd. Clergue v. Murray, Ex p. Clergue*, [1903] A. C. 521; *Wildley Ore Concentrator Syndicate v. Guthridge*, [1906] A. C. 548. *Refd. Montréal v. St. Sulpice de Montréal* (1889), 14 App. Cas. 660; *Canadian Pacific Ry. Co. v. Blain*, [1904] A. C. 453; *Daily Telegraph Newspaper Co. v. McLaughlin*, [1904] A. C. 776.

450. ——.]—The Dominion Legislature cannot affect the prerogative of the Crown to grant special leave to appeal, but in advising Her Majesty whether the prerogative should be exercised, the Privy Council pays attention to the expressed wishes of the colony, & will not recommend its exercise except in cases of general interest & importance, & then only when it manifestly appears that the Ct. below has erred in a matter of law.—*BANK OF NEW BRUNSWICK v. McLEOD* (1882), Cass. Dig. 2nd ed. 644.

451. — Sutor electing alternative appeal to High Court.—According to s. 71 of Revised Statutes of Canada, 1888, c. 135, there is no appeal from any judgment or order of the Supreme Ct. of Canada except by special leave of His Majesty in Council.

Where a sutor, having his choice whether to appeal to the Supreme Ct. or to His Majesty in Council, elects the former remedy, it is not the practice to give him special leave except in a very strong case.—*CLERGUE v. MURRAY, Ex p. CLERGUE*, [1903] A. C. 521; 72 L. J. P. C. 99; 89 L. T. 373, P. C.

Annotations:—*Fold. Canadian Pacific Ry. v. Blain*, [1904] A. C. 453; *Victorian Ry. Comrs. v. Brown, Ex p. Victorian Ry. Comrs.*, [1906] A. C. 381.

452. ——.]—The same considerations apply to a petition for leave to appeal from the High Ct. of Australia as to a petition for leave to appeal from the Supreme Ct. of Canada; & where an applt. has elected to appeal to the High Ct., the Judicial Committee will not entertain a petition for special leave to appeal from that Ct. unless a very special case is made out.—*VICTORIAN RAILWAY COMRS. v. BROWN, Ex p. VICTORIAN RAILWAY COMRS.*, [1906] A. C. 381; 75 L. J. P. C. 65; 95 L. T. 73; 22 T. L. R. 644, P. C.

453. ——.]—An application for special leave to appeal from the High Ct. of Australia will be treated in the same manner as an appln. for special leave to appeal from the Supreme Ct. of Canada. It will not be entertained save where the case is of gravity involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.—*DAILY TELEGRAPH NEWSPAPER Co. v. McLAUGHLIN*, [1904] A. C. 776; 73 L. J. P. C. 95; 91 L. T. 233; 20 T. L. R. 674, P. C.

Annotations:—*Refd. Victorian Ry. Comrs. v. Brown, Ex p. Victorian Ry. Comrs.*, [1906] A. C. 381. *Mentd. Molyneux v. Natal Land & Colonization Co.*, [1905] A. C. 555.

454. ——.]—It is not the practice of the Judicial Committee to grant special leave to appeal from a judgment of the Supreme Ct. of Canada where the decision depends upon the mere construction of an agreement, & does not raise either a far-reaching question of law or matters of dominant public importance.

Accordingly, special leave refused to appeal from a majority judgment of the Supreme Ct. of Canada, reversing a majority judgment of the Supreme Ct. of Ontario, Appellate Division, & restoring the

Sect. 4.—Special leave to appeal: Sub-sect. 2, A. & B. (a).]

judgment of the trial judge, the petitioner's liability depending solely upon the true construction of an agreement between the parties, as to which there had been an equal division of opinion among the judges of the cts. in Canada before which the case had been argued.—**ALBRIGHT v. HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO**, [1923] A. C. 167; 92 L. J. P. C. 80; 128 L. T. 518, P. C.

455. Both parties under misapprehension of law.—The parties having acted under a misapprehension of the law, leave was given to bring a new suit within three years.—**SRIMUT MOOTTOO VIJAYA RAGHANADHA GOWERY VALLABHA PERRIA WOODIA TAVER v. RANY ANGA MOOTTOO NATCHIAR** (1844), 3 Moo. Ind. App. 278; 18 E. R. 503.

Annotations :—**Mentd.** *Namboory Sotapaty v. Kanoo-Colanoo Pulla* (1845), 3 Moo. Ind. App. 359; *Katama Natchiar v. Schivagunga* (1863), 9 Moo. Ind. App. 543; *Srimut Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v. Katama Natchiar* (1866), 11 Moo. Ind. App. 50.

456. Appeal not provided for by statute or charter—Matrimonial cause.—The Charter of Justice of the Island of the Mauritius does not provide for appeals in matrimonial suits, yet upon petition for that purpose the Judicial Committee recommended the allowance of an appeal against a decree for the restitution of conjugal rights.—**SHIRE v. SHIRE** (1845), 5 Moo. P. C. C. 81; 13 E. R. 420.

457. —Granted to prevent denial of justice.—A bill, besides seeking to make defts. liable to account for a particular transaction, prayed for a general account. No general account, however, was asked for in the ct. below. Upon the Judicial Committee, affirming the decree of the ct. below, deciding against the liability of defts. as to the particular transaction, they refused to decree a general account, as it had not been asked for at the hearing in the cts. below.

The Charter of Justice of New South Wales of Oct. 13, 1823, made in pursuance of the powers conferred by 4 Geo. 4 (c. 96), gave a right of appeal, from the Cts. of Appeal in the Colony, to the King in Council, where the subject at issue involved the sum of £2,000 sterling. The 4 Geo. 4 (c. 96), being about to expire, Australian Courts Act, 1828 (c. 83), was passed, in which no provision was made for the continuance of the Ct. of Appeal; but power was given to His Majesty, by Charter, Orders in Council, or Letters Patent, to make rules for allowing Appeals from the Supreme Ct. of the Colony. No new Charter, Order in Council, or Letters Patent issued under this Act. In such circumstances the judges in New South Wales held that they had no jurisdiction to allow an appeal from the Supreme Ct. to Her Majesty in Council; the Judicial Committee, upon Special Petition, under their general jurisdiction, advised Her Majesty to admit such appeal.

It would operate as a very great grievance if no appeal is given to parties in the Colony of New South Wales (**LORD BROUGHAM**).—**FLINT v. WALKER** (1847), 5 Moo. P. C. C. 178; 12 Jur. 1; 13 E. R. 459, P. C.

458. — — —]—Although no power is given by the Charter of Justice, or the Act of Parliament creating the Supreme Ct. at New South Wales, to allow an appeal to the Queen in Council from that ct.; yet, to prevent a failure of justice, this ct. will, upon a special petition for that purpose, grant leave to appeal from a judgment of that ct.—**BANK OF AUSTRALASIA v. BREILLAT** (1847), 6 Moo. P. C. C. 152; 13 E. R. 642, P. C.

Annotations :—**Mentd.** *Bute v. Mason* (1849), 7 Moo. P. C. C. 1; *MacLae v. Sutherland* (1854), 3 E. & B. 1; *Lindus v. Melrose* (1858), 3 H. & N. 177.

459. — — —]—No provision by Statute or Charter being made for appeal to Her Majesty in Council from judgments of the Ct. of the Judicial Comr. of Oude, created on the annexation of that kingdom in the year 1858, the Judicial Committee, to prevent the denial of justice, admitted an appeal, under Judicial Committee Act, 1833 (c. 41).—**SALIK RAM v. AZIM ALI (BEG)** (1862), 14 Moo. P. C. C. 329; 8 Moo. Ind. App. 270; 15 E. R. 329, P. C.

460. — — —]—Upon petition, leave granted to appeal from an order of the Supreme Ct. at New South Wales, although no provision for appeal to the Queen in Council was made by the Charter of Justice or Act of Parliament, creating that ct.—**BUTE (MARCHIONESS) v. MASON, Ex p. HEARD** (1849), 7 Moo. P. C. C. 1; 13 E. R. 779.

461. —Matter of importance.—Under Art. 1178, Code of Civil Procedure, no appeal lies as of right from a judgment of the Ct. of Queen's Bench for Lower Canada in the matter of a penalty of imprisonment. Special leave of appeal granted on the ground of the importance of the question at issue.—**CARTER v. MOLSON** (1883), 8 App. Cas. 530; 52 L. J. P. C. 46; 49 L. T. 83, P. C.

Annotation :—**Mentd.** *Exchange Bank of Canada v. R.* (1886), 11 App. Cas. 157.

462. Matter of public importance—Involving constitutional rights.—**VICTORIA LEGISLATIVE ASSEMBLY (SPEAKER) v. GLASS**, No. 78, *ante*.

463. —Not decisive of general principle of law.—Where the determination of a case will not be decisive of any general principle of law, the Judicial Committee will not give special leave to appeal from an unanimous judgment of the ct. below on the ground that the questions involved are either of great importance to the parties, or calculated to attract public attention.—**DUMOULIN v. LANGTRY** (1887), 57 L. T. 317, P. C.

464. —Inferior court plainly right.—Although a case may be of substantial character, & may involve matter of great public interest, & may raise an important question of law, yet the judgment sought to be appealed from may be plainly right or unattended with sufficient doubt to justify special leave being granted.—**MONTREAL CITE v. ST. SULPICE DE MONTREAL (ECCLESIASTIQUES DU SEMINAIRE)** (1889), 14 App. Cas. 660; 59 L. J. P. C. 20; 61 L. T. 653, P. C.

Annotations :—**Consd.** *Daily Telegraph Newspaper Co. v. McLaughlin*, [1904] A. C. 776; *Willey Ore Concentrator Syndicate v. Guthridge*, [1906] A. C. 548. **Appld.** *Townsend v. Cox*, [1907] A. C. 514. **Mentd.** *Halifax City v. Nova Scotia Car Works*, [1914] A. C. 992.

465. —Exceptional circumstances.—**LE MESURIER v. LE MESURIER**, [1894] A. C. 283, P. C.

PART IX. SECT. 4, SUB-SECT. 2.—A.

456 i. Appeal not provided for by statute or charter—Matrimonial cause.—A suit for restitution of conjugal rights is not one to which any special money-value can be attached for the purposes of jurisdiction.—**Held**: no appeal lay as of right to Her Majesty in Council in such a suit.—**MOWLA NEWAZ v. SAJDUNNISSA BIBI** (1891),

I. L. R. 18 Calc. 378.—**IND.**

462 i. Matter of public importance—Involving constitutional right.—Leave to appeal to the Privy Council from the dismissal by the Ct. of Appeal of an appeal from the dismissal of an action for damages for personal injuries, refused, there being no question of public importance & no constitutional question at stake.—**TRAINSHI v.**

CANADIAN PACIFIC RY. CO., [1918] 3 W. W. R. 281.—**CAN.**

e. — — —]—Leave to appeal to the Privy Council refused upon the ground that the matter was not one of general or public importance within rule 2 (b) of the Privy Council Rules.—**MERCHANTS' ASSOC. OF NEW ZEALAND (INCORPORATED) v. R.** (1912), 32 N. Z. L. R. 637.—**N.Z.**

466. — Not if merely important to parties.]—Where on a petition of special leave to appeal from the High Ct. of Australia it appeared that the law as laid down by that ct. could not be objected to:—*Held*: the question of the appln. of that law to the particular case involving simply the construction of a document however substantial as between the parties was not one of public importance, & there was no sufficient ground shown for granting the petition.—*WILFLEY ORE CONCENTRATOR SYNDICATE, LTD. v. GUTHRIDGE (N.), LTD.*, [1906] A. C. 548; 75 L. J. P. C. 87; 95 L. T. 73; 23 R. P. C. 535, P. C.

467. — Whether Act constitutional—Act rejected by referendum pending appeal.]—*TAYLOR v. A.-G. FOR QUEENSLAND*, [1918] W. N. 85, P. C.

468. Question of legal importance.]—*FLEX-HULME SIGN CO., LTD. v. MACEY SIGN CO., LTD.* (1918), 35 R. P. C. 262, P. C.

469. — Not only affecting rights of litigants.]—*CHINNA (KHAN) v. MARKANDA KOTHAN*, [1921] W. N. 353, P. C.

470. —.]—*MACMILLAN & CO., LTD. v. COOPER* (1922), 66 Sol. Jo. 594.

471. Difference of judicial opinion—English decisions followed.]—*ROBINSON v. CANADIAN PACIFIC RY. CO.*, No. 322, ante.

472. — Small sum involved.]—Privy Council will not grant leave to appeal in a case where the judges in the cts. below differed radically on the facts, where there is not a large amount involved, & where no question is necessarily involved of general importance, viz., having regard to the small amount.—*RICHARDSON & SONS v. BEAMISH* (1915), 8 W. W. R. 109.

473. Determination of future litigation—Though doubtful whether order final or definitive sentence—Important question on face of pleadings.]—At the hearing of an appeal it appeared doubtful whether the order appealed against was a final judgment or had the effect of a definitive sentence; but it also appeared that the questions in controversy on the face of the pleadings were of much importance & that a determination of them might put an end to further litigation. Accordingly special leave to appeal was granted.—*SALISBURY GOLD MINING CO. v. HATHORN*, [1897] A. C. 268; 66 L. J. P. C. 62; 76 L. T. 212; 45 W. R. 591, P. C.

474. Change in procedure during appeal—Time for appeal.]—Petitioners, being resps. in a suit in the High Ct. of Bengal against whom a divisional bench pronounced judgment, applied for a review of such judgment, which was admitted for argument, but dismissed on the hearing. Petitioners applied for leave to appeal to Her Majesty in Council; but the High Ct. refused the application, on the ground that the time had expired within which such appeal could be granted. It appeared that the practice in respect of the time from which the limitation as to appeals ran had been changed pending the proceedings on review.

Under these circumstances, their Lordships granted special leave to appeal.—*GHOSE v. ENSUFF* (1868), 37 L. J. P. C. 16, P. C.

475. Two suits arising out of same facts—Ground for appealing in one—Extension of leave to other.]—*QUINLAN v. CHILD, QUINLAN v. QUINLAN, Ex p. QUINLAN*, No. 436, ante.

476. Leave granted on terms—Liberty to respondent to move to quash below.]—Special leave to appeal granted *ex parte*, from an Order of the Supreme Ct. at Jamaica issuing a peremptory mandamus, directing Justices of the Peace to restore a party to the office of surgeon; subject to the right of resp. to move upon a counter-petition to quash the leave given.—*HILL v. R.* (1854), 8 Moo. P. C. C. 138; 14 E. R. 53, P. C.

477. — Security for costs—Being given in England—Leave to appeal revoked by court below on insufficiency of security bond.]—*WEBSTER v. POWER* (1866), L. R. 1 P. C. 150; 3 Moo. P. C. C. N. S. 531; 16 E. R. 201, P. C.

478. — Delay in applying for dismissal of appeal—Leave to appeal unduly given by court below.]—Under Code of Civil Procedure for Lower Canada the appealable value is £500 sterling, but an appeal is also permitted in cases of less value if they be cases concerning titles to lands or tenements, annual rents, or other matters in which the rights in future of parties may be affected.

An annual rent of \$11.28c. had been sold for \$456, payable in ten equal yearly instalments, & the land was hypothecated to secure the amount. In a suit to enforce payment of certain instalments, the Ct. of Queen's Bench in Lower Canada granted leave to appeal to Her Majesty in Council:—*Held*: the case did not fall within the above description, & was not appealable.

Where leave to appeal has been unduly given the proper course is to come before the Privy Council before any expense has been incurred, & to apply for the dismissal of the appeal.

Such an appln. if delayed till the hearing will only be granted without costs, & if there be special circumstances in favour of granting special leave to appeal, an appln. for such leave will be entertained, but if it is granted fresh security for costs must be given.—*SAUVAGEAU v. GAUTHIER* (1874), L. R. 5 P. C. 494; 30 L. T. 510; 22 W. R. 667, P. C.

479. — Appellant to pay respondent's costs.]—*CANADIAN PACIFIC RY. v. ROY*, [1902] A. C. 220; 71 L. J. P. C. 51; 86 L. T. 127; 50 W. R. 415; 18 T. L. R. 200, P. C.

Annotations:—Mentl. McClelland v. Manchester Corpn. (1911), 76 J. P. 21; *Quebec Ry. Light, Heat & Power Co. v. Vandry*, [1920] A. C. 662.

B. Appealable Value.

(a) How determined.

Appeals from particular dominions & colonies.]—See Sect. 8, post.

468 i. Question of legal importance.]—The substantial question of law which must arise in order to give an appeal, is not limited to a question of law arising out of the facts as found by cts. from whose decision it is desired to appeal. A question of law arising on the evidence taken on the case is, without reference to the findings of the lower cts. sufficient to found an appeal.—*MORAN v. MITTU BIBE* (1876), 1 L. R. 2 Calc. 228.—IND.

468 ii. —.]—Substantial questions of law in the case will entitle plt. to appeal, notwithstanding that such questions might be immaterial to the

decision of the case.—*ASHGARH REZA v. HYDER REZA* (1889), 1 L. R. 16 Calc. 287.—IND.

468 iii. —.]—The rejection of an application to take additional evidence on appeal cannot be said to involve any substantial question of law so as to give the right to an appeal to the Privy Council.—*Re PREM CHAND MOONSHEE UPENDRA MOHAN GHOSE v. GOPAL CHANDRA GHOSE* (1894), 1 L. R. 21 Calc. 484.—IND.

468 iv. —.]—Where there is no point of law involved in a case there is no right of appeal to the Privy Council.—*THOMPSON v. CALCUTTA*

TRAMWAYS CO. (1894), 1 L. R. 21 Calc. 523.—IND.

479 i. Leave granted on terms—Appellant to pay respondent's costs.]—Where, though a matter of great general & public importance was involved, resp. was a private citizen not shown to be in an affluent position, the Supreme Ct. granted applt. leave to appeal direct to the Privy Council on terms which precluded him from claiming any costs against resp., & required him to pay to the extent of £200 resp.'s costs as between solr. & client.—*BOYD v. COLEY*, [1918] 37 N. Z. L. R. 671.—N.Z.

Sect. 4.—Special leave to appeal: Sub-sect. 2, B. (a).]

480. General rule.]—In estimating the appealable value, restricted by the Order in Council of the 10th of April, 1838, for regulating appeals from the Supreme & Sudder Dewanny Cts. in the East Indies to Rs. 10,000, as the amount in dispute, regard should be had to the whole matter involved in the suit, & not to the value of a fractional part of the property sought to be recovered.—*AMEENA KHATOOR (MUSSUMAT) v. RADHABENOD MISSEER* (1859), 12 Moo. P. C. C. 470; 7 Moo. Ind. App. 261; 14 E. R. 990, P. C.

481. —.]—(1) Her Majesty in Council is not precluded from entertaining a petn. to rescind leave to appeal, by the fact that leave to appeal was granted by a colonial ct. under the authority of a colonial statute; (2) in determining the question of the value of the matter in dispute, upon which the right of appeal depends, the correct course is to look at the judgment as it affects the interest of the party who is prejudiced by it, & who seeks to relieve himself from it by an appeal.—*MACFARLANE v. LECTAIRE* (1862), 15 Moo. P. C. C. 181; 8 Jur. N. S. 267; 10 W. R. 324; 15 E. R. 462, P. C.

Annotations:—As to (2) Apld. Allan v. Pratt (1888), 13 App. Cas. 780. *Generally, Reid. Re Marois* (1862), 15 Moo. P. C. C. 189; *Thöborge v. Laundry* (1876), 25 W. R. 216.

482. Value of subject-matter in dispute—Original value.]—The ct. will allow an appeal where the amount in dispute was originally of sufficient value.—*PRANNATH ROY CHOWDRY v. SURNOMOYEE (RANEE)* (1859), 7 Moo. Ind. App. 553; 8 W. R. 69; 19 E. R. 416, P. C.

483. —.]—An estate, the subject of the suit, was charged with a fixed annual quit rent of Rs. 64, which the Sudder Ct. decreed with a declaration of the right of pltf. to an enhanced rent of Rs. 822 13a.—*Held*: the value of the subject-matter in suit, in the circumstances, ought to be estimated as amounting to Rs. 10,000, & upon special petition, leave to appeal granted.—*SURE MUTTY SURNOMOYEE (RANEE) v. SUTTEES-CHUNDER ROY (MAHARAJAH)* (1860), 13 Moo. P. C. C. 470; 8 Moo. Ind. App. 165; 15 E. R. 176, P. C.

484. — Although value of suit reduced.]—The Judicial Committee of the Privy Council will

grant leave to appeal from the Sudder Dewanny Adawlut of Calcutta, where the actual or market value of the property in dispute exceeds 10,000 rupees, although the ct. below may have been unable to grant leave, owing to the suit having, without any intention to defraud the revenue laws, been valued at less than that sum.—*MOHUN LALL SOOKUL v. BEBEE DOSS* (1861), 8 Moo. Ind. App. 492; 19 E. R. 617; *sub nom.* *MOHUN LALL SOOKUL v. GOLUCK CHUNDER DUTT*, 7 Jur. N. S. 1217, P. C.

485. —.]—Special leave to appeal granted, notwithstanding that no appln. had been made for such leave to the ct. below: upon the allegation, that though the amount decreed was much under the appealable value, the original demand being necessarily limited by the jurisdiction of the ct. in which the suit was originally instituted, yet the subject-matter at issue exceed in value the appealable amount.—*MUTUSAWMY JAGAVERA YETTAPA NAIKER v. VENCATASWARA YETTA* (1865), L. R. 1 P. C. 1; 10 Moo. Ind. App. 313; 35 L. J. P. C. 37; 19 E. R. 991, P. C.

486. Amount for which defendant successfully resists decree—Addition of mesne profits.]—The measure of value for determining a pltf.'s right of appeal is the amount for which deft. has successfully resisted a decree. Mesne profits, if demanded by the plaintiff, must enter into the calculation of the appealable value.—*MOHIDEEN HADJIAR v. PITCHIEY*, [1893] A. C. 193; 62 L. J. P. C. 96, P. C.

487. Addition of interest to judgment.]—In an action for non-performance of a contract a verdict was given for £600 currency, under £500 sterling, & the Ct. of Q. B. in Canada refused leave to appeal to England on the ground that the sum was under the appealable value. Upon special petn. to Her Majesty in Council for leave to appeal, such leave was granted, (1) because by the law of Canada interest ran with the judgment, which would bring the subject-matter within the appealable value; (2) because important questions of mercantile law were raised, & an action of a similar nature was still pending, the transaction being a continuing contract.—*BOSWELL v. KILBORN* (1859), 12 Moo. P. C. C. 467; 14 E. R. 989, P. C.

Annotation:—Generally, Mendt. Re Pontreguina Fuel Co. (1862), 4 De G. F. & J. 541.

PART IX. SECT. 4, SUB-SECT. 2.—B. (a).

480 i. General rule.]—The incidental effect of a decree upon other property of the unsuccessful litigant not directly affected by the suit cannot be considered in order to make up the appealable amount to entitle him to appeal to the Privy Council.—*WAKEFIELD v. PARKER* (1869), 6 W. W. & A'B. 322.—**AUS.**

480 ii. —.]—An executor applied for leave to appeal to the Privy Council, & contended that the matter in dispute was of the value of Rs. 10,000, as required by s. 596 of the Civil Procedure Code, as it involved the right to the whole fund.—*Held*: the subject-matter of the dispute was only the income & was not of the requisite value.—*HUSENBHOY AHMEDBHOY v. AHMEDBHOY HABIBBHOY* (1901), 1 L. R. 26 Bom. 319.—**IND.**

480 iii. —.]—In an action against deft. for his proportion of insurance, the whole insurance being for £900.—*Held*: it gave the right of appeal to the Privy Council.—*ROGERSON v. SPRACKLIN* (1859), 4 Nfld. L. R. 368.—**NFLD.**

483 i. Value of subject-matter in dispute.]—On an application for leave

to appeal to the Privy Council.—*Held*: the ct. in considering the amount involved has to look at the judgment as it affects the interest of the parties who are prejudiced by it.—*GUNDAGAI MUNICIPAL DISTRICT v. NORTON* (1894), 15 N. S. W. L. R. 459.—**AUS.**

483 ii. —.]—In determining the question of the value of the amount involved, upon which the right to appeal to the Privy Council depends, the ct. will look at the judgment as it affects the parties, & where it appeared that defts. in obeying an injunction would be put to an expense of over £300 they were granted leave to appeal.—*CENTRE STAR MINING CO., LTD. v. ROSSLAND-KOOTENAY MINING CO., LTD.* (1905), 11 B. C. R. 509.—**CAN.**

483 iii. —.]—In suit for partition of joint family property amount or value of subject-matter for purposes of sect. 110 Civil Procedure Code of 1908 is value of share which appt. claims & not value of entire family property. Such value ought to be ascertained as at date of High Ct. decree under appeal.—*RAOJI BHIKAJ KONDKAR v. LAXMIBAI* (1919), 1 L. R. 44 Bom. 104.—**IND.**

1. — Amount of costs—Not value of the estate.]—Leave to appeal to the Privy

Council refused, the ct. looking to the amount of the costs in dispute, & not to the value of the estate.—*MCGREGOR v. MCGREGOR* (1889), 7 N. Z. L. R. 538.—**N.Z.**

g. — Addition of mesne profits.]—In a suit for possession of land & for mesne profits pltf. applied for leave to appeal to H.M. in Council & swore that the mesne profits would amount to a sum exceeding Rs. 10,000.—*Held*: pltf. were entitled to take into account their claim for mesne profits with a view to ascertaining whether the value of the matter in dispute reached the statutory amount of Rs. 10,000, & pltf. were entitled to a certificate.—*DALGLEISH v. DAMODAR NARAIN CHOWDHRY* (1906), 1 L. R. 33 Calc. 1286.—**IND.**

h. —.]—Where amount of subject-matter of suit is less than Rs. 10,000 but amount or value of subject-matter in dispute in appeal to H.M. in Council exceeded that sum owing to addition of claim for mesne profits for period between institution of suit & filing of petition for certificate of appeal.—*Held*: leave to appeal to H.M. in Council could not be granted.—*SUBRAMANIAM AYYAR v. SELLAMMAL*, [1916] 1 L. R. 39 Mad. 843.—**IND.**

k. Appeal to Privy Council —

488. —.]—By a decree of the Sudder Ct. the principal sum decreed was under Rs. 10,000; but the ct. also decreed interest:—*Held*: in calculating the appealable value interest was to be added to the principal.—**SUTTEESCHUNDER ROY (MAHARAJAH) v. GUNESCHUNDER** (1860), 13 Moo. P. C. C. 469; 8 Moo. Ind. App. 164; 15 E. R. 176, P. C.

Annotations:—*Reid*. Doorga Doss Chowdry v. Ramanauth Chowdry (1860), 8 Moo. Ind. App. 262; Mutusawmy Jagavera Yettapa Naiker v. Venkataswara Yettia (1865), L. R. 1 P. C. 1.

489. —.]—Mode of estimating the appealable value. Interest given by decree to be added to the principal.—**GOOROOPERSAD KHOOND v. JUG-GUTHCHUNDER** (1860), 13 Moo. P. C. C. 472; 8 Moo. Ind. App. 166; 15 E. R. 177, P. C.

Annotations:—*Consol.* Bank of New South Wales v. Owston (1879), 4 App. Cas. 270. *Reid*. Doorga Doss Chowdry v. Ramanauth Chowdry (1860), 8 Moo. Ind. App. 262.

490. —.]—When interest on the amount of a verdict is given & included in the judgment, such interest must be taken into account in considering whether the amount at issue reaches the limit allowed for an appeal.—**BANK OF NEW SOUTH WALES v. OWSTON** (1879), 4 App. Cas. 270; 43 L. J. P. C. 25; 40 L. T. 500; 43 J. P. 476; 14 Cox, C. C. 267, P. C.

Annotations:—*Mentd.* Edwards v. Midland Ry. (1881), 45 J. P. 374; Abrahams v. Deakin, [1891] 1 Q. B. 516; Ashton v. Spiers & Pond (1893), 9 T. L. R. 606; Dyer v. Munday (1895), 64 L. J. Q. B. 448; Cornford v. Carlton Bank, [1899] 1 Q. B. 392; Hanson v. Waller, [1901] 1 K. B. 390; Pratt v. British Medical Assocn., [1919] 1 K. B. 244.

491. — Further addition of costs.]—Costs of suit cannot be added to the principal sum & interest, in calculating the appealable value of Rs. 10,000, the amount restricted by the Order in Council of Apr. 10, 1838.—**DOORGA DOSS CHOWDRY v. RAMANAOUTH CHOWDRY** (1860), 8 Moo. Ind. App. 262; 19 E. R. 530, P. C.

Annotation:—*Reid*. G. W. Rty. of Canada v. Braid (1863), 1 Moo. P. C. C. N. S. 101.

Appealable amount—Interest added to amount of verdict.—The pltf. obtained a verdict for £494 on Sept. 19th. On Nov. 5th the Court refused a rule nisi for a new trial. On that day the verdict with the interest allowed by s. 1 of 24 Vict. No. 8 did not amount to £500. On Nov. 19th the deft. filed a petition for leave to appeal to the Privy Council. On that day the verdict with the interest added amounted to over £500. On Nov. 23rd the pltf. signed judgment for £494 only:—*Held*: deft. was entitled to leave to appeal to the Privy Council, as the amount involved was the amount of the verdict, together with interest to which pltf. was entitled at the time of signing judgment.—**GRAHAM v. PROUD-FOOT** (1894), 15 N. S. W. L. R. 452; 11 N. S. W. W. N. 91.—**AUS.**

1. —.]—**STANTON v. HOME INSURANCE CO.** (1879), 2 L. N. 314.—**CAN.**

m. —.]—Interest cannot be added to the sum demanded to raise it to the amount necessary to give a right of appeal.—**DUFRESNE v. GUVÉREMONT** (1896), 26 S. C. R. 216.—**CAN.**

n. —.]—Pltf. claimed principal & interest which amounted to more than Rs. 10,000. He obtained in ct. of first instance decree for less than Rs. 10,000 with interest, defts. appealed to High Ct. & pltf. suit was dismissed. Pltf. applied for leave to appeal to H.M. in Council:—*Held*: pltf. could not bring his appeal above statutory limit by adding to amount decreed to him by ct. of first instance interest at rate given by that ct.—**RAM KUMAR v. MUHAMMAD YAKUB** (1920), 1 L. L. R. 42 All. 445.—**IND.**

o. — Further addition of costs.]—An Order in Council allowed an

appeal from the judgment of the Supreme Ct. "in case such judgment shall involve directly or indirectly any claim respecting property in any civil right amounting to the value of £300 sterling (375 currency)."

The sum to recover which action was brought was 340 currency, but adding interest from the date of writ until judgment, together with costs, increased the sum to over £300 sterling:—*Held*: leave to appeal granted.—**POPE v. PICTOU STEAMBOAT CO.** (1866), 2 Old. 176.—**CAN.**

493 i. Amount recovered on verdict —Whether costs can be added to.]—In an action for trespass pltf. obtained a verdict of 1s. The costs amounted to more than £500; deft. applied for leave to appeal to the Privy Council:—*Held*: leave to appeal to the Privy Council should be allowed.—**RICKETSON v. BOURCHIER** (1890), 16 V. L. R. 800.—**AUS.**

493 ii. —.]—Costs cannot be added to make up appealable amount.—**BURNS v. RICKARDS** (1869), 7 N. S. R. 509.—**CAN.**

494 i. —.]—Though pltf. claimed £10,000 yet a verdict only for £d.:—*Held*: not sufficient amount in question to give defts. right to appeal.—**JONES v. SYDNEY MUNICIPAL COUNCIL** (1880), 1 N. S. W. L. R. 315.—**AUS.**

p. — Although afterwards reduced by plaintiff.]—On a petition for leave to appeal to the Privy Council, it appeared that the amount of the verdict was £514 5s. 4d. which, after the judgment of the ct was delivered, pltf. reduced by £450:—*Held*: ct. had jurisdiction to entertain the matter, as the amount in respect of which judgment had been delivered

492. —.]—It is too late for the resp. at the hearing of the appeal to object to its competency, on the ground that the amount in dispute was below the appealable value. *Qu.*: whether, in estimating the appealable value, Rs. 10,000, costs of suit can be added to the principal & interest decreed.—**NILMADHUB DOSS v. BISHUMBER DOSS** (1869), 13 Moo. Ind. App. 85; 20 E. R. 484, P. C.

493. Amount recovered on verdict—Whether costs can be added to.]—By the Consolidated Statutes for Upper Canada, 22 Vict. c. 13, s. 57, it is enacted, that the judgment of the Court of Error & Appeal, thereby established, shall be final where the matter in controversy does not exceed \$4,000. *Qu.*: if, in a case where the verdict of damages amounted to exactly that sum, the costs, which are the consequence of the verdict, can be added to the damages, so as to bring the case within the appealable value.—**GREAT WESTERN RY. CO. OF CANADA v. BRAID** (1863), 1 Moo. P. C. C. N. S. 101; 1 New Rep. 527; 8 L. T. 31; 27 J. P. 596; 9 Jur. N. S. 339; 11 W. R. 444; 15 E. R. 640, P. C.

Annotations:—*Mentd.* Scott v. London Dock Co. (1864), 34 L. J. Ex. 17; Longmore v. G. W. Rty. (1865), 19 C. B. N. S. 184; Czech v. General Steam Navigation Co. (1867), L. R. 3 C. P. 14; Hatfield (Owners) v. Glasgow (Owners), The Glasgow (1914), 84 L. J. P. 161; Montreal City v. Watt & Scott, [1922] 2 A. C. 555.

494. —.]—The proper measure of value for determining the right of appeal by a deft. is the amount recovered by pltf. in the action against which the appeal is brought. The ct. will not give leave to appeal on the ground that important questions of law are involved when it appears that one of the parties is too poor to undertake the expense of appearing by counsel on the appeal.—**ALLAN v. PRATT** (1888), 13 App. Cas. 780; 57 L. J. P. C. 104; 59 L. T. 674, P. C.

Annotation:—*Reid*. Manley v. Palache (1895), 73 L. T. 98.

was above £500.—**MACKENZIE v. WILLIAMS** (1872), 11 N. S. W. S. C. R. 178, 193.—**AUS.**

q. —.]—In an appln. by deft. for leave to appeal to the Privy Council, deft. demurred to pltf.'s declaration in which £2,000 damages were claimed. Ct. overruled the demurrer. It was against this judgment deft. sought to appeal:—*Held*: pltf. might reduce the claim from £2,000 to £450.—**DOWLING v. JONES** (1881), 2 N. S. W. L. R. 54.—**AUS.**

r. —.]—An action for infringement of a patent wherein pltf. claimed \$15,000 damages, which he consents in writing to reduce to \$25:—*Held*: whatever the value of the patent, not a cause in which an appeal lies as of right to the Privy Council.—**CAME v. CONSOLIDATED CAR HEATING CO.** (1901), 4 Q. P. R. 256; Q. R. 11 K. B. 114; [1903] A. C. 509.—**CAN.**

s. Whether amount endorsed on writ.]—In actions in respect of civil rights the test of whether the appealable amount has been reached is not the amount endorsed upon the writ.—**TIPPING v. PERTH CORPN.** (1900), 2 W. A. L. R. 110.—**AUS.**

t. —.]—In appeals to the Privy Council the amount by which the right of appeal is to be determined is that demanded, & not that recovered, if they are different.—**CITIZENS LIGHT & POWER CO. v. PARENT** (1897), 27 S. C. R. 316.—**CAN.**

u. Several interests may be added together.—To determine amount for appeal.]—In a representative action the combined interests of the original pltf. & those who had subsequently elected to take advantage of the order as pltf. fell short of the requisite

Sect. 4.—Special leave to appeal: Sub-sect. 2, B. (a) & (b).]

495. Claim & counter-claim—Counter-claim below appealable value—Two may be added together—To determine amount for appeal.]—Where the claim on a counter-claim is below the appealable amount, an appeal will nevertheless lie if the whole amount of the claim in the action exceeds that amount.—*MANLEY v. PALACHE* (1895), 73 L. T. 98; 11 R. 566, P. C.

(b) Where Subject-Matter under Appealable Value.

496. Right of appeal—Permission of lower court must be first asked.]—The Judicial Committee will not entertain an appln. for special leave to appeal to Her Majesty in Council from a decree of the High Ct., where the subject-matter in suit is under the appealable value prescribed by sects. 39 & 40 of Bombay Charter of 1862, unless petitioner has applied to the High Ct. for such leave, & has been refused.

The value of the property in question in this particular litigation is clearly below the appealable value. The only reason, therefore, to make an exception in this case would be, if there were some general right affecting other holdings, the aggregate amount of which would be above the appealable value; that such general right was called in question & that the decision of this suit would affect litigation that might arise in other suits respecting other holdings similarly circumstanced (*per CUR.*).—*GUNGOWA KOME MALUPA v. ERAWA KOME JOGAPA* (1870), 13 Moo. Ind. App. 433; 20 E. R. 612, P. C.

amount but no order, finally excluding others, whose interests if they came in would bring the total beyond that amount, had been made, deft. applied for leave to appeal to the Privy Council:—*Held*: the true test of the right to appeal to the Privy Council was the amount not of pltf.'s beneficial interest but of deft.'s liability & therefore the application should be granted.—*GOOD v. BRUCE*, [1917] N. Z. L. R. 919.—N.Z.

PART IX. SECT. 4, SUB-SECT. 2.—B. (b).

499 i. Consolidation of appeals—To bring sum over appealable amount.]—Pltf. brought a case stated for the opinion of the full ct. & obtained judgment for £289 13s. 9d., being rates due by deft. for 1897. Deft. moved for leave to appeal to the Privy Council from this judgment showing that pltfs. obtained a further sum of £289 13s. 9d. being the rates for 1898:—*Held*: leave to appeal not granted.—*RANDWICK BOROUGH v. DANGAR* (1898), 16 N. S. W. L. R. 395; 14 N. S. W. N. 417.—AUS.

499 ii. —.]—A person in Nova Scotia may appeal to the Privy Council as of right but the matter in dispute must amount to the value of \$500 sterling or upwards, & this means that the whole amount in dispute is of that value. If parties are entitled to recover \$100 sterling against each of five defts. the whole amount in dispute would be \$500 & this case would be appealable notwithstanding that each deft. might only be liable for \$100.—*GUNNING v. LUSBY* (1922), 68 D. L. R. 95.—CAN.

499 iii. —.]—Three different pltfs., claiming through the same original title sued the same deft. in separate suits for possession, the suits were heard together, & pltfs. obtained a decree. The aggregate value of the three suits amounted to more than the requisite amount though the value of each suit was under it. Deft. applied for leave to appeal to Her

Majesty in Council:—*Held*: entitled, as the decree in each case involved indirectly a question of title to property of the amount required.—*ASHANULLA v. KAROONAMOYI CHOWDHRY, ROHIMI CHOWDHRI v. KISHEN GOBIND DAS* (1879), 4 C. L. R. 125.—IND.

499 iv. —.]—A. & B. purchased the same properties deriving title through different persons. The value of the properties was over the amount required. B. granted two leases of the properties to different persons. A. was therefore obliged to bring two suits for the recovery of the properties & the value of the subject-matter in each suit was less than the amount required:—*Held*: an appeal would lie to the Privy Council.—*JOOGULKISHORE v. JOTENDRO MOHUN TAGORE* (1882), 1 L. R. 8 Calc. 210.—IND.

499 v. —.]—Leave to appeal to Her Majesty in Council granted in one of six suits directed to be heard together, although the amount involved in such suit was under the appealable value: the aggregate amount in the six suits being more than the appealable value.—*BYJNATH v. GRAHAM* (1885), 1 L. R. 11 Calc. 740.—IND.

499 vi. —.]—A number of suits were tried together; on application for leave to appeal:—*Held*: the aggregate reached the required amount & leave to appeal should be granted.—*DEONARAIN SINGH v. GUNI SINGH* (1907), 1 L. R. 34 Calc. 400.—IND.

499 vii. —.]—Where pltfs. sued the nearest reversioners under Hindu Law on the death of the widow of the last male holder, to recover his estate & joined various defts., who were in possession of separate items either as allottees from the widow, or as owners claiming by independent title &, on a decree being passed in the original ct. in pltf.'s favour, defts. preferred separate appeals to the High Ct. which were disposed of by one decree drawn up under rule 105 of the Civil Rules of Practice, & where several petitions were filed in the several

497. —.]—As a rule, in Indian cases under the appealable amount, before special leave is petitioned from His Majesty in Council, an appln. should be made to the High Ct. under sect. 600 of the Civil Procedure Code that the case is nevertheless a fit one for appeal.—*MOTI CHAND v. GANGA PARSHAD SINGH, Ex p. MOTI CHAND* (1901), L. R. 29 Ind. App. 40, P. C.

498. —.]—Upon petn. under Order 45, r. 3, for leave to appeal from a decree of the High Ct., in the suit for the recovery of Rs. 4,605, rent, the High Ct. certified that as regards the subject-matter, & the nature of the questions involved the case fulfilled the requirements of ss. 109 & 110 of the Code of Civil Procedure & that the case was a fit one for appeal to the Privy Council:—*Held*: the appeal could not be maintained since the value of the subject-matter was under Rs. 10,000, & there was nothing in the certificate to show that the discretion conferred on the High Ct. by s. 109 (c), was invoked or exercised.—*RADHAKRISHNA AYYAR v. SWAMINATHA AYYAR* (1920), L. R. 48 Ind. App. 31, P. C.

499. Consolidation of appeals—To bring sum over appealable amount.]—Two suits having been brought for sums due on the same account, each of which was under Rs. 50,000:—*Held*: such suits could not be consolidated for the purpose of appeal, though the aggregate amount of both exceeded that amount.—*MOOFTI MOHAMMUD UBDOOLLAH v. MOOTECHUND (BABOO)* (1837), 1 Moo. Ind. App. 363; 18 E. R. 148, P. C.

Annotation:—Refd. Ko Khine v. Snadden (1868), 5 Moo. P. C. C. N. S. 67

appeals for leave to appeal to His Majesty in Council & resps. to some of the petitions objected that leave could not be granted in their appeals as the value of their subject-matter was less than Rs. 10,000:—*Held*: the claims against the several allottees were based on really different causes of action against the several defts. & though they were allowed according to a well-established practice to be joined in the same suit, that the fact that only one appellate decree was drawn up in all the appeals under rule 105 of the Civil Rules of Practice could not affect the requirements of sect. 110 of the Civil Procedure Code as to granting leave in each of the appeals; & that, consequently, in such of the appeals in which the value of the subject-matter was below Rs. 10,000, the High Ct. could not grant leave to appeal to His Majesty in Council.—*VAITHILINGA MUDALIAR v. CHETTIAR*, [1919] 1 L. R. 42 Mad. 228.—IND.

499 viii. —.]—Where there were two claims separately not amounting to the requisite amount but together they were over the amount:—*Held*: The Privy Council granted special leave, the two appeals to be consolidated.—*EAST LONDON HARBOUR BOARD v. CALEDONIA LANDING, ETC., Co. & COLONIAL FISHERIES Co.* (1906), 23 S. C. 715; 16 C. T. R. 1064.—S. AF.

499 ix. —.]—In an application for leave to appeal to Her Majesty in Council the value of the property was below the required amount but the suit in appeal was connected with another suit relating to the same property which was the subject of another similar application, & that the aggregate value of the two decrees was above the required amount:—*Held*: the application should be granted.—*Re KHAWAJA MUHAMMAD YUSUF* (1896), 1 L. R. 18 All. 198.—IND.

b. —.]—Other suits dependant on decision.]—Where the appeal, though valued at less than the acquired amount involved indirectly questions respecting property of the value

500. — By consent of both parties.]—Special leave to appeal granted in a suit which had been consolidated by consent of both parties. A party to a suit, having adopted a certain valuation, cannot in the same suit object to that valuation.—*KRISTO INDRO SAHA v. HUROMONEE DASSEE* (1873), L. R. 1 Ind. App. 84, P. C.

501. Leave granted upon terms—Leave to respondent to question competency.]—The amount recovered in an action in Lower Canada was under the sum of £500, sterling, the amount specified by 34 Geo. 3, c. 6, s. 30, of Lower Canada, as the lowest limit of appeal to England. Upon a special petn. for leave to appeal:—*Held*: leave would be granted, subject to a petn. being presented by resp. upon the competency of the appeal.—*Re MAROIS* (1862), 15 Moo. P. C. C. 189; 8 Jur. N. S. 268; 15 E. R. 465; *sub nom.* *MAROIS v. AULAIRE*, *Ex p. MAROIS*, 10 W. R. 326, P. C.

Annotations:—*Reid*. *Théberge v. Landry* (1876), 2 App. Cas. 102; *Cushing v. Dupuy* (1880), 5 App. Cas. 409.

502. Where no sum or value in controversy.]—By Revised Statutes of Ontario, c. 48, s. 1, no appeal shall lie to the King in Council unless the matter in controversy exceeds the sum or value of \$4,000.

Appl. brought an action against resp. for an injunction to restrain him from infringing certain trade marks of applt., & from passing off his goods as the goods of applt., & for damages. The Ct. of Appeal for Ontario gave judgment for applt.:—*Held*: no sum or value being in controversy, the appeal was not competent.

The question whether an appeal from the Ct. of Appeal for Ontario to the King in Council is competent is one upon which the Ct. of Appeal itself must exercise its judgment; & where that ct. has avoided the expression of any opinion, no such appeal is permitted.—*GILLET* (E. W.) & Co., LTD. *v.* LUMSDEN, [1905] A. C. 601; 74 L. J. P. C. 155; 93 L. T. 314; 21 T. L. R. 698, P. C.

503. Whether granted or refused—Limitation by Colonial Act—Special saving of rights & prerogatives of Crown.]—*CUVILLIER v. AYLWIN*, No. 445, *ante*.

504. — Charges for alterations in Jersey Court House—Whether defrayable out of Crown Revenues.]—The Royal Ct. of Jersey have no power to order charges for alterations made in the Ct. House directed at their instance, to be defrayed out of the Crown Revenues of the Island. Leave given to appeal though the subject-matter of the suit was below £200, the sum required by the Order in Council of May 13, 1823, & the appeal refused by the Royal Ct.—*A.-G. OF JERSEY v. LE CAPELAIN* (1842), 4 Moo. P. C. C. 37; 13 E. R. 214, P. C.

Annotation:—*Reid*. *Belson v. Belson* (1850), 7 Moo. P. C. C. 30.

505. — Decision of court confirming poor rate—Assessments of ratepayers below fixed amounts.]—Leave to appeal from a decision of a ct. confirming a rate for the relief of the poor granted to ratepayers, the assessments on whom, separately & collectively, were less than the sum

fixed by the Orders of Council regulating appeals from the Island.—*Re TUPPER* (1834), 2 Knapp, 201; 12 E. R. 456, P. C.

Annotation:—*Reid*. *Belson v. Belson* (1850), 7 Moo. P. C. C. 30.

506. — Question of importance involved.]—Although the subject in dispute was under the appealable value prescribed by the Royal Instructions, regulating appeals from Jamaica, yet the Judicial Committee from the fact of the public importance of the question at issue, allowed an appeal.—*LINDO v. BARRETT* (1856), 9 Moo. P. C. C. 456; 4 W. R. 316; 14 E. R. 371, P. C.

507. — Sum involved uncertain in value.]—In circumstances, showing that a question of importance & the sum involved uncertain in value, leave was given to appeal from the Supreme Ct. of Jamaica refusing such appeal, although the amount of the verdict was under £300, the appealable value limited by the Order in Council of Apr. 14, 1851.—*ST. GEORGE, JAMAICA (CHURCHWARDENS) v. MAY* (1858), 12 Moo. P. C. C. 282; 14 E. R. 918, P. C.

508. —]—Where a question of great public importance arose, special leave was granted, though the subject-matter in dispute was under Rs. 10,000.—*SUMBHOOLALL GIRDHURLALL v. SURAT (COLLECTOR)* (1859), 8 Moo. Ind. App. 1; 8 W. R. 505; 19 E. R. 431, P. C.

509. — Other suits dependent on decision.]—*BOSWELL v. KILBORN*, No. 487, *ante*.

510. —]—Special leave to appeal given in a case involving a question of tenure service, although the subject-matter in dispute was below the appealable value; there being many other suits depending on the decision of the case.—*JOYKISSEN MOOKERJEE v. EAST BURDWAN (COLLECTOR)* (1860), 8 Moo. Ind. App. 265; 19 E. R. 531, P. C.

511. —]—Special leave to appeal was granted, although the amount involved in the action was under the appealable value, Rs. 10,000, there being an important question of law raised, & eleven other actions brought involving the same question of law, & which had been directed by an Order of the Ct. below to be heard upon the same evidence & concluded by the same judgment.—*KO KHINE v. SNADDEN* (1868), L. R. 2 P. C. 50; 5 Moo. P. C. C. N. S. 67; 37 L. J. P. C. 19; 16 E. R. 441, P. C.

512. — Decision affecting other property.]—*GUNGOWA KOME MALUPA v. ERAWA KOME JOGAPA*, No. 496, *ante*.

513. — Decision affecting large class of persons.]—*Re TUPPER*, No. 505, *ante*.

514. —]—Special leave to appeal, the sum involved being below the appealable amount allowed, on the ground that the question involved the construction of a Colonial Act which affected the interests of a large class in the colony for which the Act was passed.—*BROWN v. McLAUGHAN* (1870), L. R. 3 P. C. 458; 7 Moo. P. C. C. N. S. 306; 17 E. R. 117, P. C.

515. — One party too poor to appear.]—*ALLAN v. PRATT*, No. 494, *ante*.

required inasmuch as the judgment of the High Ct. would govern the decision in other suits which pltf. intended to bring on precisely the same grounds, & in respect of which precisely the same questions would arise as had arisen in the suit sought to be appealed:—*Held*: Leave to appeal granted.—*ANANDA CHANDRA BOSE v. BROUGHTON* (1873), 9 B. L. R. 423.—*IND.*

c. *Whether granted or refused—*

*Limitation by Colonial Act—Judgment given before Act came into force.]—*By Edw. VII. c. 75, the amount giving an appeal to the Privy Council was fixed at \$5,000 instead of £500 as before:—*Held*: Act did not govern a case where judgment was given before it came into force.—*SEDGWICK v. MONTREAL LIGHT HEAT & POWER CO.* (1909), 41 E. C. R. 639.—*CAN.*

d. *—]—**TOWNSEND v. NORTH-*

ERN CROWN BANK (1913), 24 O. W. R. 516; 4 O. W. N. 1245; 10 D. L. R. 652.—*CAN.*

e. *—]—*Where the matter in controversy was not shown to exceed \$1,000 (Privy Council Appeals Act, R. S. O. 1914, ch. 54, s. 3):—*Held*: appeal did not lie as of right.—*Re ONTARIO & MINNESOTA POWER CO. & FORT FRANCES* (1915), 34 O. L. R. 395.—*CAN.*

Sect. 4.—Special leave to appeal: Sub-sect. 2, B. (b); sub-sect. 3, A. & B. (a).]

516. — —.]—Under s. 596, Civil Procedure Code, there is no right of appeal to the Privy Council simply on the ground that a substantial point of law is involved. The presence of such a question does not give a right of appeal when the value is below Rs. 10,000. Under ss. 595 & 600, Civil Procedure Code, there is a right of appeal if the High Ct. certifies that the case is "otherwise" a fit one for appeal. The word "otherwise" refers to special cases, such as where the point in dispute is not measurable by money, though it may be of great public or private importance. But in all such cases a special certificate to that effect must be granted by the High Ct.—**BANARSI PARSHAD v. KASHI KRISHNA NARAIN** (1900), L. R. 28 Ind. App. 11; *sub nom.* **BANARSHI PARSHAD v. MEWA KUNWAR (MUSUMAT)**, 17 T. L. R. 128, P. C.

517. — **Custody of children involved.**—By the Order in Council of Dec. 18, 1834, for regulating appeals from the Island of Malta, to the King in Council, an appeal is allowed only where the sum, or matter, at issue, involves, directly or indirectly, any civil rights amounting to, or of the value of £1,000. But leave to appeal was granted by the Judicial Committee, from the decrees of the cts. of the Island, which directed the children to be removed from the guardianship of their mother.—**CAMILLERI v. FLERI** (1845), 5 Moo. P. C. C. 161; 13 E. R. 452, P. C.

518. — —.]—Appeal allowed without prejudice to any objection to be taken by the Royal Ct. of Jersey at the hearing, from a Provisional Order of that ct. directing the infant children of the parties to be left provisionally in the custody of the mother, pendin, a suit for a separation.—**BELSON v. BELSON** (1850), 7 Moo. P. C. C. 30; 13 E. R. 790, P. C.

*Annotation:—***Reid. Re Belson** (1850), 7 Moo. P. C. C. 114.

519. — **Counsel refused hearing.**—Leave to appeal granted from an order of the Governor & Council at Sierra Leone, refusing a new trial, although the amount of the matter at issue was under £400, the appealable value limited by the Charter of Justice; that ct. having refused to hear counsel in support of the rule on the merits of the case or the questions of law raised.—**PATNELLI v. HEDDLE** (1852), 8 Moo. P. C. C. 41; 14 E. R. 17, P. C.

*Annotation:—***Mentd. Rainy v. Sierra Leone JJ.** (1853), 8 Moo. P. C. C. 47.

520. — **Action on bill of exchange—Liability of indorsers.**—The doctrine of the liability of an agent indorsing a bill of exchange for his principal examined & explained.

Special leave to appeal allowed, although the subject-matter of the appeal was under the appealable value stipulated by the Order in Council, dated Dec. 18, 1834.—**CASTRIQUE v. BUTTIGIEG** (1856), 10 Moo. P. C. C. 94; 27 L. T. O. S. 111; 4 W. R. 445; 14 E. R. 427, P. C.

*Annotation:—***Reid. Abroy v. Crux** (1869), L. R. 5 C. P. 37.

521. — **Validity of fiat of insolvency.**—Appln. for special leave to appeal from an Order of the Supreme Ct. of Jamaica, refusing to quash a fiat, of insolvency, refused, as the validity of the fiat of

insolvency was not an appealable grievance within the Order in Council, being below the appealable value, & no special circumstances.—**Re ABRAHAMS** (1864), 2 Moo. P. C. C. N. S. 241; 15 E. R. 892, P. C.

522. — **Decision turning on particular facts.**—On petn. for special leave to appeal, the subject-matter of the appeal being under the appealable value, & questions for decision turning on the particular facts:—**Held**: the case was not one involving such special circumstances as to give leave to appeal.—**SPEARMAN v. EAST INDIA RY. Co.** (1869), 20 L. T. 501, P. C.

523. — **Construction & effect of particular contract.**—Appeal refused where the amount at issue was only \$300, & related simply to the legal construction & effect of a particular contract, & where no general principle was involved, & no other cases were necessarily affected by the decision complained of.—**JOHNSTON v. ST. ANDREW'S CHURCH, MONTREAL (MINISTER & TRUSTEES)** (1877), 3 App. Cas. 159; 26 W. R. 359; *sub nom.* **ST. ANDREW'S CHURCH, MONTREAL (MINISTER & TRUSTEES) v. JOHNSTON**, 37 L. T. 556, P. C.

*Annotations:—***Appl. Prince v. Gagnon** (1882), 8 App. Cas. 103. **Reid. Valin v. Langlois** (1879), 41 L. T. 862. **Mentd. Cushing v. Dupuy** (1880), 5 App. Cas. 409.

524. — **Controversy closed by Amending Act of Colonial Legislature.**—The High Ct. of Australia having decided contrary to a decision of their Lordships, that a State had no power to impose income tax upon a salary paid by the Commonwealth to its officers or to a member of the Commonwealth Parliament resident in such State, the Commonwealth Parliament thereafter passed an Act expressly authorising the States to impose such taxation:—**Held**: petns. for special leave to appeal from the High Ct. decisions must be refused, the amount at stake being inconsiderable, & the controversy having been closed.—**NEW SOUTH WALES TAXATION COMRS. v. BAXTER, WEBB v. CROUCH & FLINT**, [1908] A. C. 214; 77 L. J. P. C. 67; 98 L. T. 221; 24 T. L. R. 249, P. C.

SUB-SECT. 3.—CRIMINAL PROCEEDINGS.

A. In General.

525. Prerogative right to entertain appeal in respect of—Rescission of leave granted ex parte.—Leave granted on an *ex parte* appln. to appeal from a criminal proceeding in Jersey; rescinded on Special Petition of the A.-G. of the Island. The ct. being of opinion that the original leave ought not to have been given.

We are disposed to say that we ought not to have recommended Her Majesty to have allowed the appeal, but we are not disposed to say that we have not the power so to have done, as Her Majesty is the head of Justice, & we are sitting here, not merely as a judicial body, but as Privy Councillors (**PARKE, B.**).—**Re AMES** (1841), 3 Moo. P. C. C. 409; 13 E. R. 166, P. C.

*Annotations:—***Consd. Eanout v. A.-G. for Jersey** (1883), 8 App. Cas. 304. **Reid. R. v. Bertrand** (1867), L. R. 1 P. C. 520. **Mentd. Belson v. Belson** (1850), 7 Moo. P. C. C. 30; **Cremide v. Parker, The Aspasia** (1857), 11 Moo. P. C. C. 79.

526. — **From all dominions.**—**R. v. JOYKISSEN MOOKERJEE**, No. 535, *post*.

PART IX. SECT. 4, SUB-SECT. 3.
—A.

1. Bail by lower court pending appeal to Privy Council.—An accused person obtained from the Privy Council special leave to appeal, also applied to

be released on bail; but the Privy Council thought that the latter appln. should be decided by the Madras High Ct. Upon appln. being made accordingly to that ct.:—**Held**: the High Ct. had jurisdiction to make an order releasing accused on bail pending

the decision of the Privy Council; & having regard to the circumstances in which an appeal in a criminal matter will be admitted by the Privy Council, accused ought to be released on bail.—**R. v. SUBRAHMANYA AYYAR** (1900), L. L. R. 24 Mad. 161.—**IND.**

527. — Where no limitation on prerogative—Whether in cases of felony.]—Upon a petn., praying for leave to appeal from a conviction for felony:—*Held*: (1) there was no power reserved to the Crown by the Bombay Charter, to allow appeals in criminal cases, such appeal being confined to civil cases only.

(2) The Charter having been granted by the Crown, by force of an Act of Parliament, must be construed with reference to the powers conferred by the Act, even though the prerogative of the Crown were limited by such construction: & the Supreme Ct. alone has full & absolute power to allow or deny permission to appeal in criminal cases.—*R. v. EDULJEE BYRAMJEE* (1846), 3 Moo. Ind. App. 468; 5 Moo. P. C. C. 276; 18 E. R. 577; *sub n.m.* PARSEE MURDER CASE, *Ex p.* EDULJEE BYRAMJEE, 11 Jur. 855, P. C.

528. — —.]—*R. v. BERTRAND*, No. 402, *ante*.

529. — —.]—Charter giving Indian court full powers of appeal in criminal cases—Crown rights not reserved.]—Under the Bombay Charter of Justice, the Supreme Ct. at Bombay is invested with full & absolute power to allow or deny an appeal in criminal cases, & no power is reserved to the Crown, by such Charter, to grant leave to appeal in such cases.—*R. v. ALLOO PAROO* (1847), 3 Moo. Ind. App. 488; 5 Moo. P. C. C. 296; 18 E. R. 586; *sub nom.* *Ex p.* ALLOO PAROO, 11 Jur. 857, P. C.

530. — —.]—FALKLAND ISLANDS CO. v. R., No. 401, *ante*.

531. — Cautious exercise of prerogative.]—We do not say that in no case whatever, even in an appeal from Jersey in a criminal matter would it be the duty of this Board to advise Her Majesty to grant an appeal; we do not say under what circumstances it might be advisable so to advise Her Majesty, but we do say that it should be done very cautiously, & after great consideration (*per CUR.*).—*ESNOUF v. A.-G. FOR JERSEY* (1883), 8 App. Cas. 304; 52 L. J. P. C. 26; 48 L. T. 321, P. C.

532. Not a court of criminal appeal.]—The Judicial Committee of the Privy Council have no power to sit as a Ct. of Criminal Appeal. They can only interfere in a criminal case if what has been done in the ct. below is grossly contrary to the forms of justice, or violates fundamental principles. Where there is evidence to go to the jury in a criminal case they will not express an opinion as to the propriety of the verdict, or of the summing-up of the judge who tried the case.—*CLIFFORD v. KING-EMPEROR* (1913), L. R. 40 Ind. App. 241; 83 L. J. P. C. 152, P. C.

*Annotations:—*Consd. *Arnold v. King-Emperor*, [1914] A. C. 644. *Reid. Ibrahim v. R.*, [1914] A. C. 599.

533. — & stay execution of sentence.]—BALMUKAND v. KING-EMPEROR, No. 437, *ante*.

534. —.]—In criminal cases the Judicial Committee does not act as a Ct. of Criminal Appeal. It will only interfere with the finding of the ct. below in a criminal case where injustice of a serious & substantial character has occurred, either by a disregard of the proper forms of legal process not merely of a technical character or by a violation of principle such as amounts to a denial of justice. The mere admission of improper evidence is not sufficient, neither is the mere fact that their Lordships would have taken a different view of the evidence admitted. Therefore in a case in

which evidence was admitted which was not essential to the result, which might have been reached independently of it, the Judicial Committee declined to interfere, it appearing that substantial justice had been done.—*DAL SINGH v. KING-EMPEROR* (1917), L. R. 44 Ind. App. 187; 86 L. J. P. C. 140; 116 L. T. 621; 33 T. L. R. 249; 61 Sol. Jo. 351; 25 Cox, C. C. 705, P. C.

*Annotation:—**Reid. Besant v. Advocate-General & Crown Prosecutor of Madras* (1919), 35 T. L. R. 500.

B. Reasons for Granting or Refusing Leave.

(a) In General.

535. Where detrimental to administration of criminal justice—Though decision of court below unjust.]—On an appln. for leave to appeal from the sentences of the Sudder Nizamut Adawlut, the chief native criminal ct. of appeal in Bengal, the Judicial Committee, though of opinion that justice had not been done in the ct. below, declined to determine the question of the prerogative of the Crown to admit an appeal in a criminal matter, & to advise such admission, on the ground that such course might be detrimental to the general administration of criminal justice in Her Majesty's colonial & foreign possessions.—*R. v. JOYKISSEN MOOKERJEE* (1862), 1 Moo. P. C. C. N. S. 272; 9 Moo. Ind. App. 168; 15 E. R. 704; *sub nom.* *JOYKISSEN MOOKERJEE v. R.*, 9 Jur. N. S. 4; 10 W. R. 832, P. C.

*Annotations:—*Consd. *Falkland Islands Co. v. R.* (1863), 1 Moo. P. C. C. N. S. 299; *R. v. Bertrand* (1867), L. R. 1 P. C. 520. *Reid. Arnold v. King-Emperor*, [1914] A. C. 644.

536. Questions of great importance—Under appealable value.]—Leave to appeal from a sentence of the Supreme Ct. of Jamaica affirming the decision of local magistrates, against penalties inflicted for the harbouring of apprenticed labourers, refused. The amount of the penalties being within the sum specified in the 47 & 48 Instructions of 1709, providing for appeals.

The question is whether this is a case in which we ought to advise Her Majesty under the general jurisdiction to let in the appeal: it is true that an appeal has been allowed in some cases where a party has been otherwise precluded from appealing but that has only been granted in cases of great importance (*PARKE, B.*).—*Re HARVEY* (1840), 3 Moo. P. C. C. 148; 13 E. R. 64, P. C.

537. — Rights of Crown involved—Proceedings more civil than criminal.]—FALKLAND ISLANDS CO. v. R., No. 401, *ante*.

538. —.]—*R. v. BERTRAND*, No. 402, *ante*.

539. Lapse of time—No *prima facie* case of miscarriage of justice.]—In a criminal case in which more than three years had elapsed since the expiration of the sentence on the petitioner, & there was no *prima facie* case of a miscarriage of justice disclosed, the ct. refused leave to appeal.—*BADGER v. A.-G. FOR NEW ZEALAND* (1907), 97 L. T. 621; 21 Cox, C. C. 539, P. C.

540. Difference of opinion of judges—As to effect of evidence.]—It is impracticable to suppose that in such a case as this of disputed evidence, or where the question is as to the proper inference to be drawn from the evidence, this Board can judge better than those who have heard the witnesses themselves. The fact that there was a difference of opinion amongst the judges is not a ground on which, by itself, their Lordships could act in a case like the present (*per CUR.*).—

PART IX. SECT. 4, SUB-SECT. 3.—B. (a).

538 i. Questions of great importance.]—Where the questions involved were not of great general or public importance:—*Held*: there was no reason for granting special leave to appeal.—*R. v. HOARE* (1915), 49 N. S. R. 287.—*CAN.*

done by reason of some departure from the principles of natural justice. —*Re* BAL GANGADHAR TILAK (1908), I. L. R. 33 Bom. 221.—**IND**

[1902] A. C. 81; 71 L. J. P. C. 27; 86 L. T. 163; 20 Cox, C. C. 149, P. C.

557. ———.]—CLIFFORD v. KING-EMPEROR, No. 532, *ante*.

558. ——— Conviction not warranted by facts—Miscarriage of justice.]—The Seychelles Penal Code provides: "Embezzlement, s. 216 (1): Whoever embezzles, squanders away, or destroys, or attempts to embezzle, squander away, or destroy, to the prejudice of the owner, possessor, or holder thereof, any goods, money, valuable security, bill, acquittance, or other document containing or creating an obligation or discharge which has been delivered to such person merely in pursuance of any lease or hiring, deposit, agency, pledge, loan (*prêt à usage*) or for any work, with or without a promise of remuneration, with the condition that the same be returned or produced or be used or employed for a specific purpose, shall be punished with imprisonment & a fine not exceeding three thousand rupees." Applt. was convicted of an offence under the above section:—*Held*: the conviction of applt. & the sentence upon him should be set aside upon the ground that the facts did not on any just or legal view warrant a conviction, & that justice had gravely & injuriously miscarried.—LANIER v. R., [1914] A. C. 221; 83 L. J. P. C. 116; 110 L. T. 326; 30 T. L. R. 53; 24 Cox, C. C. 53, P. C.

Annotation:—*Consd.* Arnold v. King-Emperor, [1914] A. C. 644.

559. Improper admission of evidence—To grave prejudice of accused.]—(1) The Judicial Committee allowed an appeal from a conviction for murder on the ground that a body of wholly inadmissible evidence had been admitted in the Indian Ct., & that when admitted it was used to the grave prejudice of the accused.

(2) The rule that the Crown neither pays nor receives costs unless the case is governed by some local statute or there are exceptional circumstances justifying a departure from the ordinary rule, applies to criminal as well as to civil cases.—VAITHINATHA PILLAI v. KING-EMPEROR (1913), L. R. 40 Ind. App. 193; 29 T. L. R. 709, P. C.

Annotation:—*As to* (1) *Consd.* Arnold v. King-Emperor, [1914] A. C. 644.

560. ——— Admission of voluntary confession of accused—Not violating principles of natural justice.]—A subject of the Ameer of Afghanistan enlisted in an Indian regiment, & when stationed in China murdered one of the native officers. Shortly after the murder, while he was in the custody of the guard, his commanding officer said to him, "Why have you done such a senseless act?" & he replied, "Some 3 or 4 days he has been abusing me, & without doubt I killed him." At the trial this evidence was admitted, & he was convicted of murder:—*Held*: even if the statement was inadmissible in evidence, having regard to the other evidence & the circumstances of the case, there was no such violation of the principles of natural justice as would justify the board in interfering in

the matter.—IBRAHIM v. R., [1914] A. C. 599; 83 L. J. P. C. 185; 111 L. T. 20; 30 T. L. R. 383; 24 Cox, C. C. 174, P. C.

Annotations:—*Mentd.* R. v. Colpus & Boorman, R. v. White, [1917] 1 K. B. 574; R. v. Crowe & Myerscough (1917), 81 J. P. 288; R. v. Cook (1918), 34 T. L. R. 515; R. v. Volsin, [1918] 1 K. B. 531.

561. ——— Mere improper admission insufficient.]—DAL SINGH v. KING-EMPEROR, No. 534, *ante*.

562. Improper exclusion of evidence.]—ARNOLD v. KING-EMPEROR, No. 549, *ante*.

563. Not difference of opinion as to effect of evidence—In court below.]—TSHINGUMUZI v. A.-G. OF NATAL, No. 540, *ante*.

564. New trial granted by court below—After conviction for murder.]—On a petition by the Attorney-General of New South Wales, for special leave to appeal from an order of the Supreme Ct. of that colony, it appeared that the resp. was charged, on a criminal information by the Attorney-General of the colony, with murder; that he pleaded not guilty, & was tried & found guilty by the jury. The Supreme Ct. afterwards, on an applt. by the resp., made an order that a *venire de novo* should issue, on the ground that the jury were allowed access to certain newspapers pending their verdict. Their Lordships granted special leave to appeal.—R. v. MURPHY (1868), L. R. 2 P. C. 35; 5 Moo. P. C. C. N. S. 47; 37 L. J. P. C. 21; 16 E. R. 432, P. C.; *subsequent proceedings* (1869), L. R. 2 P. C. 535, P. C.

SECT. 5.—POWER TO ALLOW APPEALS DIRECT.

565. To exclusion of intermediate colonial court—Whether judicial committee will entertain—Antigua courts.]—*Re* MANNING'S ASSIGNEES, No. 654, *post*.

566. ———.]—By the Royal Instructions to the Governor of Prince Edward's Island, an appeal is given to the Governor & Council, from the decision of the Supreme Ct., in all cases where the amount at issue is of the value of £300, & from the Council to Her Majesty, where the amount at issue is £500. An action having been commenced, & judgment obtained in the Supreme Ct., for £135, an applt. was made for leave to appeal from such judgment to Her Majesty in Council, notwithstanding its being below the appealable amount:—*Held*: there being an intermediate Ct. of Appeal in the island, no appeal could be received from the Supreme Ct.; but the ct., under the circumstances, advised the allowance of the appeal to the Governor & Council in the Island.—*Re* CAMBRIDGE (1841), 3 Moo. P. C. C. 175; 13 E. R. 74, P. C.

567. ——— Judicial Committee Act, 1844, c. 69.]—Appeal allowed, under above Act, direct from the Ct. of Assize of the Island of Jamaica, to Her Majesty in Council, without bringing a Writ of Error, in the Ct. of Errors, the intermediate Ct., in the Island.

PART IX. SECT. 5.

565 i. To exclusion of intermediate Colonial Court—Whether Judicial Committee will entertain—Australian Courts.]—Leave to appeal will be granted directly from a judgment of the primary judge to the Privy Council.—WOOLLEY v. IRONSTONE HILL LEAD GOLD-MINING CO. (1875), 1 V. L. R. 237.—AUS.

565 ii. ———.]—An appeal lies directly from the primary judge in Equity to the Privy Council.—DEAN v. DAWSON (1888), 9 N. S. W.

L. R. 27; 4 N. S. W. W. N. 134.—AUS.

565 iii. ———.]—A party has no right to appeal from the decision of a primary judge direct to the Privy Council, but must first exhaust the appellate jurisdiction of the Full Court.—AUSTRALIAN SMELTING CO., LTD. v. BRITISH BROKEN HILL PROPRIETARY CO., LTD. (1898), 23 V. L. R. 643.—AUS.

565 iv. ———.]—Order made by judge of Supreme Ct. sitting in

chambers is a judgment of Supreme Ct. from which appeal will lie to Privy Council under the Constitution.—SAUNDERS v. BORTHISTLE (1904), 1 C. L. R. 379.—AUS.

565 v. ——— New Zealand Courts.]—Where respondent was a private citizen not shown to be in affluence & the matter was one of great general & public importance:—*Held*: appellant granted leave to appeal direct to the Privy Council.—BOYD v. COLAY, [1918] 37 N. Z. L. R. 571.—N.Z.

Sect. 5.—Power to allow appeals direct. Sect. 6: Sub-sects. 1 & 2, A. & B. Sect. 7.]

Such appeal is not of course, but requires special grounds to be shown to warrant the appln.—*Re BARNETT* (1844), 4 Moo. P. C. C. 453; 13 E. R. 378, P. C.

568. ——— Questions of law.]—Where there are questions of law, raised by the proceedings, in the inferior Cts. in the colonies, this Ct. will favour an application for leave to appeal, direct to the Queen in Council, under above Act, without resorting to the intermediate Ct. of Appeal in the Colony.—*HARRISON v. SCOTT* (1846), 5 Moo. P. C. C. 357; 10 Jur. 443; 13 E. R. 528, P. C.

569. ——— Prevention of delay & expense.]—Appeal allowed, under above Act, direct to Her Majesty in Council, upon a bill of exceptions, to prevent the delay & expense of bringing a writ of error returnable before the Governor & Council of the Island of Jamaica.—*A.-G. OF JAMAICA v. MANDERSON* (1848), 6 Moo. P. C. C. 239; 12 Jur. 383; 13 E. R. 675, P. C.

570. ———]—Under above Act an appeal allowed direct from the Assize Ct., at Kingston, in Jamaica, to the Queen in Council, without an intermediate appeal to the Ct. of Error in the Island.—*HITCHENS v. HOLLINGSWORTH* (1852), 7 Moo. P. C. C. 228; 13 E. R. 808, P. C.

571. ——— Appeal to intermediate court permissive.]—15 Vict. No. 10, gives an appeal to her Majesty in Council from every judgment of the Supreme Ct. of Victoria. 19 Vict. No. 13, gives one judge power to sit alone in the Supreme Ct. in Equity, & gives an appeal to the whole ct. in bkpcy., saving the appeal from the judgment of the full ct. to the Queen in Council:—*Held*: the judgment of the single judge in equity was a judgment of the Supreme Ct. from which an appeal would lie direct to Her Majesty, & the intermediate appeal was only permissive.—*GARDEN GULLY UNITED QUARTZ MINING Co. v. MCLISTER* (1875), 1 App. Cas. 39; 33 L. T. 408; 24 W. R. 744, P. C.
Annotation:—*Mentd. Re Alma Spinning Co., Bottomley's Case* (1880), 16 Ch. D. 681.

SECT. 6.—HEARING OF APPEAL.

SUB-SECT. 1.—IN GENERAL.

Generally.]—*See* COURTS, Vol. XVI., p. 150, No. 494 *et seq.*

What evidence admissible.]—*See* COURTS, Vol. XVI., p. 151, Nos. 502–513.

Power of judicial committee—Generally.]—*See* COURTS, Vol. XVI., pp. 151–153, Nos. 514–535.

— To consider points not raised in court below.]—*See* COURTS, Vol. XVI., pp. 153–156, Nos. 536–570.

— To remit.]—*See* COURTS Vol. XVI., pp. 156–158, Nos. 571–587.

SUB-SECT. 2.—PRINCIPLES UPON WHICH JUDICIAL COMMITTEE ACTS.

A. In General.

See, generally, COURTS, Vol. XVI., pp. 158–160, Nos. 588–614.

572. Broad principles of justice—Technical objections disregarded.]—The Judicial Committee, in appeals from the native cts. in India, will look to the broad principles of justice, & discourage mere technical objections, which do not affect the

merits of the case, & more especially will discountenance the introduction of objections that may have occurred in the course of litigation, but were not raised at the commencement of the suit.—*RAMNAD (ZEMINDAR) v. YETTIAPPOORAM (ZEMINDAR)* (1859), 7 Moo. Ind. App. 441; 8 W. R. 9; 19 E. R. 375, P. C.

573. Abstract points of law not considered—Speculative opinions on hypothetical questions.]—*A.-G. FOR ONTARIO v. HAMILTON STREET RY. CO.*, No. 164, *ante*.

574. ——— Where not arising in case.]—Special leave will not be granted to appeal from a judgment which is not impeached, merely with a view to have an abstract point of law, not arising in the case, decided by their Lordships.—*R. v. LOUW, Ex p. A.-G. FOR CAPE OF GOOD HOPE*, [1904] A. C. 412; 73 L. J. P. C. 65; 91 L. T. 210; *sub nom.* *A.-G. FOR CAPE OF GOOD HOPE v. LOUW*, 20 T. L. R. 572, P. C.

575. ———]—*A.-G. FOR ONTARIO v. A.-G. FOR CANADA*, No. 169, *ante*.

576. Rights of persons not parties to litigation—Not dealt with.]—*A.-G. FOR DOMINION OF CANADA v. A.-G. FOR PROVINCES OF ONTARIO, QUEBEC & NOVA SCOTIA, A.-G. FOR PROVINCE OF ONTARIO v. A.-G. FOR DOMINION OF CANADA, A.-G. FOR PROVINCES OF QUEBEC & NOVA SCOTIA v. A.-G. FOR DOMINION OF CANADA*, No. 119, *ante*.

577. Questions of valuation—Whether objections to entertained—Valuation adopted by party objecting.]—*KRISTO INDRO SAHA v. HUROMONEE DASSEE*, No. 500, *ante*.

578. ——— When item improperly included or excluded.]—Judicial Committee will not interfere with any question of valuation unless it can be shown that some item has been improperly included or excluded or that there is some fundamental principle which renders valuation unsound. On mere question of value of admitted items their Lordships will not interfere, nor will they allow a party to contend that valuation has been arrived at on an erroneous principle unless he has raised that contention by his printed case.—*CHARAN DAS v. AMIR KHAN*, [1920] L. R. 47 Ind. App. 255, P. C.

Appealable value.]—*See* Sect. 4, sub-sect. 2, B., *ante*.

579. Damages awarded by court below—Judicial committee will not interfere.]—Where a new trial has been ordered on the ground that the damages awarded by a jury for personal injury & loss of business caused by an accident were excessive, the Judicial Committee will not interfere with the decision of the ct. below, who have knowledge of the local conditions affecting business.—*WEST INDIA ELECTRIC Co. v. ROBERTS*, [1920] A. C. 1025; 90 L. J. P. C. 47; 124 L. T. 165, P. C.

—]—*See* COURTS, Vol. XVI., p. 162, No. 650 *v.*

580. Questions not raised in court below—Not considered.]—A mandament of penal interdict ought not to be granted to restrain the execution or a sentence upon grounds that might have been brought forward at the hearing of the cause.—*NIEUWERKERK v. REYNOLDS* (1829), 1 Knapp, 151; 12 E. R. 278, P. C.

581. ———]—*FLINT v. WALKER*, No. 457, *ante*.

582. ———]—It is, their lordships think, the experience of every one familiar with causes tried before a jury, that no more inflexible rule has ever obtained in the cts. than that you shall not raise a question after a trial which has not been raised at the time, which question, if it had been raised, could have been answered by

evidence on the other side (*per CUR.*).—**VICTORIA CORPN. v. PATTERSON, VICTORIA CORPN. v. LANG**, [1899] A. C. 815; 68 L. J. P. C. 128; 81 L. T. 270, P. C.

583. —.—.]—An appeal to the King in Council is an appeal, strictly so called, confined to the materials which were before the ct. below, & not a re-hearing.—**PONNAMMA v. ARUMOGAM**, [1905] A. C. 383; 74 L. J. P. C. 102; 92 L. T. 740; 21 T. L. R. 524, P. C.

—.]—*See, further*, **COURTS**, Vol. XVI., pp. 153–156, Nos. 536–570.

584. Where no application made to court of colony—To deal with matter complained of.—The Judicial Committee will not interfere with an act of the executive Government of a colony in a case in which no appln. has been made to the cts. of justice in the colony to interpose in the matter.—*Ex p. MGOMINI* (1906), 94 L. T. 558; 21 Cox, C. C. 154; *sub nom.* **MGOMINI, MZINELWA & WANDA (BY THEIR NEXT FRIEND MANGENA) v. NATAL (GOVERNOR) & A.-G.**, 22 T. L. R. 413; 70 J. P. Jo. 172, P. C.

585. Appeal not a re-hearing.—**PONNAMMA v. ARUMOGAM**, No. 583, *ante*.

586. Free pardon granted since leave to appeal—Court will not enter into merits.—Special leave to appeal from a conviction of a colonial ct. for a misdemeanor having been given, subject to the question of the jurisdiction of Her Majesty to admit such an appeal; & it appearing, at the opening of the appeal, that since such qualified leave had been granted the prisoner had obtained a free pardon & been discharged from prison, the Judicial Committee declined to enter upon the merits of the case, or to pronounce an opinion upon the legal objections to the conviction, the prisoner having obtained the substantial benefit of a free pardon, & dismissed the appeal.—**LEVIEN v. R.** (1867), L. R. 1 P. C. 536; 4 Moo. P. C. C. N. S. 483; 36 L. J. P. C. 62; 16 W. R. 159; 16 E. R. 400, P. C.

Annotation:—**Refd. Kali Nath Roy v. King-Emperor** (1920), 37 T. L. R. 162.

B. Where Questions of Fact involved.

Generally.—*See* **COURTS**, Vol. XVI., p. 160, Nos. 615 *et seq.*

587. Credibility of witnesses—Testimony improperly discredited.—No appeal will lie from the judgment of a ct. below on the sole ground that it discredited the testimony of the witness improperly.—**SANTACANA Y ALOY v. ARDEVOL** (1830), 1 Knapp, 269; 12 E. R. 322, P. C.

Annotation:—**Consd. Canepa v. Larios** (1834), 2 Knapp, 276.

588. Rule in Indian cases.—In questions of disputed facts, the rule of the Judicial Committee is, that the ordinary legal & reasonable

presumptions of facts must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to the cts. below may commonly be; that due weight must be given to the evidence; & that evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed, without some grave grounds to support the imputation, as such a rejection would virtually submit the decision of the rights of others to the suspicion, & not to the deliberate judgment, of the judge. The entire history of a family must, therefore, not be thrown aside because the evidence of some of the witnesses is incredible or untrustworthy.—**RAMAMANI AMMAL v. KULANTHAI NATCHEAR** (1871), 14 Moo. Ind. App. 346; 20 E. R. 810, P. C.

—.]—*See, further*, **COURTS**, Vol. XVI., p. 161, Nos. 627–634.

Validity of instrument.—*See* **COURTS**, Vol. XVI., pp. 160, 161, Nos. 624–626.

Trial with jury.—*See* **COURTS**, Vol. XVI., pp. 161–162, Nos. 635–640.

Questions of boundaries.—*See* **COURTS**, Vol. XVI., p. 162, Nos. 643–645.

Where concurrent findings.—*See* **COURTS**, Vol. XVI., pp. 162–164, Nos. 650–679.

SECT. 7.—PRACTICE AND PROCEDURE—COSTS

See, generally, **COURTS**, Vol. XVI., pp. 134–171, Nos. 321–774.

589. Appeal from interlocutory order.—*Semble*: with respect to appeals from cts. practising according to the Civil Law, you may appeal from an interlocutory order, which may ultimately conclude the case.—**CAMERON v. FRASER** (1842), 4 Moo. P. C. C. 1; 6 Jur. 113; 13 E. R. 200, P. C.

590. Time for appeal—Slave Act, 1834 (c. 113).—Appl. from a decree of condemnation pronounced in a Vice-Admty. Ct. abroad against a vessel engaged in the slave trade, contrary to Slave Act, 1834 (c. 113), must, in compliance with sect. 29 of that Act, procure an inhibition to issue within twelve months after that decree, or he will be barred his appeal.—**LOGAN v. BURSLEM** (1842), 4 Moo. P. C. C. 284; 7 Jur. 1; 13 E. R. 312, P. C.

591. Time for rescission of leave to appeal—Unduly given by court below—Effect of delay.—**SAUVAGEAU v. GAUTHIER**, No. 478, *ante*.

592. Time for objection to appeal—On application for leave to appeal—Or by petition to Crown before hearing.—**PISANI v. A.-G. FOR GIBRALTAR**, No. 447, *ante*.

593. Costs of appeal—Upon remit to court below.—Under a remit to the ct. below, the

PART IX. SECT. 7.

589 i. Appeal from interlocutory order.—A motion by deft. for leave to appeal to Privy Council:—*Held*: If decree had been final, leave to appeal would have been granted but being only interlocutory motion dismissed.—**UNITED HAND-IN-HAND & BAND OF HOPE CO. (REGD.) v. NATIONAL BANK OF AUSTRALASIA** (1880), 6 V. L. R. 60, 198.—**AUS.**

589 ii. —.—.]—A matter having been decided on an interlocutory application, which appeared to be the whole matter in dispute between the parties, though other issues were raised by the pleadings, the ct. granted leave to appeal to the Privy Council from the interlocutory order.—**ZOBEL v. CROU-DACE** (1897), 18 N. S. W. L. R. 412; 14 N. S. W. W. N. 100.—**AUS.**

589 iii. —.—.]—On an application for leave to appeal to H.M. in Council from an order of the High Ct.:—*Held*: such was in the nature of an interlocutory order, & was not one from which the High Ct. could grant leave to appeal to Her Majesty in Council.—**PALAK DHARI RAI v. RADHA PERSAD SINGH** (1878), 1 L. R. 2 All. 65.—**IND.**

589 iv. —.—.]—Defts. applied for leave to appeal to Her Majesty in Council from an order of the High Ct.:—*Held*: such order not being a "final decree" was not appealable to Her Majesty in Council.—**RAMADHIN MAHTON v. GANESH** (1882), 1 L. R. 4 All. 238.—**IND.**

589 v. —.—.]—Appl. applied for leave to appeal to His Majesty in Council:—*Held*: the order not being a final, but an interlocutory, order,

no appeal lay to H.M. in Council.—**GANGAPPA REVANSHIDAPPA v. GANGAPPA MALLESHPAPPA** (1914), 1 L. R. 38 Bom. 421.—**IND.**

589 vi. —.—.]—Appeals in matters interlocutory in their nature should be allowed to be referred to H.M. in Council only when decision will put an end to litigation & finally decide rights of parties.—**SAJJID ALI KHAN v. ISHAQ KHAN** (1919), 1 L. R. 42 All. 174.—**IND.**

g. Costs of appeal—Effect of delay.—Where there was delay between decrees of High Ct. in 1909 & setting down appeals for hearing in 1916 for which no reason appeared:—*Held*: a grave reproach on administration of justice. If appeals had succeeded the Privy Council would have refused applts. costs.—**BANGA CHANDRA DEVA**

Sect. 7.—Practice and procedure—Costs. Sect. 8: Sub-sect. 1.]

Judicial Committee, in the circumstances, directed that the costs of the appeal should abide the ultimate result of the proceedings consequent upon the remit.—*JONES v. MCKENZIE* (1859), 13 Moo. P. C. C. 1; 7 W. R. 717; 15 E. R. 1, P. C.

594. — Respondents in same interest severing defences—One set of costs allowed.]—Where resps. were in the same interest, but severed in their defences, only one set of costs was allowed.—*WOOMATARA DEBIA v. UNNOPOORNA DASSEE* (1872), 11 B. L. R. 158, P. C.

595. — Appeal dismissed for want of prosecution—Costs not provided for in order of court below—Power of court below to correct order.]—Where an appeal was dismissed for want of prosecution, but the order of the ct. below granting leave to appeal had made no provision as to the costs in case of such dismissal for want of prosecution:—*Held*: the ct. below had power, upon a proper appln., to correct such omission in the order giving leave to appeal.—*MILSON v. CARTER*, [1893] A. C. 638; 62 L. J. P. C. 126; 69 L. T. 735; 9 T. L. R. 613; 1 R. 425, P. C.

596. Security for costs—Whether Crown must give—Attorney-General, Isle of Man.]—The A.-G. of the Isle of Man, as the chief law officer of the Crown in the Island, bringing an appeal to the Queen in Council, is not required to enter into a recognisance to answer costs of appeal.—*A.-G. OF ISLE OF MAN v. COWLEY* (1859), 12 Moo. P. C. C. 27; 14 E. R. 821, P. C.

597. — Appeal allowed notwithstanding delay in perfecting—Delay due to suspension & removal of colonial judges—Imperfect constitution of court.]—*INGLIS v. DE BARNARD*, No. 55, ante.

598. — Rule in cases between Crown & subject.]—In cases between the Crown & a subject, the rule of the Judicial Committee in dealing with costs will in future be that the Crown neither pays nor receives costs, unless the case is governed by some local statute, or there are exceptional circumstances justifying a departure from the ordinary rule.—*JOHNSON v. R.*, [1904] A. C. 817; 73 L. J. P. C. 113; 91 L. T. 234; 53 W. R. 207; 20 T. L. R. 697, P. C.

Annotations:—*Apld. Vaithinatha Pillai v. King-Emperor* (1913), 29 T. L. R. 709. *Reid. The Zamora*, [1916] 2 A. C. 77; *Re Letters Patent No. 139207, Re Carbonit Akt.*, [1923] 2 Ch. 604. *Mentd. A.-G. v. TILL* (1909), 5 Tax Cas. 440.

599. — —.] — VAITHINATHA PILLAI v. KING-EMPEROR, No. 559, ante.

Costs in legal proceedings by & against Crown & Crown servants.]—See CONSTITUTIONAL LAW, Vol. XI., pp. 530–535, Nos. 341–378.

600. Bail — Power to dispense with—Privy Council Rules, 1865, No. 15.]—Rule No. 15 of 1865 may be dispensed with in a proper case.

Their Lordships entertain no doubt of their power to dispense with the obligation put upon an applt. of giving bail for £200 under r. 15 of the P. C. Rules of 1865 for appeals in Ecclesiastical & Maritime cases, in a proper case (*per CUR.*).—*HUNTER v. S.S. HESKETH*, [1891] A. C. 628; 61 L. J. P. C. 84; 66 L. T. 305; 7 Asp. M. L. C. 160, P. C.

601. Admissibility of evidence—Not before court below.]—Evidence of the owner's claim not tendered in the ct. below, was received by the Judicial Committee on the hearing of the appeal.—*GUIMARAENS v. PRESTON* (1842), 4 Moo. P. C. C. 167; 6 Jur. 879; 13 E. R. 265, P. C.

Annotation:—*Mentd. Hocquard v. R.*, *The Newport* (1857), 11 Moo. P. C. C. 156.

602. — —.]—It was ordered in this case that certain documents not before the ct. below, should be received by the Registrar & produced at the hearing subject to objection as to admissibility.—*A.-G. & RECEIVER-GENERAL FOR JERSEY v. LE MOIGNAN*, [1892] A. C. 402; 61 L. J. P. C. 53; 66 L. T. 803, P. C.

603. Appeal in formâ pauperis — After leave in regular form granted in lower court.]—QUINLAN v. CHILD, QUINLAN v. QUINLAN, Ex p. QUINLAN, No. 436, ante.

—*See COURTS*, Vol. XVI., pp. 170, 171, Nos. 755–774.

Leave to appeal.]—See Sect. 4, ante; COURTS, Vol. XVI., pp. 137–143, Nos. 352–421.

Preparation & transmission of record.]—See COURTS, Vol. XVI., pp. 144, 145, Nos. 422–436.

Petition of appeal.]—See COURTS, Vol. XVI., p. 145, Nos. 437, 438.

Cross-appeals.]—See COURTS, Vol. XVI., pp. 145, 146, Nos. 439–445.

Consolidation of appeals.]—See COURTS, Vol. XVI., p. 146, Nos. 446, 447.

Parties on appeal.]—See COURTS, Vol. XVI., p. 146, Nos. 448–456.

Time for appeal.]—See COURTS, Vol. XVI., pp. 146–148, Nos. 457–481.

Lodging cases.]—See COURTS, Vol. XVI., pp. 148, 149, Nos. 482–485.

Interlocutory proceedings.]—See COURTS, Vol. XVI., pp. 149, 150, Nos. 486–493.

Hearing of appeal.]—See COURTS, Vol. XVI., pp. 150–164, Nos. 494–680.

Judgment on appeal.]—See COURTS, Vol. XVI., pp. 164–166, Nos. 681–698.

Costs of appeal.]—See COURTS, Vol. XVI., pp. 167–170, Nos. 699–754.

BISWAS v. JAJAT KISHORE AGHARJYA CHOWDHURI, [1917] I. L. R. 44 Cal. 186.—*IND.*

h. — Appeal dismissed for want of prosecution — Costs not provided for in order of court below.]—An order was granted to resps., giving leave to appeal from the Ct. of Appeal to the Privy Council. Resp. did not prosecute the appeal:—*Held*: applt. was entitled to an order discharging the previous order, & to his costs of the first order & incurred in consequence thereof.—*CLRAVE v. KING* (1880), O. B. & F. 61.—*N.Z.*

k. Security for costs—Whether Crown must give.]—Upon leave being given to appeal against a decision of the ct. in favour of the Crown, the ct.

is bound if the decree be executed to require the Crown to enter into security for the due performance of the order of the Privy Council on the appeal.—*KETTLE v. R.* (1866), 3 W. W. & A.B. 141.—*AUS.*

l. —.]—If resp. executes the judgment he must give security to abide by the order of the Privy Council on the appeal should it be against him, & he must give this security even though he only takes money out of ct. which has been paid on foot of the judgment. Payment of costs amounts to a partial execution, & the solr.'s undertaking to repay them is not equivalent to the security which is required by the Privy Council Rules.—*MITCHELL v. LEMM* (1910), 6 Hong

Kong, L. R. 162.—*HONG KONG.*

m. —.] Where leave has been given to a party by the ct. of Appeal to appeal from its decision to the Privy Council, subject to the condition that applt. finds security for costs, & applt. has performed that condition, the jurisdiction of the ct. of Appeal over that appeal is gone, & it has no power on the ground that the appeal has not been duly prosecuted either to discharge the order made by it or to vary the order by discharging that part of it ordering a stay of execution. The practice is regulated not by the rules of the ct. of Appeal but by the terms of the Order in Council of the 16th of May, 1871.—*LYNNAR v. DUNLOP*, *etc.* (1907), 26 N. Z. L. R. 929.—*N.Z.*

SECT. 8.—APPEALS FROM PARTICULAR DOMINIONS, ETC.

SUB-SECT. 1.—AUSTRALIA.

Special leave to appeal.]—See Sect. 4, *ante*.

604. Right to appeal.—From Supreme Court direct to Judicial Committee—Operation of Crown Lands Act, 1889.]—Above Act, sect. 8, sub-sect. 6, enacts that the decision of the Supreme Ct. on a case stated by the Land Court "shall be conclusive" & does not take away the right of appeal to the Queen in Council in such a case.—NEW SOUTH WALES LANDS MINISTER v. HARRINGTON (1899), 68 L. J. P. C. 60; 80 L. T. 604, P. C.

605. ——— Operation of Australian Judiciary Act, 1903—Not retrospective.]—COLONIAL SUGAR REFINING CO. v. IRVING, No. 442, *ante*.

PART IX. SECT. 8, SUB-SECT. 1.

604. 1. Right to appeal.—From Supreme Court direct to Judicial Committee—Operation of Crown Lands Act, 1889.]—Where the Supreme Ct. has given a decision under s. 8 (6) of Crown Lands Act, 1889, there is an appeal to the Privy Council, notwithstanding the clause in that section which says that its "decision shall be conclusive."—RE BARBOUR (1891), 12 N. S. W. L. R. 90; 8 N. S. W. N. 7.—AUS.

n. ——— On case stated.—Under Taxation Act, 1884.]—An appeal lies as of right to the Judicial Committee of the Privy Council from a decision of the Supreme Ct. on a case stated under Taxation Act, 1884, where the amount involved is of the value of £500.—WALLAROO & MOONTA MINING & SMELTING CO. LTD. v. TAXES COMR. (1914), 8 A. L. J. 388.—AUS.

o. Leave to appeal.—15 Vict. No. 10, Sect. 33.]—A rule nisi obtained by a creditor by £288 to expunge a proof of debt of a creditor for £53,587 was on appeal to the full ct. discharged. On an application under 15 Vict. No. 10, s. 33, for leave to appeal to the Privy Council:—*Held*: the matter in issue was of sufficient amount within sect. 33 & leave to appeal granted.—RE RUTLEDGE & CO., *Re* FLOWER SALTING CO.; *Ex p.* ROLFE & BAILEY (1863), 2 W. & W. 51.—AUS.

p. ———.]—A judgment overruling a plea in equity does not conclude the merits of a case within the meaning of 15 Vict. No. 10, so as to entitle the unsuccessful party to obtain leave to appeal to the Privy Council.—A. G. v. PRINCE OF WALES CO. (1869), 6 W. W. & A. B. 4.—AUS.

q. ———.]—Petition for leave to appeal to Privy Council:—*Held*:—if value of both realty & personality together at time of testator's death exceeded £500 leave to appeal should be granted.—BUCKLEY v. MILLAR (1869), 8 N. S. W. S. C. R. 123, 474.—AUS.

r. ———.]—Where a co. was fined £10:—*Held*: leave to appeal to Privy Council granted on affidavit of co.'s secretary that case indirectly involved claim or demand relating to property of value of £500.—BENDIGO WATERWORKS CO. v. THUNDER (1870), V. R. (Law.) 123.—AUS.

s. ———.]—Leave to appeal to Privy Council will not be granted where there is a sum at issue not above £500 & nothing else involved.—GARDNER v. MCCULLOCK (1876), 2 V. L. R. 128.—AUS.

t. ———.]—An award of over £8,000 as purchase-money of a store & stock-in-trade, was referred back to the arbitrators, so far as regarded the valuation of certain parts of the stock-in-trade, & the arbitrators then reduced their former award to less than £500.—*Held*: the matter in issue was not the value of the stock-

in-trade, but the difference between the two valuations of the arbitrators; & leave to appeal to the Privy Council refused.—RE ARMSTRONG & CULLEY (1878), 4 V. L. R. 178.—AUS.

a. ———.]—MAY v. MARTIN (1886), 12 V. L. R. 115.—AUS.

b. ———.]—A petition for leave to appeal to the Privy Council was presented:—*Held*: the decision was a final order from which applts. could appeal.—RE ANGLO-AUSTRALIAN INVESTMENT FINANCE & LAND CO., LTD. (1893), 14 N. S. W. Eq. 110.—AUS.

c. ———.]—When in action to recover possession of land of greater value than £500. Deft. sets up defence that he is entitled to tenancy of land until money due to him exceeding £500 in amount is paid, then though rent payable in respect of tenancy is less than £50 the real dispute between parties is in excess of £500.—COMMERCIAL BANK OF AUSTRALIA, LTD. v. MCGASKILL (1897), 23 V. L. R. 10, 343.—AUS.

d. ———.]—In an application for leave to appeal to the Privy Council against the decision of the full ct. reversing a decree of nullity of marriage:—*Held*: ct. not being satisfied that there was in dispute, a civil right of value of more than £100 refused leave to appeal.—CHARD v. HARRISON (1903), 3 S. R. N. S. W. 26; 19 N. S. W. N. 250.—AUS.

e. ——— Order in Council, Nov. 13, 1850.]—Several actions arising out of same cause were brought by different parties against same debts. In one, judgment was obtained which would govern the rest; on motion for leave to appeal to Privy Council:—*Held*: judgment did not "indirectly" involve question respecting amounts claimed in others within meaning of Order in Council of Nov. 13, 1850.—MORSE v. AUSTRALASIAN STEAM NAVIGATION CO. (1870), 9 N. S. W. S. C. R. 81.—AUS.

f. ——— Order in Council, June 9, 1860.]—W. sued C. & Co. in the county ct. for £50. Defts. applied for leave to appeal to the Privy Council under Order in Council, June 9, 1860, & it was stated in an affidavit filed in support of the application that the decision involved claims or demands exceeding the appealable amount made since the judgment against defts. by other persons in respect of similar transactions:—*Held*: as the transaction in respect of which the judgment was given was one entirely different from all other transactions, the judgment could not be said to involve directly or indirectly any claim, demand or questions within the meaning of the Order in Council, though it settled the law governing other transactions of a similar character.—WILCOX v. CLARKE & CO. (1896), 21 V. L. R. 752.—AUS.

g. ———.]—Two applications

606. ——— Operation of Australian Constitution Act, 1900—Taxation of Commonwealth officer by individual State.]—An officer of the Commonwealth of Australia, receiving his salary from the Commonwealth, is taxable in respect of such salary by the Govt. of the State in which he resides & carries on his official duties. The right of appeal to His Majesty in Council from the judgment of the Supreme Ct. of a State in such a case is not taken away by the Australian Constitution Act.—WEBB v. OUTRIM, [1907] A. C. 81; 76 L. J. P. C. 25; 95 L. T. 850; 23 T. L. R. 147, P. C.

Annotation.—*Reid*. New South Wales Taxation Comrs. v. Baxter, Webb v. Crouch & Flint, [1908] A. C. 214.

607. ——— In cases of insolvency.]—An appeal lies to the Judicial Committee from the Supreme Ct. in cases of insolvency.—WILLANS v.

necessary for leave to appeal to Privy Council under Order in Council of June 9, 1860. On initial application party has first to satisfy ct. that judgment to be appealed from is of value over £500. Ct. then grants conditional order declaring amount & value of security to be entered into by applt. for prosecution of appeal & payment of costs, & directing whether judgment appealed from be carried into execution or be suspended pending appeal.

If applt. comply with this order within 3 months, a subsequent application is necessary for final order that terms have been complied with & appeal allowed to be made. Words "Persons or Persons" in Order in Council includes both applt. & resp. when judgment appealed from is not entirely in favour of one party.—CAYRON v. RUSSELL (1899), 24 V. L. R. 997.—AUS.

h. ———.]—Where a judge on the trial of an action referred to the full ct., certain questions before delivering his judgment in the action, & the full ct. gave a decision:—*Held*: not a final order within the meaning of Order in Council, June 9, 1860.—WEBSTER v. SHAW, [1905] 1 V. L. R. 200.—AUS.

k. ——— In discretion of Court.]—Right of appeal to the Privy Council depends on No. 6 of the Orders in Council, & is in the discretion of the ct.—PARKER v. FALKNER (1889), 10 N. S. W. L. R. 13; 5 N. S. W. N. 57.—AUS.

l. ——— Under Supreme Court Act, 1890.]—On application for leave to appeal to Her Majesty in Her Privy Council under sect. 431 of Supreme Court Act, 1890, the ct. must be satisfied that the issue amounts to £1,000 sterling in value.—BROWN v. HIGGINS (1900), 25 V. L. R. 691.—AUS.

m. ———.]—H. applied for registration of a trade mark. The matter eventually came before the full ct. which ordered the trade mark to be registered. N. sought leave to appeal to the Privy Council:—*Held*: the matter in issue amounting to more than the sum of £1,000 leave granted.—RE MAIZO & MAIZENA TRADE MARKS, [1906] V. L. R. 246.—AUS.

aa. ——— Certificate of leave from High Court—Operation of Australian Judiciary Act, 1903—Not retrospective.]—Pltf. obtained a verdict for £300 damages. Deft. appealed to the full ct. of N. S. W., & on Aug. 20, 1903, that ct. discharged defts. rule nisi. On Aug. 25 in same year Judiciary Act, 1903 was passed, & on Oct. 15 the High Ct. granted deft. special leave to appeal. Pltf. moved to rescind the order granting leave on the grounds that the ct. had no jurisdiction as the judgment appealed from was pronounced before the passing of Judiciary Act:—*Held*: the motion for leave to appeal was rescinded.—HANNAN v. DALGARNO (1903), 1 C. L. R. 1.—AUS.

Sect. 8.—Appeals from particular dominions, etc.: Sub-sect. 1 & 2.]

AYERS (1877), 3 App. Cas. 133; 47 L. J. P. C. 1; 87 L. T. 732, P. C.
Annotation:—Mentl. Re Commercial Bank of South Australia (1887), 38 Ch. D. 522.

608. Leave to appeal—Certificate of leave from High Court—Australian Constitution Act, 1900 (c. 12), s. 74.]—The Commonwealth of Australia Constitution Act enacts by sect. 74 that no appeal shall be permitted to the King in Council from any decision of the High Ct. upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth & those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Ct. shall certify that the question is one which ought to be determined by His Majesty in Council:—*Held*: in the absence of a certificate from the High Ct. leave to appeal from a decision of that ct. could not be given.—A.-G. FOR NEW SOUTH WALES v. NEW SOUTH WALES (COLLECTOR OF CUSTOMS), [1909] A. C. 345; 78 L. J. P. C. 114; 100 L. T. 578; 25 T. L. R. 413, P. C.

609. ———.]—A ct. constituted by the Commonwealth Parliament for the purposes defined by s. 51 (xxxv.) made, upon an appln. by a federation of builders' labourers' association in different States, an award against applts. as to wages & conditions of labour. The High Ct. discharged a rule *nisi* prohibiting further proceedings upon the award, holding that there was an industrial dispute extending beyond the limits of any one State, & refused to grant a certificate under above section:—*Held*: the decision of the High Ct. was one to which s. 74 applied, &

in the absence of a certificate an appeal to His Majesty in Council was not competent.—JONES v. COMMONWEALTH COURT OF CONCILIATION & ARBITRATION, [1917] A. C. 528; 86 L. J. P. C. 145; 117 L. T. 225; 33 T. L. R. 358, P. C.

610. ———.]—Upon a case stated by a judge of the High Ct. of Australia upon the hearing a summons under s. 21AA (1), of the Commonwealth Conciliation & Arbitration Act, 1904–1918, the Full Bench of Australia held that the Parliament of the Commonwealth has power under s. 51 (xxxv.) of the Constitution to make laws binding upon the States with respect to conciliation & arbn. for the prevention & settlement of industrial disputes extending beyond the limits of one State, so as to bind a Minister of the Crown for a State acting under a statute of that State as an employer. Upon a petn. for special leave to appeal from the decision of the Full Bench, & from the final order of the judge based upon it, objection was taken that an appeal was not competent having regard to s. 74 of the Commonwealth Constitution, in the absence of a certificate of the High Ct. under that section:—*Held*: special leave to appeal should not be granted.—MINISTER FOR TRADING CONCERNS FOR THE STATE OF WESTERN AUSTRALIA v. AMALGAMATED SOCIETY OF ENGINEERS (AUSTRALIAN SECTION), [1923] A. C. 170; 92 L. J. P. C. 60; 128 L. T. 641, P. C.

SUB-SECT. 2.—CANADA.

Special leave to appeal.]—See Sect. 4, ante

611. Competency of appeal—From Supreme Court—Under Supreme Court Act, 1875, sect. 47.]

608 1. Leave to appeal—Certificate of leave from High Court—Australian Constitution Act, 1900, sect. 74.]—Constitution Act, sect. 74, provides no appeal shall be permitted to the King in Council from a decision of the High Ct. upon any question as to the limits *inter se* of the constitutional powers of the Commonwealth & those of the States unless the High Ct. shall certify that the question is one which ought to be determined by the King in Council, & that the High Ct. may so certify if satisfied that for any special reason the certificate should be granted:—*Held*: a certificate under sect. 74 should not be granted in respect of the questions decided by the High Ct. —AMALGAMATED SOCIETY OF ENGINEERS v. ADELAIDE S.S. CO., LTD. (1921), 29 C. L. R. 406.—AUS.

o. ———.]—*Grounds for granting—Not same as those upon which judicial committee grants leave.*—The principles applicable to the granting by the Privy Council of leave to appeal from the High Ct. or from the Supreme Ct. are not applicable to the granting of a certificate under Constitution, s. 74.—DEAKIN v. WEBB (1904), 1 C. L. R. 585.—AUS.

p. ———.]—*Conflicting judgment of High Court & Privy Council on same question.*—The fact that there are conflicting judgments of the High Ct. & the Privy Council on the same question is not sufficient reason for granting a certificate for leave to appeal to the Privy Council.—BAXTER v. TAXATION COMRS. (1907), 4 C. L. R. 1087.—AUS.

q. ———.]—The fact that a decision of the Privy Council, on a question of law as to the limits *inter se* of the constitutional powers of the Commonwealth & the States, is contrary to a previous decision of the High Ct. as to which a certificate

under sect. 74 of the Constitution has been asked & refused:—*Held*: not to be of itself a sufficient reason for granting a certificate as to another decision of the High Ct. following its previous decision.—FLINT v. WEBB (1907), 4 C. L. R. 1178.—AUS.

r. ———.]—*Time for application.*—On a motion for leave to appeal to the Privy Council, notice of motion having been given to resp. within fourteen days after judgment, but for a date outside the fourteen days. Resp. on the application took preliminary objection that the motion was out of time:—*Held*: there was jurisdiction to hear the motion, & leave granted to appeal.—SPENCER v. REGISTRAR OF TITLES (1909), 11 W. A. L. R. 76.—AUS.

s. ———.]—Petition for leave to appeal to Privy Council was filed & served within 14 days after judgment:—*Held*: application was not out of time although not heard until after 14 days had elapsed.—BEARD, WATSON, LTD. v. DIXON'S TRUST LTD. (1916), 16 S. R. N. S. W. 47; 33 N. S. W. W. N. 8.—AUS.

t. Practice—Order of Privy Council made order of court.]—Ex p. motion by deft. that order of Privy Council may be made order of ct.:—*Held*: order to be drawn up making order of Privy Council an order of ct.—PURVES v. A.-G. (1862), 1 N. S. W. S. C. R. 23.—AUS.

u. ———.]—After decision of Privy Council on appeal it is unnecessary to apply to Supreme Ct. to make order of Privy Council an order of this ct.—DROUHART v. MCPHERSON (1878), 4 V. L. R. 290.—AUS.

v. ———.]—It is unnecessary in an equity suit to make an order of the Privy Council an order of Supreme Ct.—BROUGHAM v. MELBOURNE BANK.

ING CORPN. (1879), 5 V. L. R. 110.—AUS.

c. ———.]—*Costs—Taxation of under order of Privy Council.*—PURVES v. A.-G. (1862), 1 N. S. W. S. C. R. 23.—AUS.

d. ———.]—*When proceedings stayed—Pending appeal to Privy Council.*—Ptf. asked leave to appeal to Privy Council:—*Held*: leave granted but refused stay of proceedings & deft. ordered to give security for performance of order of Privy Council in £10,000 & pfts. to give security for £300 for costs.—BANK OF NEW SOUTH WALES v. TYSON & SANDEMAN (1871), 11 N. S. W. S. C. R. 1.—AUS.

e. ———.]—On motion for leave to appeal to Privy Council, ct. can only stay execution of judgment on appct. giving security.—NEWHEY v. GARDEN GULLY CO. (1878), 2 V. L. R. 26.—AUS.

f. ———.]—Where the full ct. has given judgment for a sum under £500, that ct. has no jurisdiction to stay proceedings on the judgment pending on application to the Privy Council for leave to appeal therefrom.—SYNNAMON v. NEW ZEALAND INSURANCE CO. (1898), 9 Q. L. J. 13, 24.—AUS.

g. ———.]—A stay of proceedings pending an appeal to the Privy Council can only be granted by the full ct. where the order appealed from expressly directs the payment of money. To induce the ct. to stay proceedings the appellant must make out a case of some doubt, or show at least a possibility of succeeding. Special circumstances must also be shown by affidavit to exist.—LIEBE v. MOLLOY (1907), 9 W. A. L. R. 116.—AUS.

PART IX. SECT. 8, SUB-SECT. 2.

h. Leave to appeal—Right of joint appellant to refuse to participate—After

—Sect. 47 of the above Act refers only to the hypothetical establishment in the future of a ct. for hearing colonial appeals, not to any existing ct.; & in any case it leaves Her Majesty's prerogative entirely untouched.—**JOHNSTON v. ST. ANDREW'S CHURCH, MONTREAL (MINISTER & TRUSTEES) (1877), 3 App. Cas. 159; 26 W. R. 359; sub nom. ST. ANDREW'S CHURCH, MONTREAL (MINISTER & TRUSTEES) v. JOHNSTON, 37 L. T. 556, P. C.**

Annotations:—*Consd. Cushing v. Dupuy (1880), 5 App. Cas. 409. Auld. Prince v. Gagnon (1882), 8 App. Cas. 103. Refd. Valin v. Langlois (1879), 41 L. T. 662.*

612. — Under Canadian Controverted Elections Act, 1886.]—Whether the prerogative of the Crown has or has not been taken away by the general prohibition of appeals under the above Act, it ought not to be exercised in the case of an appeal from a decision of the Supreme Ct. of Canada upon an election petn., considering the narrow range of such cases, & the desirability of their being decided speedily & locally.—**KENNEDY v. PURCELL (1888), 59 L. T. 279; 4 T. L. R. 664, P. C.**

613. — Under Railway Act, 1906, s. 56.]—An appeal from the order of the Railway Board lies to the Supreme Ct. under sect. 56, sub-sect. 2, of the Railway Act, 1906, after the leave prescribed by that sect. has been obtained, on any question of jurisdiction or law. Under sub-sect. 3 the Supreme Ct. is to determine by its judgment the questions submitted, & under sub-sect. 5, to certify its opinion to the Board, which is to make an order in accordance therewith, & that order by sub-sect. 9 is declared to be final:—*Held*: the provisions of sect. 56 are not sufficient to take away the prerogative of the Crown to grant leave to appeal from the said judgment.—**CANADIAN PACIFIC RY. v. TORONTO CORPN. & GRAND TRUNK RY. OF CANADA, [1911] A. C. 461; 81 L. J. P. C. 5; 104 L. T. 724; 27 T. L. R. 448, P. C.**

614. — Under Colonial Courts of Admiralty Act, 1890, s. 6.]—Notwithstanding the provisions of the Canadian Supreme & Exchequer Courts Act, 1875, s. 47, with respect to the finality of the judgments of the Supreme Ct., an appeal

lies as of right under sect. 6 of the above Act, from a judgment of the said ct. when pronounced in an appeal thereto from a decree of the Colonial Ct. of Admty. constituted in pursuance of & exercising jurisdiction under the above Act.—**RICHELIEU & ONTARIO NAVIGATION CO. v. CAPE BRETON (OWNERS), [1907] A. C. 112; 76 L. J. P. C. 14; 95 L. T. 896; 23 T. L. R. 185, P. C.**

615. — From Court of Queen's Bench for Lower Canada.—On issue of writ of *capias ad respondendum*.]—The Ct. of Q. B. of Lower Canada has no power to grant leave to appeal from a judgment of that Ct. in respect of the issue of a writ of *capias ad respondendum*, unless such proceeding is distinct from & not incident to a suit.—**GOLDRING v. BANQUE D'HOCHELAGA (1880), 5 App. Cas. 371; 49 L. J. P. C. 82.**

616. — Code of Civil Procedure Art. 1178.]—CARTER v. MOLSON, No. 461, ante.

617. — On petition of right.]—An appeal lies to her Majesty from a decision of the Ct. of Q. B. for Lower Canada upon a petition of right.—**R. v. DEMERS, [1900] A. C. 103; 69 L. J. P. C. 5; 81 L. T. 795, P. C.**

618. — From Court of Appeal for Ontario.—Must be determined by that court.]—GILLETT (E. W.) & CO., LTD. v. LUMSDEN, No. 502, ante.

619. — From Board of Railway Commissioners for Canada.—Only on special leave.]—An appeal lies, by special leave, to His Majesty in Council, from an order of the Board of Railway Comrs. for Canada, but, having regard to the nature of the functions of that Board & the rights of appeal given by the Railway Act, leave should be granted cautiously & only under special circumstances.—**TORONTO RY. CO. v. TORONTO CITY, [1920] A. C. 426; 89 L. J. P. C. 81; 122 L. T. 635, P. C.**

620. — Under Canadian Act, 1877, c. 41.—& Civil Procedure Code, Art. 1178.]—CUSHING v. DUPUY, No. 91, ante.

621. — Under Canadian Criminal Code, s. 1025.—Public nuisance.]—Appls., a street ry. co. in Toronto, incorporated by a statute which confirmed an agreement with the Toronto Corpn. whereby appls. cars were not to be overcrowded,

leave granted.]—**MUIR v. MUIR (1870), 15 L. C. J. 79.—CAN.**

k. — Order of Vacation Judge final.]—The order of a judge made in vacation granting leave to appeal to the Queen in Council, & settling the terms on which the appeal will be granted, is final & cannot be revised or rescinded by the ct.—**DOMVILLE v. KEEVAN (1870), 2 Han. 175.—CAN.**

l. — Supreme Court of Canada.—Jurisdiction.]—The Supreme Ct. of Canada has no jurisdiction in respect to the granting or refusal of applications for leave to appeal to the Judicial Committee of the Privy Council, & notice of such an application ought not to be put upon the motion paper.—**KELLY v. SULLIVAN, MOORE v. CONNECTICUT MUTUAL INSURANCE CO., QUEEN INSURANCE CO. v. PARSONS (1880), Cass. Dig. 2nd ed. 695.—CAN.**

m. —.]—NASHMITH v. MAN-NING (1881), Cass. Dig. (1886 ed.) 403.—CAN.

n. — Constitution of court granting leave.]—Leave to appeal to the Privy Council from a judgment of the Supreme Ct. of British Columbia may be granted by any *quorum* of the full ct., although not constituted of the same judges as those who delivered the judgment proposed to be appealed from.—**R. v. VICTORIA LUMBER & MANUFACTURING CO. (1897), 5 B. C. R. 305.—CAN.**

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o. — Divisional Court.—When granted.]—The Divisional Ct. will not in its discretion allow an appeal to be brought from that ct. to the Privy Council except in a matter of general public interest.—**GORDON v. COTTON (1894), 3 B. C. R. 287.—CAN.**

p. — Not question of public importance.—Question of fact.]—Pitfs. obtained a verdict & judgment in their favour at the trial of the action, & successive appeals by defts. to the Supreme Ct. of Alberta *en banc* & the Supreme Ct. of Canada were unanimously dismissed. Defts., having paid into ct. the amount of the judgment, applied to stay the payment out pending an application for leave to appeal to the Privy Council. An application by defts. for a stay of proceedings upon the judgment of the Supreme Ct. of Canada, made before the judgment had been certified to the Alberta Ct. was refused by a judge of the former ct.:—*Held*: in view of that refusal, & the facts that three tribunals had, without dissent, found in favour of pitfs. defts., having a right of appeal to the Judicial Committee direct, elected to appeal to the Supreme Ct. of Canada, from which they had no appeal as of right; & it did not appear that there had been any miscarriage of justice, through accident, mistake or otherwise, but that every question in dispute had been fully considered, & the case involved merely a question of fact, &

nothing of public import that leave to appeal would probably be refused, & this application should be refused.—**WICKHAM v. GRAND TRUNK PACIFIC RY. CO. (1912), 22 W. L. R. 65.—CAN.**

q. —.]—DOYLE v. MOIRS, LTD. (1915), 49 N. S. R. 242.—CAN.

r. — Special sittings for leave to appeal.]—RE ASSESSMENT ACT & HEINZ (1914), 20 B. C. R. 140.—CAN.

s. — Time for application.]—An appeal to the Queen in Council, under the order of Nov. 1852, from a judgment of this ct. affirming a decree in equity, may be applied for within fourteen days after the minutes of the decree are settled, though more than fourteen days have elapsed since the judgment was pronounced.—**BROOKFIELD v. ST. ANDREW'S & QUEBEC RY. CO. (1860), 4 All. 496.—CAN.**

t. — Stay of proceedings.]—By an order of the Ct. of Error & Appeal, the M. Co. were ordered to remove a bridge constructed by them which impeded the navigation of the Desjardins Canal, against which the co. appealed to the Privy Council:—*Held*: under the statute, the circumstance of the co. having perfected the security required by orders was a sufficient answer to a motion for sequestration for non-compliance with the order requiring the removal of the bridge; & the co. having applied to this ct. for a stay of proceedings under

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were convicted under sect. 223 on an indictment for a nuisance endangering the property & comfort of the public. A demurrer was overruled, & the conviction was affirmed by the Appellate Ct. on the ground that the code left untouched the right to proceed by indictment for a public nuisance & that the nuisance was a public one:—*Held*: on appeal to the Privy Council, the case was not a criminal one within the meaning of sect. 1025 but might properly be made the subject of appeal to the King in Council as the wrong done was only a civil wrong, & as appls. were under no duty to the public generally, but only under a contractual obligation to the Corpn., the demurrer should have been allowed & an acquittal directed.—*TORONTO RY. v. R.*, [1917] A. C. 630; 86 L. J. P. C. 195; 117 L. T. 579; 34 T. L. R. 1, P. C.

622. Leave to appeal—When special leave granted—Where suitor elects to go to Supreme Court.]—*CLERGUE v. MURRAY, Ex p. CLERGUE*, No. 451, *ante*.

623. ————.]—Special leave to appeal from a decree of the Supreme Ct. of Canada will not be granted to a petitioner who has elected to appeal to that ct. & not to His Majesty direct, unless a question of law is raised of sufficient importance to justify it.—*CANADIAN PACIFIC RY. v. BLAIN*, [1904] A. C. 453; 73 L. J. P. C. 109, P. C.

624. ————.]—Petn. for special leave to appeal from the Supreme Ct. of Canada dismissed where the petitioners were appls. to that ct. & no important question of law was raised.—*EWING (WILLIAM) & CO. v. DOMINION BANK*, [1904] A. C. 806; 74 L. J. P. C. 21, P. C.

625. ————.]—An action alleging acts of trespass upon a lane in the city of Toronto was brought in the Supreme Ct. of Ontario, & an appeal from the Appellate Div. reversing the judgment of the trial judge was reversed by a majority of three judges to two on a question of dedication of the lane as a highway:—*Held*: as Canada had its own final ct., it was only in cases of a very exceptional kind that special leave to appeal from the Supreme Ct. of Canada should be given, & this case was not one for special leave.—*BALDWIN v. O'BRIEN*, [1919] W. N. 182, P. C.

626. ———— In criminal matter—Refusal of writ of certiorari by Supreme Court.]—Under the Canada Temperance Act, 1888, a search warrant was issued & duly executed, & large quantities of intoxicating liquor found on the hotel & premises searched & a conviction of applt. subsequently obtained in regard thereto, with a consequent order for the destruction of the liquor:—*Held*: the Supreme Ct. having dismissed appls. for writs of *certiorari* to remove into the said ct. the record of the said search warrant & destruction order, special leave to appeal therefrom must be refused. The decision was plainly right, having regard to sect. 10 of the Act under which the warrant was issued.—*TOWNSEND v. COX*, [1907] A. C. 514; 76 L. J. P. C. 98; 97 L. T. 620, P. C.

———.]—*See, also*, Sub-sect. 3, *ante*.

627. ———— Not on mere construction of agreement.]—*ALBRIGHT v. HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO*, No. 454, *ante*.

628. Amount below appealable value—Code of Civil Procedure for Lower Canada.]—*SAUVAGEAU v. GAUTHIER*, No. 478, *ante*.

629. Order in council directing reversal of judgment—Form & requisites of—To enable Court of Queen's Bench of Lower Canada to act.]—An Order in Council, founded upon the report of the Judicial Committee on an appeal from the Ct. of Q. B. in Lower Canada, simply directed the reversal of the judgment. Upon the Order being transmitted to Canada, the Ct. of Q. B. recorded it, but was of opinion that it was unable to act further, on the ground, that as a Ct. of Appeal, it had no jurisdiction to make of its own accord such an order on the Ct. below, as would give effect to the Order of Her Majesty in Council. Upon petn. by appls., the Judicial Committee varied the Order in Council by adding to the reversal of the judgment of the Ct. of Q. B., a further direction, that the judgment of the Superior Ct., the original Ct. from whence the appeal was brought, be also reversed, & the verdict given vacated, & that the cause be remitted back to the Superior Ct. with directions to that Ct. to award a *venire facias de novo*.—*MONTREAL ASSURANCE CO. v. M'GILLIVRAY* (1861), 13 Moo. P. C. C. 87; 9 W. R. 370; 15 E. R. 33, P. C.

Annotation:—Reid. The Singapore & The Hebe (1866), 4 Moo. P. C. C. N. S. 271.

the order, pending their appeal to the Privy Council, both motions were refused.—*DUNDAS v. HAMILTON & MILTON ROAD CO.* (1872), 19 Gr. 455.—*CAN.*

a. ———— Money paid out of court on judge's order—Right to recover—On reversal of judgment of supreme court.]—*CITIZENS' INSURANCE CO. v. PARSONS* (1882), 32 C. P. 492.—*CAN.*

b. ————.]—Execution upon a judgment of the Supreme Ct. of Canada, made an order of this ct. will be stayed pending an appeal to the Privy Council, upon terms.—*DAVIES v. McMILLAN* (1893), 3 B. C. R. 35.—*CAN.*

c. ————.]—Where plffs. were appealing to the Privy Council from a judgment of the Ct. of Appeal dismissing with costs an appeal from the judgment of the Q. B. Div. in favour of defts. with costs, & had given security in \$2,000, as required in R. S. O. 1887, c. 41, s. 2:—*Held*: the order of a judge of the Ct. of Appeal, under sect. 5, allowing the security should not have stayed the proceedings in the action, & so much of the order as related to the stay should

be rescinded.—*McMASTER v. RADFORD* (1894), 16 P. R. 20.—*CAN.*

d. ————.]—A Judge in Chambers of the Supreme Ct. of Canada will not entertain an application to stay proceedings pending an appeal from the judgment of the ct. to the Privy Council.—*ADAMS & BURNS v. BANK OF MONTREAL* (1901), 31 S. O. R. 223.—*CAN.*

e. ————.]—*OTTAWA ELECTRIC CO. v. OTTAWA CITY* (1906), *Cout.* 409.—*CAN.*

f. ————.]—An appeal to the Privy Council by special leave does not come within the scope of the Privy Council Appeals Act, 1914, s. 10, but the Supreme Ct. has an inherent power to stay proceedings in it in such cases, which it will exercise upon security being allowed.—*MITCHELL v. FIDELITY & CASUALTY CO. OF NEW YORK* (1917), 38 O. L. R. 543; 34 D. L. R. 22.—*CAN.*

g. ———— Order of Railway Committee—To build bridge.]—Where the sole question in two actions was as to the validity of an order of the railway committee of the Privy Council of

Canada requiring plffs. to build a bridge:—*Held*: refusing an application to allow the security upon a proposed appeal to the Privy Council from the decision of the Ct. of Appeal, an appeal did not lie as of right under R. S. O., 1897, c. 48, s. 1.—*CANADIAN PACIFIC RY. CO. v. TORONTO CITY* (1909), 19 O. L. R. 663.—*CAN.*

h. ———— Same question before Judicial Committee.]—The ct. will not, except in special circumstances, grant leave to appeal to the Privy Council, when the same question is already under appeal in another proceeding, although not between the same parties.—*R. v. LITTLE* (1898), 6 B. C. R. 321.—*CAN.*

k. In criminal cause—Objection taken—Application to present same matter in a civil action.]—*TOWNSEND v. BROOKWORTH* (1907), 2 E. L. R. 421.—*CAN.*

l. Appeal from judgment of Appellate Division—Affirming order of Ontario Railway & Municipal Board—Operation of railway on highway.]—*Re TORONTO RY. CO. & TORONTO CITY* (1915), 34 O. L. R. 465.—*CAN.*

SUB-SECT. 3.—INDIA.

Special leave to appeal.]—See Sect. 4, *ante*.

630. Leave to appeal—What courts may grant—Supreme Court of Madras.]—The Supreme Ct. at Madras admitted an appeal to the King in Council after the expiration of six months from an original decree:—*Held*: the Ct. was not authorised by the Madras Charter of 1800, creating the Supreme Ct., to grant leave to appeal.—*EAST INDIA CO. v. SYED ALLY* (1827), 7 Moo. Ind. App. 555; 19 E. R. 417, P. C.

Annotations:—*Mentl. Secretary of State for India v. Sahaba* (1859), 13 Moo. P. C. C. 22; *Hemchand Devchand v. Azam Sakarial Chhotamall*, [1906] A. C. 212.

631. — High Court should state grounds for refusing.]—The High Ct. in refusing a certificate for leave to appeal to His Majesty in Council should state the grounds for refusing it.—*VENGANAT SWAROOPATHIL VALIA NAMBIDI AVERGAL v. CHERAKUNNATH NAMBIYATHAN, Ex p. VENGANAT SWAROOPATHIL* (1906), L. R. 33 Ind. App. 67, P. C.

632. From what orders or judgments appeals entertained—Bengal, Bombay, & Madras Charters.]—The right of appeal given by the Charters of Bengal, Madras, & Bombay, is not confined to cases where a right or duty is finally decided, but includes interlocutory judgments, decrees, or decretal orders; such appeal does not, however, extend to the finding of a jury upon issues directed from the Equity side of the ct.; no motion for a new trial having been made, nor exceptions taken to the Master's report founded on the verdicts in such issues.—*NATHOOBHAY RAMDASS v. MOOLJEE MADOWDASS* (1840), 3 Moo. P. C. C. 87; 2 Moo. Ind. App. 170; 13 E. R. 40, P. C.

633. — Order of Supreme Court of Madras—Dismissing Master.]—An order made by the judges of the Supreme Ct. of Madras, dismissing the Master of that Ct. from his office, for alleged official misconduct, in the taxation of a bill of costs, reversed upon appeal, by the Judicial Committee of the Privy Council. Such an order,

being made by the ct. at its own instance, is not an appealable grievance, within the Madras Charter of Justice of Dec. 1800.

An appeal having been allowed by the ct. below, & referred by Her Majesty to the Judicial Committee for adjudication in the ordinary way, their Lordships, though of opinion that there existed no charter right of appeal, thought it a fit case for the allowance of a special appeal; & having heard the case upon the merits, directed a petn. for special leave to appeal to be presented to Her Majesty; which, on being referred to them, they recommended the allowance thereof, & that the appeal be placed in the same plight & condition as that originally referred to them.—*Re MINCHIN* (1847), 6 Moo. P. C. C. 43; 4 Moo. Ind. App. 220; 13 E. R. 599, P. C.

Annotation:—*Reid. Cremidi v. Parker, The Aspasia* (1857), 11 Moo. P. C. C. 79.

634. — Order of High Court of Calcutta dismissing Moonsiff—Conclusive.]—An Order of the High Ct. at Calcutta, dismissing a Moonsiff for corruption in the exercise of his functions as judge, is final, & there is no jurisdiction in the Judicial Committee to admit a special appeal therefrom.—*Re SREE MOHUN GHUTUCK* (1870), 13 Moo. Ind. App. 343; 20 E. R. 580, P. C.

635. — Answer of full court to question of law submitted by divisional court—Not framed as decree or interlocutory order—Objected to without cross-appeal.]—Where a Division Bench of a High Ct. refers a question of law for the consideration of the Full Bench, & the answer of the Full Bench is not framed as a decree or as an interlocutory order, & an appeal is brought to Her Majesty in Council, it is open to resp. without a cross-appeal to object to the correctness of the answer given by the Full Bench on the question of law referred.—*PHOOLBAS KOONWUR (MUSSUMAT) v. LALLA JOGESHUR SAHOY* (1876), L. R. 3 Ind. App. 7, P. C.

636. — Final order—What amounts to—Civil Procedure Code, 1882.]—Special leave granted to appeal from a decree directing debt to account;

PART IX. SECT. 8, SUB-SECT. 3.

630 I. Leave to appeal—What courts may grant—Chief Court of Lower Burma.]—In a suit on a promissory note for Rs. 10,42 principal, & interest at 1½ per cent. *per mensem*, & also for interest "on the decree from the date of the institution of the suit until realisation," the first ct. passed a decree for only Rs. 500 "with interest as prayed." The chief ct. of Lower Burma ordered that: "the decree of the original ct. be altered to a decree for the full amount claimed," & said nothing about interest. *Ptfs.*, resp., applied by petition to the chief ct. to amend its decree by adding a specific statement that "interest as prayed for in the plaint" was payable on the decretal amount, but the application was dismissed. *Def't.* appealed to the Privy Council, & shortly before the case came on for hearing, resp. petitioned for special leave to enter a cross-appeal so far as the decree of the chief ct. had failed to include interest after the institution of the suit. A consent order in Council was made on Mar. 5, 1910, that resp. should have leave on the hearing to appeal on the question raised in their petition, & their Lordships, while dismissing the appeal, altered the decree of the chief ct. as prayed in the petition without a cross-appeal being entered.—*CASSIM AHMED JEW A. v. NARAINAN CHETTY* (1910), L. L. R. 37 Calc. 623.—IND.

m. From what orders or judgments appeals entertained—Orders made by High Court under 24 & 25 Vict. c. 104,

s. 15.]—Sembie: orders made by the High Ct. under 24 & 25 Vict., c. 104, s. 15, are subject to appeal to the Privy Council.—*HURDEO NARAIN SAHU v. GRIDHARI SINGH* (1874), 13 B. L. R. 103.—IND.

n. — Order of High Court giving possession.]—When the sons of K., in execution of the decree of M.M. in Council, applied for possession of one-third of the property, U. opposed the application on the ground that he was in possession under a decree of the High Ct. which had become final:—*Held*: the decree of H.M. in Council must be executed, notwithstanding its execution involved the disturbance of the possession obtained by U. under the decree of the High Ct., which had become final.—*UDAI SINGH v. BHARAT SINGH* (1878), I. L. R. 1 All. 456.—IND.

o. — Final order—What amounts to—Civil Procedure Code, 1877.]—An order passed on appeal by the High Ct. determining a question mentioned in Act X of 1887, s. 244, is a final "decree" within the meaning of that Act, s. 595:—*Held*: where such an order involved a claim or question relating to property of the value of upwards of ten thousand rupees, & reversed the decisions of the lower ct., that, notwithstanding the value of the subject-matter of the suit in which the decree was made in the ct. of first instance was less than that amount, such order was appealable to H.M. in Council.—*RAM KIRPAL SHUKUL v. RUP KUAR* (1881), I. L. R. 3 All. 635.—IND.

p. — — — — —.]—An order in a partnership suit for account refusing to allow *ptfs.* to have their accounts taken in a particular manner suggested by themselves, unless they would consent to give certain credits in their accounts to *def'ts.*, is not a final decree within the meaning of Civil Procedure Code, s. 595; although the effect of such order may be to make it impossible for *ptfs.* to proceed further in the case, & consequently an appeal from such an order of the High Ct. to the Queen in Council does not lie.—*ABEN SHA SABIT ALI v. CASSIRAO BABA SAHEB HOLKAR* (1882), 1 L. R. 6 Bom. 260.—IND.

636 I. — — — — — Civil Procedure Code, 1882.]—No appeal lies as a matter of right, under Code of Civil Procedure (XIV of 1882), s. 595, to the Privy Council, albeit the value of the subject-matter exceeds Rs. 10,000, as the decree of the High Ct. is not a final, but an interlocutory decree. In such case a certificate should first be obtained that the case is a fit one for appeal to H.M. in Council.—*ISHVAROAS HUDHGAIR v. CAUDASAMA AMARANG* (1884), I. L. R. 8 Bom. 548.—IND.

636 II. — — — — —.]—The judgment of the High Ct. in a first appeal was as follows:—"This appeal must, in my opinion, be dismissed with costs & the judgment of the first ct. affirmed: & I do not think it necessary to say more than that we agree with the judge's reasons." The *applt.* applied for leave to appeal to H.M. in Council on the ground that the requirements of Civil Procedure Code, s. 574, had not been complied with:—*Held*:

Sect. 8.—Appeals from particular dominions, etc.:
Sub-sects. 3 & 4.]

such decree being final within the meaning of the Civil Procedure Code.—**RAHMTHOY HIBIBHOY v. TURNER** (1890), L. R. 18 Ind. App. 6, P. C.

*Annotation:—***Apld.** **Syed Muzhar Husein v. Bodha Bibi** (1894), 11 T. L. R. 106.

637. —————.]—**SYED MUZHAR HUSEIN v. BODHA BIBI** (1894), 11 T. L. R. 106, P. C.

638. —————.]—**RAI RADHA KISHEN v. JAUNPORE COLLECTOR** (1900), 17 T. L. R. 129, P. C.

639. —————.]—**Not from order removing appellant from roll of vakils.—Indirect appeal from conviction.]**
 —A conviction of forgery followed by sentence is sufficient without further inquiry to justify an order of ct. removing applt. from the roll of vakils & cancelling his certificate. He is not entitled to go behind the conviction for the purpose of showing that he had committed no offence at law. An

appeal to Her Majesty will not be allowed, as it would be indirectly an appeal from a conviction.—**Re RAJENDRO NATH MUKERJI** (1899), L. R. 26 Ind. App. 242, P. C.

640. —————.]—**Not from decision of High Court.—On appeal from court under Indian Land Acquisition Act, 1894.]—**A special & limited appeal is given by the Indian Land Acquisition Act, 1894, from the award of the ct. to the High Ct., but no appeal lies under the Act from the High Ct. to the Judicial Committee of the Privy Council.—**RANGOON BOTATOUNG CO. v. RANGOON COLLECTOR** (1912), L. R. 39 Ind. App. 197; 28 T. L. R. 540, P. C.

*Annotation:—***Distd. Secretary of State for India v. Sri Chelikani Rama Rao** (1916), 85 L. J. P. C. 222.

641. **From what courts appeal entertained.—Sudder Court of Bombay.]—**An appeal lies to the Queen in Council from the decision of a single judge of the Sudder Ct., upon the admissibility of a

the objection involved no substantial question of law, & the application for leave to appeal must therefore be rejected.—**SUNDAR BIBI v. BISHKESHAR NATH** (1886), I. L. R. 9 All. 83.—IND.

636 iii. —————.]—**Pltf.** in a suit to recover property set up an adoption. The ct. of first instance held that the adoption was not proved, & dismissed the suit without trying the issues framed with reference to other allegations in the pleadings. On appeal by pltf., the High Ct. passed a decree setting aside the decree of the ct. of first instance, declaring the alleged adoption to be established, & remanding the suit for the trial of the remaining issues. Defts. sought to appeal to H.M. in Council against the decree of the High Ct. Defts. application was refused on the ground that that decree was not a final decree, & no appeal lay.—**TIRUNARAYANA v. GOPALASAMI** (1889), I. L. R. 13 Mad. 349.—IND

636 iv. —————.]—Where the High Ct. in appeal has confirmed the decree of the lower ct. & has taken substantially the same view of the facts, & where, upon the facts as found by both ct.s, no question of law arises, leave to appeal to the Privy Council should be refused. The substantial question of law referred to in Code of Civil Procedure (Act XIV. of 1882), s. 596, need not directly arise out of the concurrent findings of fact, but it is enough if it is involved in those findings, & can, if the appeal is allowed, be raised in the course of the argument.—**Re SHRI VISHWAMBHAR PANDIT** (1895), I. L. R. 20 Bom. 699.—IND.

636 v. —————.]—There is no appeal to H.M. in Council against an order refusing the appointment of a receiver in a suit. Such order does not finally decide any matter which is directly in issue in the cause in respect to the right of the parties, & is not "final" within the meaning of cl. (a) & (b) of s. 595 of Civil Procedure Code, s. 595, cl. (a) & (b), & Letters Patent, s. 39; nor is the matter a special case falling within the terms of Code, s. 59, cl. (c), or Letters Patent, s. 40.—**CHUNDI DUTT JHA v. PUDMANUND SINGH BAHADUR** (1895), I. L. R. 22 Cal. 928.—IND.

636 vi. —————.]—Where the cardinal point in a suit was, whether notice under Bengal Tenancy Act, s. 167, to annul certain incumbrances was properly served or not, an order of the High Ct. holding that the notice had been properly served & remanding the case to be tried out on the other issues, is a final decree & an appeal from the decree to the Privy Council would lie.—**ANANDA GOPAL GOSSAIN v. NAFAR CHANDRA PAL CHOWDHURY**

(1908), I. L. R. 35 Cal. 618.—IND.

q. —————.]—**Civil Procedure Code, 1908.]—**An order of remand which determines only a part of the case & leaves other matters still to be determined is not a "final order," within the meaning of Code of Civil Procedure, s. 109.—**BAIJ NATH DASS v. SOHAN BIBI** (1909), I. L. R. 31 All. 545.—IND.

r. —————.]—**Orders of the High Ct. reversing on appeal two decisions of the lower ct., & remanding the cases for trial, either on the ground that the lower ct. was wrong in dismissing the suit for insufficiency of the pleadings, & the other on the ground that the lower ct. was wrong in dismissing the suit on the plea of bar contained in old Civil Procedure Code, s. 43, are purely preliminary or interlocutory orders, which do not decide the respective rights of the parties, & are not final orders within the meaning of Civil Procedure Code, s. 109, so as to be capable of being appealed against to the Privy Council.—****VENKATARAMA ILOW v. NARASIMHA RAO** (1913), I. L. R. 38 Mad. 509.—IND.

s. —————.]—**An order sanctioning prosecution made in the course of disciplinary proceedings against an attorney under Letters Patent of 1865, cl. 10, is not governed by cl. 39 & therefore against such an order no leave to appeal to the Privy Council can be given. Letters Patent, cl. 39, empowers the High Ct. to declare the fitness of an appeal to the Privy Council in any matter, not being of criminal jurisdiction, if it is a final judgment, decree, or order of the ct., made by an appeal or in the exercise of original jurisdiction. A proceeding under cl. 10 is a disciplinary power which does not fall under any of the jurisdictions specified in the Letters Patent, & thus is not governed by cl. 39.—****Re AN ATTORNEY** (1914), I. L. R. 41 Cal. 734.—IND.

t. —————.]—**Civil Procedure Code Act V 1908, s. 109, cl. (c), is intended to meet special cases, as for example those in which the point in dispute is not measurable by money though it may be of great public or private importance, & is not confined to the question whether the order appealed from is a final order within the meaning of sect. 109, cl. (a) & (b). The High Ct. has jurisdiction in a proper case to grant leave to appeal to the Privy Council from an interlocutory order under sect. 109 cl. (c), where, if such leave is refused, grave injury might result to the petitioner and needless complications might occur, much to his detriment.—**

SIRA PROHAD SINGH v. PRAYAG KUMARI DEBI (RANI) (1922), I. L. R. 49 Cal. 967.—IND.

a. —————.]—**Not from interlocutory judgment of High Court.]—**No appeal lies under Amended Letters Patent, s. 70, of the High Ct., to the Privy Council from an interlocutory judgment or order of a judge of the High Ct., until such judgment or order has been subjected to an appeal to the High Ct. under Letters Patent, cl. 15, except in those cases in which, by reason of the number of the judges who have made such order, an appeal under cl. 15 is given directly to the Privy Council.—**SONBAY v. AHMEDBHAI HABIBHAI** (1872), 9 Bom. 398.—IND.

639 i. —————.]—**Not from order removing appellant from roll of vakils.]—**A candidate at an examination for pleadership, a mistake in the computation of his marks having been made, was erroneously declared qualified for admission as a vakil of the High Ct. by a Govt. notification. The mistake having been discovered, such notification was, so far as he was concerned, cancelled. He then petitioned the High Ct. in the matter, & was informed by it that his name must be excluded from such notification, as he had not qualified by obtaining the requisite number of marks. The candidate having applied for leave to appeal to H.M. in Council:—**Held:** Civil Procedure Code, c. 45, had no applcn., & the matter was not one in which the High Ct. was concerned to grant or refuse leave to appeal to H.M. in Council.—**Re SUKH NANDAN LAL'S PETITION** (1884), I. L. R. 6 All. 163.—IND.

b. —————.]—**Not from disciplinary proceedings under Letters Patent. Clause 10.]—**Disciplinary proceeding under Letters Patent, Cl. 10, are not appealable under cl. 39, & High Ct. had no power to give leave to appeal to Privy Council from an order passed in exercise of such jurisdiction.—**RAMCHANDRA AYYAR (K. R.) v. VAKIL'S ASSOC. (PRESIDENT), HIGH COURT MADRAS, VAKIL'S ASSOC. (PRESIDENT), HIGH COURT MADRAS v. RAMCHANDRA AYYAR** (1916), I. L. R. 39 Mad. 128.—IND.

c. **Grounds for appeal.—Substantial point of law involved.]—**In criminal cases the High Ct. will not, in general, grant leave to appeal to the Privy Council, unless some important question of law or practice or jurisdiction is involved.—**R. v. PESTANZI DINSHA** 1873, 10 Bom. 75.—IND.

d. —————.]—**Where the decree of an Appellate Ct. has affirmed the decision of the ct. immediately below it upon an issue of fact, & no substantial**

special appeal.—*MOORE KAIKHOOSCROW HORMUSJEE v. COOVERBAHEE* (1856), 6 Moo. Ind. App. 448; 5 W. R. 139; 19 E. R. 168; *sub nom.* *HORMUSJEE v. COOVERBAHEE*, 29 L. T. O. S. 1, P. C.

642. Grounds for appeal—Substantial point of law involved—Necessity for certificate of High Court.]—*BANARSI PARSHAD v. KASHI KRISHNA NARAIN*, No. 516, *ante*.

643. ———.]—Where leave to appeal is granted by the High Ct. without any certificate, under sect. 596 of the Civil Procedure Code, that the value of the matter in appeal in Rs. 10,000 or upwards, or any decision under ss. 595 (c) & 600 that the case was a fit one for appeal:—*Held*: the appeal was admitted without jurisdiction, & as there was no ground for granting special leave, it could not be heard.—*RADHA KRISHN DAS v. RAI KRISHN CHAND* (1901), L. R. 28 Ind. App. 182, P. C.

644. ———.]—Where the decree of the Appellate Ct. was that "the appeal be dismissed," but the reasons given were not the same as those of the lower Ct. in respect of some matters of fact:—*Held*: the Appellate Ct. affirmed the decision of the lower Ct., within the meaning of sect. 596; & a certificate, which granted leave to appeal to the Privy Council on the ground that by its decree the Appellate Ct. did not affirm the ct. below, & which did not find that the appeal involved a substantial question of law, did not comply with that sect.—*TASSADUQ RASUL KHAN v. KASHI RAM* (1902), L. R. 30 Ind. App. 35, P. C.

645. ——— Where superior court has affirmed lower court.]—Where a decree of the High Ct. affirms the decree appealed from, it ought not to give leave to appeal unless there is, as required by sect. 596 of the Civil Procedure Code, some substantial question of law involved. An appeal admitted contrary to that sect. will be dismissed without being heard.—*KARUPPANAN SERVAI v. SRINIVASAN CHETTI* (1901), L. R. 29 Ind. App. 38, P. C.

646. ——— Only where appeal not of right—Civil Procedure Code, 1908.]—*THILLAI CHETTY v. SHANMUGANATHAN CHETTIAR*, [1922] W. N. 7, P. C.

647. ——— Omission to record reasons in granting order of admission to review—Civil Procedure Code, 1882, s. 626.]—With reference to the requirement in sect. 626 of the Civil Procedure Code that reasons should be recorded by the judge granting an order of admission to review:—*Held*: the mere omission to record them was not a ground for granting special leave to appeal from the order or from the decree, which was subsequently made.

question of law is involved, no appeal is open under Code of Civil Procedure, s. 596, & leave to appeal should not be granted by the High Ct. in such a case.—*NIRBHAI DAS v. KUAR (RANI)* (1894), I. L. R. 16 All. 274.—IND.

648 i. ——— Necessity for certificate of High Court.]—The representative of a decree-holder applied for execution of a decree without producing before the ct. a certificate of succession as required by (Act No. VII) of 1889, s. 4. The ct. to which the application was made granted execution. The judgment-debtor appealed to the High Ct., by which the order of the lower ct. was sustained upon production of the necessary certificate of succession:—*Held*: an objection, that the said application for execution was improperly granted by reason of the non-production of the succession certificate before the lower ct., did not raise a "substantial question of law" within the meaning of Code of Civil

Procedure, s. 596, so as to warn the High Ct. in granting leave to appeal to H.M. in Council.—*SHUJA ALI KHAN v. RAM KUR* (1897), I. L. R. 20 All. 118.—IND.

e. ———.]—The expression "involve some substantial question of law," as used in Code of Civil Procedure, s. 596, must be construed with reference to the practice of the Privy Council not to interfere with concurrent findings of fact of the ct. below; & this being so, it cannot be said that a question which only arises if the concurrent findings of fact of the ct. in India are disregarded—a question which can never arise so long as the Privy Council maintains those concurrent findings of fact—is a "substantial question of law" which the appeal to the Privy Council "involves."—*BANKE LAL v. JAGAT NARAIN* (1900), I. L. R. 23 All. 94.—IND.

f. ———.]—The nature of the

—*THAKUR SHANKAR BUKSH v. BALWANT SINGH, Ex p. THAKUR SHANKAR BUKSH* (1899), L. R. 27 Ind. App. 79, P. C.

648. Appealable value—Necessity for certificate of high court.]—*RADHA KRISHN DAS v. RAI KRISHN CHAND*, No. 643, *ante*.

649. ——— Interest of appellant in suit.]—Under Code of Civil Procedure 1908, sect. 110, an appeal lies to His Majesty in Council when amount or value of subject-matter in dispute in the appeal is Rs. 10,000 or upwards. From a mtge. decree made by High Ct. Allahabad, deft. who was not party to mtge. appealed to the Privy Council, the only claim open to applt. was that she was entitled to a two-biswas share in the mtged. property:—*Held*: subject-matter of appeal was share claimed by applt. & High Ct. wrongly certified appeal on basis that subject-matter was amount of decree.—*RADHA KUNWAR v. REOTI SINGH* (1916), L. R. 43 Ind. App. 187, P. C.

650. ——— Effect of order in council Feb. 9, 1920.]—Rule 2 of rules laid down by Order in Council of Apr. 10, 1838, whereby certificate of a Ct. in India that the value in dispute in appeal to Privy Council amounts to Rs. 10,000 & upwards shall be conclusive, remained in force until repealed by Order in Council of Feb. 9, 1920.—*RADHA-KRISHNA AYYAR v. SUNDARASWAMIER* (1922), 49 L. R. Ind. App. 211, P. C.

651. Sum below appealable value—Substantial point of law alone not ground for appeal.]—*BANARSI PARSHAD v. KASHI KRISHNA NARAIN*, No. 516, *ante*.

652. ——— Prior application to High Court.]—*MOTI CHAND v. GANGA PARSHAD SINGH, Ex p. MOTI CHAND*, No. 497, *ante*.

653. ——— Certificate must show discretion of court exercised.]—*RADHAKRISHNA AYYAR v. SWAMINATHA AYYAR*, No. 498, *ante*.

SUB-SECT. 4.—OTHER PLACES.

Special leave to appeal.]—*See* Sect. 4, *ante*.

654. Antigua—Appeal from refusal of court to enter up writ of error—Necessity to obtain judgment of court of error.]—The Ct. of Error in Antigua having refused to enter upon a Writ of Error issued from the Ct. of Common Pleas, on the supposition that they were not a properly constituted Ct.: no appeal lies against such refusal to the Queen in Council.

By the constitution of the Cts. in Antigua no appeal lies from the Ct. of Common Pleas except to the Ct. of Error in the Island, & a judgment

legal position of a person who has collected debts of deceased person by virtue of his being holder of succession certificate granted under provisions of Succession Act, 1889, is a substantial question of law as would support granting of special leave of appeal to H.M. in Council.—*NAJM-UN-NISSA BIBI v. AMINA BIBI* (1916), I. L. R. 38 All. 188.—IND.

PART IX. SECT. 8, SUB-SECT. 4.

g. Hong Kong—Order in Council Appeal thereunder—Full Court has no discretion.]—In considering an application for leave to appeal to the Privy Council the Full Ct. does not exercise any discretion, but has merely to see that the case comes within the terms of the Order in Council, & that the necessary formalities have been duly fulfilled.—*LOYA KEE v. NG WAI* (1907), 2 Hong Kong L. R. 199.—HONG KONG.

h. ——— Appeal allowable only

**Sect. 8.—Appeals from particular dominions, etc.:
Sub-sect. 4. Part X. Sects. 1 & 2.]**

must be obtained from that ct. to give the Judicial Committee jurisdiction in the matter.—*Re MANNING'S ASSIGNEES* (1840), 3 Moo. P. C. C. 154; 18 E. R. 66, P. C.

Annotations:—Reid. Colonial Bank v. Warden (1846), 5 Moo. P. C. C. 340. *Mentd. Re Whitfield* (1845), 5 Moo. P. C. C. 157.

655. Gibraltar—Charter of Justice—Appeal allowable only from final judgment or decree—Or other definitive sentence.]—By a Charter of Justice to a Colonial Ct., power was given to any party to appeal to the King in Council, against any final judgment, decree or sentence of the ct., or any rule or order having the effect of a final or definitive sentence, & which appeal should be subject to the regulations therein mentioned. In a subsequent part of the Charter there was a reservation to the King in Council, upon the petn. of any person aggrieved by any judgment or determination of the ct. to appeal therefrom, upon such other terms, & subject to such other regulations & restrictions, as to His Majesty should seem fit. Upon a petition for leave to appeal:—*Held*: no appeal could be allowed, except from a final judgment, decree or sentence, or rule or order having the effect of a definitive sentence.—*Re NAHON & PARIENTE* (1832), 2 Knapp, 66; 12 E. R. 404, P. C.

656. — Application for special leave by Egyptian subject detained for political reasons—Dismissal of ex parte application for summons by Chief Justice.]—*Re ZAGHLUL (PASHA)* (1923), 67 Sol. Jo. 382, P. C.

657. Grenada—Colonial Act, No. 250—No appeal thereunder to Judicial Committee.]—By the Grenada Colonial Act, No. 250, made in pursuance of Slavery Abolition Act, 1833 (c. 73), the jurisdiction exercised by the Chief Justice is final

& conclusive, & no appeal lies therefrom to the Queen in Council.—*Re STRONACH* (1898), 2 Moo. P. C. C. 811; 12 E. R. 1023, P. C.

658. Jersey—Special leave to appeal in criminal cases from—Rescission of leave granted ex parte definitive sentence.]—*Re AMES*, No. 525, *ante*.

659. — — — — —]—*ESNOUF v. A.-G. FOR JERSEY*, No. 531, *ante*.

660. New Zealand—Security for costs of appeal—Power to dispense with.]—*BUNNY v. HART*, No. 305, *ante*.

661. — — — — — Order in Council, May 10, 1860—Appeal thereunder—Order not retrospective.]—Two orders of the Supreme Ct. at New Zealand, the first suspending, & the second striking an Attorney off the Rolls of that ct., sustained by the Judicial Committee.

By the Order in Council dated May 10, 1860, provision was made for a direct appeal from judgments, decrees or orders of the Supreme Ct. at New Zealand to the Queen in Council. That ct. refused to allow an appeal from an Order made before the date of that Order in Council on the ground that it was not retrospective in its operation. Upon petn., special leave to appeal granted.—*BUNNY v. NEW ZEALAND JUDGES* (1862), 15 Moo. P. C. C. 164; 15 E. R. 455, P. C.

662. — — — — — New Zealand Act, 1895, No. 43, s. 93—Appeal from Native Appellate Court—Competency of.]—New Zealand Act, 1895, No. 43, s. 93, declares that the decisions of the Native Appellate Ct. established thereby shall be "final & conclusive," but does not expressly exclude His Majesty's prerogative:—*Held*: the legal rights subjected to the ct. being rights in the matters of land, succession, & probate, an appeal would have lain to His Majesty if the ct. had not been established & could not be taken away except by express words.—*Re WI MATUA'S WILL*, [1908] A. C. 448;

*from final judgment—Not judgment granting new trial.]—*A judgment of the full ct. granting a new trial, is not a final judgment from which an appeal lies, "as of right" to the Privy Council.—*TANG WANG SHI v. LAI CHI CHIN* (1910), 6 Hong Kong L. R. 1.—**HONG KONG.**

k. — — — — — Value involved—Claim must be not less than \$5,000.]—On application by plff. for leave to appeal to the Privy Council:—*Held*: the claim or question must be of the value of \$5,000.—*HUNG KWI CHING v. LO SUT PO* (1913), 8 Hong Kong L. R. 78.—**HONG KONG.**

l. Newfoundland—Value involved—Construction of statute—In favour of party appealing.]—Notwithstanding the amount of the judgment sought to be appealed to the King in Council was for £100, & 49 Geo. III., c. 27, s. 5, only gives an appeal when the judgment is for a sum above £100:—*Held*: when there was a doubt as to the meaning & construction of the statute, the ct. would lean to the side of the party appealing so as to enable him to have the benefit of a higher tribunal.—*HUIE, REED & Co. v. McPHERSON'S ESTATE TRUSTEES* (1817), 1 Nfld. L. R. 22.—**NFLD.**

m. — — — — — Indirectly—Leading case affecting interests of others.]—The Charter allowing an appeal in cases where the sum of \$500 or upwards is "directly or indirectly" involved, the ct. permitted an appeal upon a matter which directly involved \$11 only, but was a leading case affecting large interests throughout Newfoundland.—*HANRAHAN v. BARRON* (1850), 3 Nfld. L. R. 161.—**NFLD.**

n. — — — — — Royal Charter—Security for appeal.]—Before granting leave to appeal to the Privy Council under the

provisions of the Royal Charter, the ct. will not call upon applt. to give the security for the amount of the judgment & costs in the suit in the ct. below. The execution, however, is not suspended by reason of leave to appeal being granted. The question of issuing execution, or security for its suspension, may arise any time after judgment, either after leave to appeal has been granted or before.—*DEA v. TAREHIN* (1899), 8 Nfld. L. R. 224.—**NFLD.**

o. — — — — — Reinstatement of appeal—By creditors of bank—After withdrawal by trustees.]—*Re COMMERCIAL BANK OF NEWFOUNDLAND (WINDING UP OF)*, *Re CLAPP* (1890), 8 Nfld. L. R. 105.—**NFLD.**

p. New Zealand—Order in Council, 1860—Appeal thereunder—From Supreme Court.]—The English Order in Council, 1871, on the subject of appeals from New Zealand Ct. of Appeal does not nullify the Order of May, 1860, by which the right of direct appeal from the Supreme Ct. of the Colony is granted.—*FRANCK v. STEAD* (1881), 1 N. Z. L. R. 112.—**N.Z.**

q. — — — — — Order giving leave to appeal—Must specify terms.]—Where an order is made for leave to appeal to the Privy Council on the usual terms, the order when drawn up should specify the terms, stating that execution is to be stayed if a stay of execution is intended. If the order merely states "upon the usual terms" it is irregular.—*KAIWEHATA v. RUSSELL* (1886), 4 N. Z. L. R. 147.—**N.Z.**

r. — — — — — Whether appeal allowable only from final order.]—There cannot be an appeal to the Privy Council from a refusal by the Ct. of Appeal to discharge an order made in the Supreme Ct. for leave to proceed without

service under Rule 53. *Qu.*: whether there can be an appeal to the Privy Council from the Ct. of Appeal on any interlocutory order.—*ASHBURY v. ELLIS* (1891), 10 N. Z. L. R. 450.—**N.Z.**

s. — — — — —]—Where the decision of the Ct. of Appeal was not a judgment, decree, or order in an action, nor was the proceeding a question respecting any civil right:—*Held*: the ct. had no power to grant leave to appeal to the Privy Council.—*Re COLONIAL BANK OF NEW ZEALAND* (1906), 26 N. Z. L. R. 315.—**N.Z.**

a. — — — — — Application for leave to appeal—Time for.]—Applts., within fourteen days from the date of delivery of judgment of the Ct. of Appeal, filed & served notice to move for leave to appeal to the Privy Council. The Ct. of Appeal after delivering judgment, had risen without adjournment, & there was no sitting of the ct. within the fourteen days or till some time after the day named in the notice:—*Held*: applts. were not debarred from their right of appeal, having afterwards moved on the first day on which the ct. did sit.—*ISAAC v. SCHULTZE* (1892), 10 N. Z. L. R. 707.—**N.Z.**

b. — — — — — Licensees represented by Licensing Committee—Appeal dealt with as application from licensees.]—Although only the Licensing Committee had been before the Cts. formally, the Ct. of Appeal, in dealing with an application for leave to appeal to the Privy Council, dealt with it as an application by the licensees.—*Re ADDINGTON LICENSING COMMITTEE* (1893), 12 N. Z. L. R. 70.—**N.Z.**

c. — — — — — Value involved trifling—Leave refused.]—Leave to appeal to

78 L. J. P. C. 17; 99 L. T. 752; 24 T. L. R. 834, P. O.

Annotations.—*Reid*, Canadian Pacific Ry. v. Toronto Corp'n. & Grand Trunk Ry. of Canada, [1911] A. C. 461; *Hineiti Rirerire Arani v. Public Trustee of New Zealand* (1919), 88 L. J. P. C. 160.

663. Nigeria—Public Lands Ordinance, 1903 (Lagos), s. 23—Appeal from Supreme Court.]—*AMODU TIJANI v. SOUTHERN NIGERIA (SECRETARY)*, No. 391, *ante*.

664. South Africa—South Africa Act, 1909 (c. 9)—Appeal under—Only in special circumstances.]—Under South Africa Act, 1909 (c. 9), s. 106, leave to appeal from the Appellate Division of the Supreme Ct. of South Africa will be given only in special circumstances.—*WHITTAKER v. DURBAN CORPN.* (1920), 90 L. J. P. C. 119; 124 L. T. 104; 36 T. L. R. 784, P. C.

665. Straits Settlements—Letters Patent, August 10, 1855—Appeal from Supreme Court under—Not abrogated by Ordinance No. 5 of 1868.]—*YEAP CHEAH NEO v. ONG CHENG NEO*, No. 251, *ante*.

666. Zanzibar—Order in Council, Oct. 17, 1884—Appeal from highest Civil Court.]—The Ct. for Zanzibar, established under the Order in Council of Oct. 17, 1884, being the highest Civil Ct. of Appeal for the district, an appeal lies from it to the Crown in Council.

Where by a treaty rights of extritoriality are conferred upon British subjects as regards their persons & property, land purchased by a British subject is not stamped with the same character & attended by the same incidents as if it were land in England, but its incidents are governed by the law of its site, & the local law applies to compensation for unauthorised encroachments on it.

An officer of the Crown acting judicially in a foreign country by virtue of powers conferred by treaty, is bound to take judicial notice of the local law applicable to a case before him.—*SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLES-WORTH, PILLING & Co.*, [1901] A. C. 873; 70 L. J. P. C. 25; 84 L. T. 212; 17 T. L. R. 265, P. C. *Annotation*.—*Reid*, *Casdagil v. Casdagil*, [1918] P. 89.

Part X.—The Channel Islands.

SECT. 1.—IN GENERAL.

667. Whether within United Kingdom—Insurance against accident happening within United Kingdom—Accident in Jersey.]—A policy of insurance covered death caused by accident happening within the United Kingdom, & was made subject to a condition that in case of fatal accident notice thereof must be given to the insurers within seven days. The assured was accidentally drowned in Jersey. It was impossible to give notice within seven days :—*Held* : the accident happened within the United Kingdom, & that notice was not a condition precedent to the right to recover, & the insurers were liable.—*STONEHAM v. OCEAN, RAILWAY & GENERAL ACCIDENT INSURANCE CO.* (1887), 19 Q. B. D. 237; 51 L. T. 236; 51 J. P. 422; 35 W. R. 716; 3 T. L. R. 695.

Whether writ of Habeas Corpus runs to Channel Islands.]—*See CROWN PRACTICE*, Vol. XVI., p. 249, Nos. 483–486.

SECT. 2.—THE GOVERNOR.

668. Guernsey—Power to deport alien—Whether advice of bailiff & jurats necessary.]—The advice of the Bailiff & Jurats of the Royal Ct. in the Island of Guernsey, is not necessary, for the purpose of authorising the Governor, or Lieutenant-Governor, to exercise the power of deportation of aliens domiciled in the Island. The Bailiff & Jurats are individually entitled to take part, & speak, in all conferences with the Governor, or Lieutenant-Governor, of the Island; but the Governor, or Lieutenant-Governor, has the sole authority to appoint the time & place for such conference.

A writ of pardon, under Her Majesty's sign manual, addressed to the Lieutenant-Governor, & the keeper of the gaol, to discharge out of custody a person undergoing imprisonment, does not require to be verified & registered by the Royal Ct., before it is executed.

The refusal of the gaoler to discharge a prisoner,

the Privy Council was refused, on the ground that the value of the right actually in question in the action was trifling.—*SANTAS CO., LTD. v. OGLE* (1896), 14 N. Z. L. R. 600.—N.Z.

d. — *Application to be made to Supreme Court.*]—The proper course for a party desiring to appeal to the Privy Council is to apply to the Supreme Ct. for leave.—*DEVELIN v. WAHAI-SILVERTON GOLD-MINING CO.* (1897), 16 N. Z. L. R. 191.—N.Z.

e. — *No appeal from Supreme Court upon question unconsidered by Court of Appeal.*]—The mere fact that two Judges have sat in the Supreme Ct. is not a sufficient reason for that Ct. to give leave to appeal from its decision direct to the Privy Council upon a question which has not been in any form before the Ct. of Appeal.—*Re NEW ZEALAND MIDLAND RY. CO., LTD., Ex p. COATES* (1899), 17 N. Z. L. R. 596.—N.Z.

f. — *Value involved—Less than £500—Other interests involved.*]—*Qu.* : whether there is a right to appeal to the Privy Council where, though the amount recovered in the action is

under £500, there are other claims by other persons against same debt, dependent upon same facts, which, together with the amount recovered in the action, amount to more than £500.—*BLUNDEN v. OXFORD ROAD DISTRICT (INHABITANTS)* (1901), 21 N. Z. L. R. 196.—N.Z.

g. — *Licensing appeal—On ground of irreparable injury—Leave granted on terms.*]—The Ct. of Appeal having held that the certificate for a publican's licence held by resp. ought to be quashed, & resp. having asked the Ct. to direct, as part of the terms on which he should be allowed to appeal to the Privy Council, that the order quashing the certificate should lie in the office of the Ct. pending the decision of the Privy Council upon the appeal, on the ground that irreparable injury would be caused to him by the loss of the right to apply for a renewal of his licence at the next licensing meeting, the Ct. directed that if resp. should, within one calendar month, pay into Ct. the costs of applt. in the Supreme Ct. & the Ct. of Appeal, & give security for the costs of the appeal to the Privy Council & for the prosecu-

tion of the appeal with diligence, then the order quashing the certificate should lie unsealed in the office until the further order of the Ct.—*Re O'DRISCOLL'S APPLICATION, Ex p. FRETHEY* (1902), 22 N. Z. L. R. 517.—N.Z.

h. — *Terms of appeal refused.*]—A certificate for a publican's licence having been granted in respect of premises which were capable of being used only as a bar, & the certificate having been ordered to be quashed, the Ct. declined to direct that the order should lie in the office pending an appeal to the Privy Council.—*PENNEY v. WAIRAU LICENSING COMMITTEE* (1902), 22 N. Z. L. R. 602.—N.Z.

k. — *Value involved—Must be not less than £500.*]—Where less than £500 is involved in appeal & questions involved are not of general importance, leave to appeal to Privy Council should be refused.—*RIDD MILKING-MACHINE CO., LTD. v. SIMPLEX MILKING-MACHINE CO., LTD.* (1914), 33 N. Z. L. R. 1531.—N.Z.

Sect. 2.—The Governor. Sects. 3, 4, 5 & 6.]

on the production of a writ of pardon under the sign manual will not warrant the Lieutenant-Governor in enforcing obedience to the writ, by the threat of military or other force.—*Re GUERNSEY (BAILIFF, ETC.)* (1844), 5 Moo. P. C. C. 49; 13 E. R. 408, P. C.

Annotation:—Reid. R. v. Eduljee Byramjee (1846), 3 Moo. Ind. App. 468.

669. — Right to appoint time & place of conference.]—*Re GUERNSEY (BAILIFF, ETC.)*, No. 668, *ante*.

670. — Enforcement of writ of pardon under sign manual—Whether threat of force warranted.]—*Re GUERNSEY (BAILIFF, ETC.)*, No. 668, *ante*.

671. Jersey—Power to stay registration of act of states—Matter “of special interest of crown”—Provision for detention of lunatics.]—According to the constitution of the Island of Jersey, the Lieutenant-Governor of that Island has the power of staying by his negative voice, the registration of any Act or Ordinance passed by the States of the Island, which he may deem contrary to the interests of the Crown, or affecting the Royal prerogative. The States of the Island, by an Act, passed in 1861, deferred for a year, the choice of a site for the erection of a public lunatic asylum, & resolved provisionally to place the insane at a private establishment at the charge of the Island & parishes therein. Upon this Act, the Lieutenant-Governor affixed his negative veto. The exercise of this power, upon petition of the States to the Queen in Council, complaining thereof, as being unconstitutional, approved, as the matter was “a special interest of the Crown” within the meaning of the Order in Council of July 19, 1861.—*Re JERSEY STATES REPRESENTATION* (1862), 15 Moo. P. C. C. 195; 15 E. R. 468, P. C.

SECT. 3.—ISLAND LEGISLATION

672. Jersey—Power to originate laws—Whether in crown by order in council—Without concurrence of states.]—*Qu.*: whether the Crown, by force of the prerogative, can, by Orders in Council, without the concurrence of the States of Jersey, originate laws for Jersey, or, whether an exclusive right of originating all laws for that Island resides alone in the States.—*Re JERSEY STATES* (1853), 9 Moo. P. C. C. 185; 8 State Tr. N. S. 285; 14 E. R. 268, P. C.

Annotation:—Reid. D’Allain v. Le Breton (1857), 11 Moo. P. C. C. 64.

673. — Whether exclusive right of states.]—*Re JERSEY STATES*, No. 672, *ante*.

674. — Right of governor to exercise veto.]—*Re JERSEY STATES REPRESENTATION*, No. 671, *ante*.

675. — Acts to be lodged au greffe before consideration—Whether rule applicable to preamble.]—By the Order in Council of March 28, 1771, every Act of the States of the Island of Jersey must be lodged *au Greffe*, for fourteen days before it shall be determined for debate & consideration. Such rule applies to the preamble as well as the enacting part of the Act.—*Re JERSEY STATES, Re GIBAUT’S PETITION* (1858), 11 Moo. P. C. C. 320; 14 E. R. 717, P. C.

676. Guernsey—Inclusion of Island of Herm—Local taxation.]—The Island of Herm being one of the dependencies of Guernsey is, for the purpose

of local taxation, part & parcel thereof. By several successive Orders in Council, the States of Guernsey were empowered to raise a duty of one shilling per gallon on all spirituous liquors retailed & consumed in the island, the produce of which was to be applied in the construction & repair of coast defences, harbours, roads, etc. By an Ordinance of the Royal Court the States prohibited the importation of spirits into the islands of Sark, Herm, & Jethou:—*Held*: such prohibition was within the meaning & authority of the Order in Council, though not originally enforced, & the object to which the tax was to be applied formed no ground of exemption to the inhabitants of Herm.—*MARTYN v. M’CULLOCK* (1837), 1 Moo. P. C. C. 308; 12 E. R. 831, P. C.

677. — Prohibition of importation of spirits.]—*MARTYN v. M’CULLOCK*, No. 676, *ante*.

SECT. 4.—JUDICIAL OFFICERS AND ADVOCATES.

678. Jersey—Denonciateur of royal court—By whom appointed.]—The Bailiff of the Island of Jersey has no authority to appoint a third *Denonciateur* of the Royal Ct. of the Island.—*LE GALLAIS v. DE VEULLE* (1833), 11 Moo. P. C. C. 72, n.; 14 E. R. 622, P. C.

679. — Mode of filling vacancy among jurats—Vacancy caused by resignation—Prerogative of Crown to authorise election.]—By the constitution & law of the island of Jersey the Royal Ct. is composed of a bailiff & twelve jurats, & upon the voluntary resignation of a jurat it is the prerogative of the Crown to admit such resignation, & to authorise a new election to fill up the vacancy so occasioned. *Secus*: on a vacancy occurring by the death of a jurat, when the Royal Ct. have power alone to order a new election.—*Re JERSEY JURATS* (1866), L. R. 1 P. C. 94; 3 Moo. P. C. C. N. S. 456; 16 E. R. 173, P. C.

680. — Vacancy caused by death—Power of court to authorise new election.]—*Re JERSEY JURATS*, No. 679, *ante*.

681. — Number of advocates entitled to practise in royal court—Right of nomination in bailiff.]—The number of the Advocates entitled to practise at the Bar of the Royal Ct. of the Island of Jersey is by legal custom limited to six. The right of nomination of an Advocate to practise in the Royal Ct. is vested in the Bailiff of the Island, by virtue of his office. A petn. to the Queen in Council, praying for an Order upon the Bailiff of the Island to admit the petitioner to take the oaths & practise as an Advocate in the Royal Ct., was referred to the Judicial Committee. The Bailiff put in an answer, stating, that by the law of the Island, the number of Advocates entitled to practise in the Royal Ct. was limited to six, & that that number was complete:—*Held*: the Judicial Committee had no power to make the Order.—*D’ALLAIN v. LE BRETON* (1857), 11 Moo. P. C. C. 64; 14 E. R. 619, P. C.

682. — Bar thrown open by Act—Compensation to six Advocates refused.]—An Act of the States of Jersey for opening the Bar of the *Cour Royale*; hitherto confined to six Advocates, confirmed by the Queen in Council. Compensation to the six Advocates of that ct., for consequent loss by reason of throwing open the Bar refused.—*Re JERSEY BAR* (1859), 13 Moo. P. C. C. 263; 15 E. R. 99, P. C.

Annotations:—Mentd. Kennedy v. Brown (1863), 13 C. B. N. S. 677; *Gugy v. Brown* (1866), 4 Moo. P. C. C. N. S. 315.

683. — “*Clameur de Haro*”—Attorney-general necessary party.]—*Semble*: The “*Clameur de Haro*,” in the Island of Jersey, being in its nature essentially a criminal as well as a civil process, the A.-G. of the Island is a necessary party in all the stages of the cause.—*AHIER v. WESTAWAY* (1855), 9 Moo. P. C. C. 395; 14 E. R. 347, P. C.

684. — Judge not bound to take notes—Notes mere private memoranda.]—Where judge’s notes of evidence are mere private memoranda, & are not taken in pursuance of any law or practice requiring them:—*Held*: it would be improper to have them before a Ct. of Appeal.

By the law & practice of Jersey it is not the judge’s duty to take notes; on the contrary the judge appears to be forbidden to take notes which shall form part of the record. In that case the judge’s notes are mere private memoranda for the assistance of his own memory; & he may only take down such points as he desires to direct his own attention to in the conduct of the case (*per CUR.*).—*BAUDAINS v. JERSEY BANKING CO., LIQUIDATORS, Ex p. BAUDAINS* (1888), 13 App. Cas. 832, P. C.

685. Guernsey—*Contrôle de la Reine*—Abolition of office.]—The ancient office of *Contrôle de la Reine* of the Royal Ct. of the Island of Guernsey, was upon a vacancy of that office, by an arrangement made in 1851 by the Home Secretary & the *Procureur de la Reine*, but without the cognisance of the States of the Island, amalgamated with the office of *Procureur de la Reine*. Upon petn. by the States to the Crown, complaining of that amalgamation & the suspension of the office of *Contrôle* as unconstitutional & interfering with the due administration of justice & the legislature of the Island, that office was, by an Order in Council, directed to be revived. *Semble*: by the constitution of the Island of Guernsey such an office could only be abolished by an Order in Council, with the consent of the States of the Island.—*Re GUERNSEY STATES PETITION* (1861), 14 Moo. P. C. C. 368; 15 E. R. 345, P. C.

SECT. 5.—ISLAND COURTS.

686. Jurisdiction—Royal Court of Jersey—Appointment of commissioners to repair pavements.]—A remonstrance or petn. was presented to a ct. consisting of 10 members, praying that a certain *Acte* or decree of that ct. might be annulled, or for such other relief as the ct. might deem fit. Four of the members were of opinion that the remonstrance ought not to be received:—*Held*: the remonstrance ought to have been received.

The Royal Ct. of Jersey has no power to appoint comrs. to repair the pavements of the town of St. Helier, & to raise the costs of such repairs by a tax on the inhabitants.—*LE GROS v. LE BRETON* (1833), 2 Knapp, 181; 12 E. R. 448, P. C.

687. — Voluntary liquidation—When decision final.]—A bank partnership in Jersey stopped payment, & after certain proceedings in voluntary liquidation, the Royal Ct. registered & confirmed a composition between the partnership & its creditors:—*Held*: the decisions of the Royal Ct. were only final in reference to such a composition as it was entitled to register.—*CRÉDIT FONCIER OF ENGLAND v. AMY, BAILY v. AMY* (1874), L. R. 6 P. C. 146, P. C.

688. — Royal court of Guernsey—Ordinances for relief of poor—Enforcement of.]—The Royal Ct.

of Guernsey having the power to make ordinances for the relief of the poor, may direct the manner & the property upon which they are to be levied.—*TUPPER v. ST. PETER PORT HOSPITAL (TREASURER)* (1836), 3 Knapp, 406; 12 E. R. 706, P. C.

689. Petition to annul decree—Presented to court consisting of ten members—Four members against reception of petition—Duty to receive.]—*LE GROS v. LE BRETON*, No. 686, *ante*.

690. Upkeep of—Not a charge on Crown Revenue.]—The Royal Ct. of Jersey have no power to order charges for alterations made in the Ct. House directed at their instance, to be defrayed out of the Crown Revenues of the Island.—*A.-G. OF JERSEY v. LE CAPELAIN* (1842), 4 Moo. P. C. C. 37; 13 E. R. 214, P. C.

Annotation:—*Mentd.* *Belson v. Belson* (1850), 7 Moo. P. C. C. 30.

Appeals to Judicial Committee of Privy Council.—*See* Part IX., Sect. 8, sub-sect. 4, *ante*.

SECT. 6.—ISLAND LAW.

691. Jersey law—Norman law.]—The possession necessary to constitute a title by prescription must be uninterrupted & peaceable both according to the law of England, the civil law, & those of France, Normandy & Jersey.—*BENEST v. PIPON* (1829), 1 Knapp, 60; 2 State Tr. N. S. App. 1012; 12 E. R. 243, P. C.

Annotation:—*Mentd.* *Mannall v. Fishor* (1859), 5 C. B. N. S. 856.

692. — — — — —]—*THORNTON v. ROBIN* (1837), 1 Moo. P. C. C. 439; 12 E. R. 881, P. C.

Annotation:—*Refd.* *A.-G. & Receiver-General for Jersey v. Turner, Solicitor-General for Jersey*, [1893] A. C. 326.

693. — — — — — Authority of written customary laws of Normandy—Since separation of Jersey from Normandy.]—Their Lordships have much difficulty in ascertaining what are the recognised authorities on the law of Jersey. The book called *Le Grand Coutumier de Normandie*, which is probably the earliest admitted authority, does not appear to contain anything on the subject of testamentary exors. or succession of movables, & was not cited or referred to in the argument. The commentary of M. Terrien on the Civil law, as well public as private, observed in the county & Duchy of Normandy, was cited by the counsel both for applt. & resp. & the A.-G. for the Island of Jersey seemed to admit it to be a book of authority in the cts. of Jersey. These commentaries were published at Paris in the year 1574, a considerable time after the final separation of the Duchy of Normandy from the Crown of England, but apparently several years before the formation of *La Coutume Réformée* of the Duchy, which appears to have been prepared under the authority of Letters Patent granted by Henry III. of France, & dated Oct. 14, 1585. The commentary of Terrien, therefore, may be reasonably regarded as the best evidence of the old custom of Normandy & also of the Channel Islands before the separation of Normandy from the English Crown (*per CUR.*).—*LA CLOCHE v. LA CLOCHE* (1870), L. R. 3 P. C. 125; 6 Moo. P. C. C. N. S. 383; 39 L. J. P. C. 25; 22 L. T. 765; 18 W. R. 646; 16 E. R. 770, P. C.; subsequent proceedings, *sub nom.* *LA CLOCHE v. LA CLOCHE, LA CLOCHE v. JERSEY (VISCOUNT)* (1872), L. R. 4 P. C. 325, P. C.

Annotations:—*Refd.* *Fallo v. Godfray* (1888), 14 App. Cas. 70. *Mentd.* *Baudains v. Richardson*, [1906] A. C. 169.

Sect. 6.—Island law. Part XI.]

694. — — — — —.]—The written customary Laws of Normandy, since the time of the separation of the Island of Jersey from that duchy, are authorities received in Jersey as expositions of the law & customs of the island.—*LA CLOCHE v. LA CLOCHE*, *LA CLOCHE v. JERSEY* (Viscount) (1872), L. R. 4 P. C. 325; 9 Moo. P. C. C. N. S. 87; 41 L. J. P. C. 51; 20 W. R. 953; 17 E. R. 446; P. C.

695. — — — — —.]—Undoubtedly the law of Jersey was founded originally upon the law of Normandy (*per cur.*).—*DYSON v. GODFRAY* (1884), 9 App. Cas. 726; 53 L. J. P. C. 94; 51 L. T. 580, P. C.

696. — — — — —.]—Jersey is governed by its own law. It was a portion of the Duchy of Normandy until that duchy was lost by King John. Its law is founded apparently mainly on the old custom of Normandy, much modified by the usage in the island & by the legislation in the island. Counsel on both sides were agreed in denying to the English common law of real property any force (*per cur.*).—*DE CARTERET v. BAUDAINS*, *DE CARTERET v. GAUTIER* (1886), 11 App. Cas. 214; 55 L. J. P. C. 33, P. C.

Annotation:—Mentd. Godfray v. Sark, Constables, [1902] A. C. 534.

697. — — — — — *Coutume de Paris & coutume d'Orleans without force.*]—The laws of Jersey are derived from those of Normandy, where the Roman law did not prevail.

The *Coutume de Paris* & the *Coutume d'Orleans* may be used to interpret the laws of Jersey, but have not the force of law in the island.—*FALLE v. GODFRAY* (1888), 14 App. Cas. 70; 58 L. J. P. C. 61; 60 L. T. 120, P. C.

Annotation:—Mentd. Baudains v. Richardson, [1906] A. C. 169.

698. — — — — — *Erroneous origin of long prevalent practice—Not altered by Privy Council.*]—Where a practice, founded on the old Norman law, though erroneous in its origin, has for a long series of years prevailed in Jersey, with respect to the inadmissibility of the evidence of a witness on the ground of *inimicitie*, the Judicial Committee will not alter such practice.—*JANVRIN v. DE LA MARE* (1861), 14 Moo. P. C. C. 334; 9 W. R. 623; 15 E. R. 332, P. C.

699. — — — — — *Whether covenant to pay common rent as seigneurial binding—Alienation of rent from fief—Repurchase by lord.*]—A covenant to pay a common rent as seigneurial, binding, notwithstanding the said rent may have been before alienated from the fief, & only been repurchased by the lord.—*LEMPRIERE v. LE BRUN* (1809), 1 Act. 7; 12 E. R. 3, P. C.

700. — — — — — *Lords of fiefs not bound to discharge rents or incumbrances—Estates falling into possession on death of tenants.*]—Lords of fiefs in the Island of Jersey not bound to discharge rents or incumbrances due on estates falling into their possession by the decease of their tenants.—*PIPON v. COUTANCHE* (1809), 1 Act. 4; 12 E. R. 2, P. C.

701. — — — — — *Crown not entitled to primer seisin or l'Année de succession—Upon death of lord of manor—Tenure d'Haubert.*]—The Crown is not entitled to primer seisin or *l'Année de Succession*, upon the death of the lord of a manor in Jersey, held by tenure *d'Haubert*.

The existence of a feudal custom in one country, as England, affords no legal inference of its existence in another country, as Jersey.—A.-G. v.

SYMONDS (1830), 1 Knapp, 390; 12 E. R. 368, P. C.

702. — — — — — *Crown lands brought into mortmain—Seigneurial rights of Crown.*]—Where land in Jersey held of the Queen as lady of the *seigneurie* thereof was brought into mortmain:—*Held*: the purchaser was bound to pay to the Crown the indemnity due by law in respect of the consequent loss or diminution in value of the seigneurial rights. But the Crown is not also entitled by the custom of the island to preserve its seigneurial rights by interposing a nominal vassal called *homme vivant mourant et confisquant* between itself & the holders in mortmain in order to pay duties & service in respect of the property.—A.-G. & RECEIVER-GENERAL FOR JERSEY v. TURNER, SOLICITOR-GENERAL FOR JERSEY, [1893] A. C. 326; 62 L. J. P. C. 110; 69 L. T. 161; 1 R. 378, P. C.

— *Right of Crown to hold collector personally liable.*]—See CONSTITUTIONAL LAW, Vol. XI., p. 583, n.

703. — — — — — *Purchase within forty days of death of vendor—Set aside by heir of vendor—Parties to suit for recovery.*]—A purchase made within forty days of the death of the vendor, set aside by the heir of the vendor, such purchases being void by the law of Jersey. The purchaser under such circumstances cannot call upon the heir to repay him the purchase-money, but must recover it as he can from the persons to whom it has been given by the deceased vendor. *Semble*: the receiver of the purchase-money ought to be made party to a suit for the recovery of property sold under such circumstances.—*MARETT v. JENNES* (1829), 1 Knapp, 103; 12 E. R. 260, P. C.

704. — — — — — *Building contract—Act of Royal Court calling in aid of experts or sworn appraisers—To view work done.*]—H. entered into a contract with F. for certain work to be done by H. to houses in Jersey, payment to be made by F. at stated periods. Two other agreements were contemporaneously made between the same parties for the purchase of pieces of land adjoining, for building other houses. These contracts were to be passed *devant justice* within one year, which was not done. H. commenced the work, & F. paid him a first instalment. H. being unable to complete the work, transferred his contract to L., & F. assented to the transfer, upon condition that the agreements for the purchase & sale between him & H. should be passed before the Royal Ct. H. afterwards became a bkpt., & F. was declared tenant *après decret* to his estate. L. finished the work, F. having recognised L. as being substituted for H. F. refused to pay L. on the ground that the completion of the other agreements with H. was a condition precedent to the right to recover for the work done:—*Held*: by the law of Jersey, an *Acte* of the Royal Ct., calling in the aid of experts, or sworn appraisers, to view the work done, was the proper course.—*FALLE v. LE SUEUR & LE HUQUET* (1859), 12 Moo. P. C. C. 501; 7 W. R. 707; 14 E. R. 1002, P. C.

705. — — — — — *Hypothec of movables unattended with possession—No right of priority over other creditors—Although registered in Royal Court.*]—According to the law of Jersey, a hypothec of movables, if unattended with possession, although registered in the Royal Ct. of the Island, gives no right of priority over the other creditors of the mtgor.—*HAYLEY v. BARTLETT* (1861), 14 Moo. P. C. C. 251; 4 L. T. 567; 9 W. R. 770; 1 Mar. L. C. 90; 15 E. R. 299, P. C.

706. — — — — — *Effect of registration of marriage contract—In public register—Right of hypothec.*]—The legal effect of the registration in the public

register of Jersey pursuant to an order of the Royal Ct. of a marriage contract, is to confer a right of hypothec in respect of its provisions from the date of the said order.—*SIMON v. VERNON* (1883), 8 App. Cas. 542; 52 L. J. P. O. 79; 49 L. T. 238, P. C.

707. —“*Curatelle*”—Mismanagement of property by intemperance in friend—How intemperance established.]—By the law of Jersey in order to place a man under *curatelle* the ct. must be satisfied not merely that he is prodigal or likely to mismanage his property, but that he is so by reason of his habitual intemperance in the matter of drink. To establish the intemperance the ct. must not merely have the evidence of relatives, *les electeurs*, but the presentment after examination of *les six principaux*.—*Ex p. NICOLLE* (1879), 5 App. Cas. 346; *sub nom. Re NICOLLE*, 49 L. J. P. C. 51, P. C.

—Suit on judgment obtained in England.]—See CONFLICT OF LAWS, Vol. XI., p. 467, No. 1225.

Relating to—Descent & Distribution.]—See DESCENT & DISTRIBUTION.

—Easement.]—See EASEMENTS & PROFITS A PRENDRE.

—Ecclesiastical Law.]—See ECCLESIASTICAL LAW.

—Evidence.]—See EVIDENCE.

—Executors.]—See EXECUTORS & ADMINISTRATORS.

—Family Arrangements.]—See FAMILY ARRANGEMENTS.

—Highways.]—See HIGHWAYS, STREETS & BRIDGES.

—Husband & Wife.]—See HUSBAND & WIFE.

—Judgments.]—See JUDGMENTS & ORDERS.

—Limitation of Actions.]—See LIMITATION OF ACTIONS.

—Mortgages.]—See MORTGAGE.

—Prison Boards.]—See PRISONS.

—Sale of land.]—See SALE OF LAND.

—Set-off.]—See SET-OFF & COUNTERCLAIM.

—Settlement.]—See SETTLEMENTS.

—Trusts—Liability of trustees or agents to account to cestuis que trust or principal.]—See AGENCY, Vol. I., p. 475, No. 1572, i.; TRUSTS & TRUSTEES.

—Wills.]—See WILLS.

Part XI.—Isle of Man.

708. Not part of realm of England—Feudatory dominion by Liege Homage.]—Many things are admitted on both sides; that Man is not part of the realm of England; parcel only of the King's Crown of England; a distinct dominion now under the King's grants, & so ever since from long time past granted; held as a feudatory dominion by Liege Homage of the Kings of England: the laws of England therefore, as such, extend not to it, neither the common nor statute law, unless expressly named or some necessary consequence resulting from it (LORD HARDWICKE, C.).—*SODOR & MAN (BP.) v. DERBY (EARL), DERBY (EARL) v. ATHOL (DUKE)* (1751), 2 Ves. Sen. 337; 28 E. R. 217, L. C.; *previous proceedings, sub nom. DERBY (EARL) v. ATHOL (DUKE)* (1749), 1 Ves. Sen. 202, L. C.

Annotations:—*Refd. R. v. Johnson* (1805), 6 East, 583; *Re Crawford* (1849), 13 Q. B. 613; *Ex p. Brown* (1864), 5 B. & S. 280; *A.-G. for the Isle of Man v. Mylchreest* (1879), 4 App. Cas. 294; *Companhia de Mocambique v. British South Africa Co., De Sousa v. British South Africa Co.*, [1892] 2 Q. B. 358. *Mentd. Doe d. Simpson v. Simpson* (1838), 4 Bing. N. C. 333; *Pemberton v. Barnes*, [1899] 1 Ch. 544.

709. Not part of United Kingdom.]—*DAVISON v. FARMER* (1851), 6 Exch. 242; 20 L. J. Ex. 177; 15 J. P. 691; 155 E. R. 531.

Annotation:—*Mentd. O'Flaherty v. McDowell* (1857), 6 H. L. Cas. 142; *Mather v. Brown* (1876), 1 C. P. D. 596.

710. Not a foreign dominion of British Crown.]—*Ex p. BROWN*, No. 79, *ante*.

711. Application of English law.]—*SODOR & MAN (BP.) v. DERBY (EARL), DERBY (EARL) v. ATHOL (DUKE)*, No. 708, *ante*.

712. Reference of case by Chancellor to members of House of Keys—Decision of members not binding on Chancellor—Power to refer case again to other members.]—*BLACHFORD v. CHRISTIAN* (1829), 1 Knapp, 73; 12 E. R. 248, P. C.

Appeal to Judicial Committee.]—See Part IX., Sect. 8, sub-sect. 4, *ante*.

Right of subject to petition Sovereign—No reservation in Crown grant.]—See Vol. XI., p. 515, No. 169.

Right of Crown—In respect of minerals in Isle of Man.]—See Vol. XVI., p. 216, No. 25.

Law in respect of particular subjects.]—See TITLES *passim*.

Part XII.—Irish Free State.

713. Irish Free State Constitution Act, 1922 (session 2), (c. 1)—Effect of on regulations made under Restoration of Order in Ireland Act, 1920 (c. 31).—By reg. 14B of the regulations made in Aug. 1920, under the Restoration of Order in Ireland Act, 1920, power was given to the Secretary of State to order the internment in a place in the British Islands specified in the order of any person suspected of acting or having acted or being about to act in a manner prejudicial to the restoration or maintenance of order in Ireland, & it was thereby provided that the person so interned should be subject to the like restrictions & might be dealt with in like manner as a prisoner of war except so far as the Secretary of State might modify such restrictions.

On Dec. 5, 1922, the Irish Free State Constitution Act was passed, by which the Irish Free State was given a distinct & independent executive.

On Mar. 7, 1923, an order, purporting to be made under the said reg. 14B, was issued by the Secretary of State ordering that the appct., who was then residing in England, should be interned in such place in the Irish Free State as the Irish Free State Government should determine. Appct. was arrested in London under that order & conveyed to Dublin, where he was interned. He was so deported under an agreement between the Secretary of State & the Irish Free State Government that if a certain advisory committee appointed by the Secretary of State for that purpose reported that he ought not to have been interned the said Govt. would release him.

On an appln. for a writ of *habeas corpus* directed to the Secretary of State:—*Held*: reg. 14B was inconsistent with the Irish Free State Constitution Act, 1922, & impliedly repealed by it, & the order of internment was consequently bad.—*R. v. SECRETARY OF STATE FOR HOME AFFAIRS, Ex p. O'BRIEN*, [1923] 2 K. B. 361; 92 L. J. K. B. 797; 129 L. T. 419; 87 J. P. 160; 39 T. L. R. 487; 27 Cox. C. C. 433; *sub nom. O'BRIEN v. SECRETARY OF STATE FOR HOME AFFAIRS* (No. 2), 67 Sol. Jo. 553, C. A.; *reversg. S. C. sub nom. Ex p. O'BRIEN*, 39 T. L. R. 413, D. C.; *subsequent proceedings, sub nom. SECRETARY OF STATE FOR HOME AFFAIRS v. O'BRIEN*, [1923] A. C. 603, H. L.

714. — Transference of liabilities of British Government to Irish Free State.—During the war

the Board of Trade undertook to bear the cost of replacing certain rails & sleepers which were to be removed from a railway belonging to the suppliants in Southern Ireland & which were to be used elsewhere in Southern Ireland to provide traffic accommodation required under war-time conditions. In 1922, while the contract was still executory, the Ministry of Transport, which had succeeded the Board of Trade, disclaimed any liability to the suppliants:—*Held*: the effect of the legislation creating the Irish Free State was that the liabilities of the British Govt. under the contract were transferred to the Govt. of the Irish Free State, so that the suppliants could not maintain a petition of right for a declaratory judgment as to the liability of the Ministry of Transport, since the petition must be treated as embodying a claim against the British Exchequer only.—*GREAT SOUTHERN & WESTERN RY. CO. v. R.* (1923), 40 T. L. R. 98.

715. Appeals from to Judicial Committee—Looked at from dominion point of view—When special leave to appeal granted.—The Judicial Committee will look at appeals from the Irish Free State from the point of view of the Dominions, & will not give leave to appeal unless the case involves some great principle of wide public interest.—*HULL v. MCKENNA* (1923), 67 Sol. Jo. 807, P. C.

716. Liability to give security for costs—Resident in position of foreigner.—A pltf., who is resident in the Irish Free State & who has no assets in England, is in the position of a foreigner with regard to liability to give security for costs, inasmuch as the effect of Irish Free State (Consequential Provisions) Act, 1922 (session 2) (c. 2), s. 1 (1), & of Irish Free State Constitution Act, 1922 (session 2) (c. 1), s. 1, & art. 73 of the Schedule, is that Judgments Extension Act, 1868 (c. 54), has ceased to have operation in the Irish Free State.—*WAKELY v. TRIUMPH CYCLE CO., LTD.* (1923), 40 T. L. R. 15; 68 Sol. Jo. 117, C. A.

Removal for trial in Ireland—Crime committed in Ireland—Notwithstanding Habeas Corpus Act.—*See CROWN PRACTICE*, Vol. XVI., p. 253, No. 543.

Judicial Committee of the Privy Council, *see, generally*, Part IX.

Notes on Canadian Constitutional Cases.*

Distribution of powers between Dominion & Provincial Legislatures—In general.—The legislative jurisdiction of the Dominion is generally contained in B. N. A. Act, 1867, s. 91, & of the Provinces in sect. 92 of the same Act.

Temperance legislation, by means of a uniform law throughout the Dominion, relates to "Peace, order & good government" under sect. 91 & not to "Property & Civil Rights" under sect. 92.—*RUSSELL v. R.* (1882), 7 App. Cas. 829.

Subjects, which under one aspect fall under sect. 92, may in another aspect fall within sect. 91. Liquor Licence Act of Ontario held to be *intra vires*.—*HODGE v. R.* (1883), 9 App. Cas. 117.

The incorporation of companies with power to carry on business throughout the Dominion is vested solely in the Dominion.—*COLONIAL BUILDING ASSOCIATION v. QUEBEC* (1883), 9 App. Cas. 157.

Dominion legislation respecting pre-confederation. Liquor legislation held *ultra vires*, but its own prohibitory provisions where duly brought into operation held *intra vires*.—*A.-G. OF ONTARIO v. A.-G. OF DOMINION*, [1896] A. C. 348.

Provincial legislation requiring brewers & distillers to obtain licenses to sell wholesale within the province held *intra vires*.—*BREWER & MALTSTERS ASSOCIATION v. A.-G. FOR ONTARIO*, [1897] A. C. 231.

* Prepared by E. R. Cameron, Esq., K.C., Registrar of the Supreme Court of Canada.

Provincial legislation for suppression of liquor traffic held *intra vires*.—A.-G. FOR MANITOBA v. MANITOBA LICENSE HOLDERS ASSOCIATION, [1902] A. C. 73.

Dominion legislation authorising a telephone company to interfere with provincial streets & highways held *intra vires*.—TORONTO v. BELL TELEPHONE CO., [1905] A. C. 52.

Dominion legislation although ancillary only to railway legislation & although affecting property & civil rights of a province may be *intra vires*.—GRAND TRUNK RAILWAY v. A.-G. OF CANADA, [1907] A. C. 65.

Dominion legislation prohibiting importation of intoxicating liquors in provinces where sale is forbidden by provincial law declared *intra vires*.—GOLD SEAL, LIMITED v. A.-G. OF ALBERTA (1921), 62 S. C. R. 424.

Provincial legislation purporting to preclude Dominion trading companies from carrying on their business in a province unless registered thereunder & subjecting such companies to penalties for so carrying on business held *ultra vires*.—GREAT WEST SADDLERY COMPANY v. R., [1921] 2 A. C. 91; *reversing* (1919), 59 S. C. R. 45.

A Provincial Act prohibited within the province the keeping for sale or sale of liquor except liquor kept for export & in certain other cases held *intra vires*.—CANADIAN PACIFIC WINE CO. v. TULEY, [1921] 2 A. C. 417.

Provincial legislation with respect to the sale of intoxicating liquor which preserves the exclusive power of the Dominion held not *ultra vires*, although it provided a penalty.—R v. NAT. BELL LIQUORS, LTD., [1922] 2 A. C. 128.

Provincial legislation imposing a tax on liquor kept for export is indirect taxation & *ultra vires*.—SECURITY EXPORT CO. v. HETHERINGTON, [1923] S. C. R. 539. (Leave to appeal granted by the Privy Council, Aug. 29, 1923.)

Dominion legislation passed by reason of the existence of war may extend to matters normally under legislative control of a province under power to make laws for "Peace, order & good government."—FORT FRANCES PULP & PAPER CO. v. MANITOBA FREE PRESS CO., [1923] A. C. 695. *See, also, Re GREY* (1918), 57 S. C. R. 150.

Education, B. N. A. Act, 1867, s. 93.]—*See* WINNIPEG v. BARRETT, [1892] A. C. 445; BROPHY v. A.-G. OF MANITOBA, [1895] A. C. 202; REGINA PUBLIC SCHOOL DISTRICT v. GRATTON SEPARATE SCHOOL DISTRICT (1915), 50 S. C. R. 589; TRUSTEES R. C. SEPARATE SCHOOLS OF OTTAWA v. MACKELL, [1917] A. C. 62; TRUSTEES R. C. SEPARATE SCHOOLS OF OTTAWA v. OTTAWA, [1917] A. C. 76; TRUSTEES R. C. SEPARATE SCHOOLS OF OTTAWA v. QUEBEC BANK, [1920] A. C. 230.

Precious Metals & Royalties, B. N. A. Act, 1867, s. 109.]—A.-G. OF ONTARIO v. MERCER (1883), 8 App. Cas. 767; A.-G. OF BRITISH COLUMBIA v. A.-G. OF CANADA (1889), 14 App. Cas. 295; ST. CATHERINES MILLING CO. v. R. (1888), 14 App. Cas. 46; A.-G. OF DOMINION v. A.-G. OF ONTARIO, [1897] A. C. 199; ONTARIO MINING CO. v. SEYBOLD, [1903] A. C. 73.

Dominion & Provincial Property not liable to taxation, B. N. A. Act, 1867, s. 125.]—SMITH v. VERMILION HILLS COUNCIL, [1916] 2 A. C. 509; A.-G. OF BRITISH COLUMBIA v. A.-G. OF CANADA (1922), 64 S. C. R. 377.

Legislative power of the Dominion.]—RUSSELL v. R. (1882), 7 App. Cas. 829, as explained A.-G. FOR ONTARIO v. A.-G. OF CANADA, [1896] A. C. 346.

Regulation of Trade & Commerce, B. N. A. Act, 1867, s. 91, sub-s. 2.]—Dominion legislation autho-

rising a Board of Commerce created by another act to restrain certain trade combinations held *ultra vires* as interfering with Property & Civil Rights.—*Re* BOARD OF COMMERCE ACT, [1922] 1 A. C. 191; an appeal from (1920), 60 S. C. R. 456, where the ct. was equally divided in opinion.

Navigation & Shipping, B. N. A. Act, 1867, s. 91, sub-s. 10.]—Workmen's Compensation Board & Canadian Pacific Railway, [1920] A. C. 184. *See, also, PAQUET v. CORPORATION OF PILOTS OF QUEBEC*, [1923] A. C. 1029.

Sea Coast & Inland Fisheries, B. N. A. Act, 1867, s. 91, sub-s. 12.]—*Held*: that sect. 91 gives Dominion no proprietary rights but a tax by way of licence may be valid.—A.-G. FOR DOMINION v. A.-G. FOR ONTARIO, QUEBEC & N. S., [1898] A. C. 700; the Provincial legislature of Quebec has not power to grant exclusive rights of fishing in tidal waters.—A.-G. FOR CANADA v. A.-G. FOR QUEBEC, [1921] 1 A. C. 413. *See, also, A.-G. FOR B. C. v. A.-G. FOR CANADA*, [1914] A. C. 153.

Banking, B. N. A. Act, 1867, s. 91, sub-s. 15.]—Dominion Bank Act held *intra vires*.—TENNANT v. UNION BANK, [1894] A. C. 31.

Bankruptcy & Insolvency, B. N. A. Act, 1867, s. 91, sub-s. 21.]—Voluntary assignments for benefit of creditors are not governed by this section but are *intra vires* of Province under Property & Civil Rights.—A.-G. FOR ONTARIO v. A.-G. FOR DOMINION, [1894] A. C. 189. *See, also, CUSHING v. DUPUY* (1880), 5 App. Cas. 409.

Naturalisation & Aliens, B. N. A. Act, 1867, s. 91, sub-s. 25.]—Provincial legislation prohibiting aliens working in certain mines held *ultra vires*.—UNION COLLIERY CO. v. BRYDEN, [1899] A. C. 580. Provincial legislation providing that no Chinese or Japanese should be employed on government contracts held *ultra vires*.—*Re* EMPLOYMENT OF ALIENS (1921), 63 S. C. R. 293. (Appeal to the P. C. dismissed, Oct. 20, 1923.) Provincial legislation determining whether a grantee or licensee of provincial property should or should not employ persons of a certain race may be *intra vires* notwithstanding the legislative jurisdiction vested in the Dominion respecting "Naturalisation & Aliens."—BROOKS-BIDLAK v. A.-G. FOR B. C., [1923] A. C. 450; *affirming* (1921), 63 S. C. R. 466. Provincial legislation prohibiting white female labour in places of business managed by aliens held *intra vires*.—QUONG WING v. R. (1914), 49 S. C. R. 440. Dominion legislation for deporting aliens held *intra vires*.—A.-G. FOR CANADA v. CAIN, [1906] A. C. 542. Provincial legislation providing that aliens should not vote at elections held *intra vires*.—CUNNINGHAM v. TOMEX HOMMA, [1903] A. C. 151.

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legislation affecting a Dominion Railway held *intra vires*.—CAN. PAC. RY. CO. v. BONSECOURS, [1899] A. C. 307. Certain Provincial legislation affecting a Dominion Railway requiring proper fences to be erected held *ultra vires*.—MADDEN v. NELSON & FORT SHEPPARD RAILWAY, [1899] A. C. 626. Dominion legislation providing for an order directing certain measures to be taken for safeguarding the resps.' railway & for protecting the public held *intra vires*.—TORONTO v. CAN. PAC. RY. CO., [1908] A. C. 54. Dominion legislation subjecting provincial railways (although not declared to be for the general advantage of Canada) to provisions which relate to through traffic held *ultra vires*.—MONTREAL v. MONTREAL STREET RAILWAY, [1912] A. C. 332; *affirming* (1910), 43 S. C. R. 197. Provincial legislation in the matter of railways held *ultra vires*.—A.-G. OF ALBERTA v. A.-G. FOR CANADA, [1915] A. C. 361; *affirming* (1913), 48 S. C. R. 9. *See, also*, BRITISH COLUMBIA ELECTRIC RAILWAY v. VANCOUVER, VICTORIA RAILWAY, [1914] A. C. 1067; TORONTO & NIAGARA CO. v. NORTH TORONTO, [1921] A. C. 834.

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Direct taxation on certain Commercial Corporations carrying on business in a province held *intra vires* of the province.—BANK OF TORONTO v. LAMBE (1887), 12 App. Cas. 575.

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A provincial statute cannot levy a succession duty tax on property locally situate outside the province.—WOODRUFF v. A.-G. FOR ONTARIO, [1908] A. C. 508.

Provincial legislation in the matter of suc-

cession duties held *ultra vires*.—COTTON v. R., [1914] A. C. 176.

A provincial act, which imposed succession duties in respect of property outside the Province upon the death of the owner domiciled within it, was held *ultra vires* the legislative power of the province.—BURLAND v. R., [1922] A. C. 215.

See, also, as to maxim *mobilia sequuntur personam*.—SMITH v. PROVINCIAL TREASURER OF NOVA SCOTIA (1919), 58 S. C. R. 570. *Also* as to *situs* of property.—ROYAL TRUST v. MINISTER OF FINANCE OF B. C. (1919), 27 B. C. R. 269; *reversed* (1920), 61 S. C. R. 127; *restored*, [1922] 1 A. C. 57.

Other legislation imposing succession duties upon transmission of movable property outside the Province held *intra vires*.—BARTHE v. ALLEYNSHARPLES (1920), 60 S. C. R. 1; *affirmed*, [1922] 1 A. C. 215. *See, also*, BOYD v. A.-G. OF B. C. (1917), 54 S. C. R. 532, where property in the Province but owner domiciled elsewhere.

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DEPOSITION.

See CRIMINAL LAW AND PROCEDURE ; EVIDENCE.

END OF VOL. XVII.

